



13 British American Blvd. | Suite 2 | Latham, New York 12110 | P 518.867.8383 | F 518.867.8384 | www.leadingageny.org

Key Court Decisions Affecting Property Tax Exemptions for Not-for-Profit Senior Housing and Assisted Living Residences

In recent years, municipalities faced with falling property tax revenues and rising expenses have taken an increasingly restrictive approach to charitable purpose exemptions from property taxes, particularly in the context of market rate senior housing and assisted living residences. When courts have been asked to review denials of exemptions for senior housing and assisted living residences, they have typically upheld the municipalities' determinations, unless the property serves principally a low-income population. This memorandum provides a brief overview of the case law governing property tax exemptions for not-for-profit senior housing and assisted living residences under the New York State Real Property Tax Law.

Please note that this memorandum does not contain an exhaustive survey of the statutes and case law and is not intended to convey legal advice. Please consult with your attorney to obtain a comprehensive analysis of the law applicable to the circumstances of your organization.

I. NYS Real Property Tax Law §420-a

Both the State Constitution and New York's Real Property Tax Law provide for exemptions from property taxes for property used exclusively for charitable purposes and owned by a corporation organized for such purposes.¹ Specifically, section 420-a of the Real Property Tax Law provides for a mandatory property tax exemption for property:

owned by a corporation or association organized or conducted *exclusively* for religious, charitable, hospital, educational, moral or mental improvement of men, women or children purposes, or for two or more such purposes, and used *exclusively* for carrying out thereupon one or more of such purposes either by the owning corporation or association or by another such corporation or association.²

However, such properties are not entitled to an exemption if any officer, member or employee of the corporation receives a profit from its operations, other than reasonable compensation for services or as a "proper beneficiary" of its charitable purposes. In addition, the exemption does not apply if the organization is merely a "pretense" for directly or indirectly making a pecuniary profit.³ Section 420-a further provides that if any portion of the property owned by a not-for-profit is *not* used exclusively for the purposes set forth in that section, that portion is subject to

¹ N.Y.S. Constitution, Art. 16, §1; N.Y. Real Property Tax Law 420-a(1).

² N.Y. Real Property Tax Law 420-a(1) (emphasis added).

³ *Id.*

taxation, unless it is used by another not-for-profit for an exempt purpose set forth in specified sections of the Real Property Tax Law. Notably, since hospitals are explicitly identified as eligible for the exemption, and nursing homes are defined as “hospitals” under the State’s Public Health Law, the exempt status of property owned by not-for-profit nursing homes (and used for that purpose) is somewhat more settled than that of other continuing care sites.⁴

The Real Property Tax Law includes other provisions that permit or require tax exemptions for not-for-profit providers of senior housing or continuing care services, including a mandatory exemption for certain not-for-profit housing companies and nursing home companies. This memorandum focuses on the charitable purpose and hospital exemption set forth in section 420-a.

II. Case Law

Tax exempt status alone does not guaranty a property tax exemption under section 420-a. Entitlement to a property tax exemption hinges on the interpretation of the requirement that the property be used “exclusively” for a “charitable” purpose.⁵ Courts have interpreted the “exclusive” use requirement loosely to mean that the property must be used “primarily or principally” for a charitable purpose. Furthermore, where a property is used principally for a charitable purpose, the existence of a non-charitable use that is *incidental* to a property’s principal, exempt purpose will not disqualify the property from a mandatory exemption.⁶ The exemption does not apply, however, where a property’s principal purpose is non-charitable, even if it has an incidental charitable or hospital use.⁷ Real property used partly for a purpose reasonably incidental to the exempt purpose and partly for a non-qualifying purpose may qualify for a partial exemption covering the area used for an exempt purpose.⁸

a. Principally Used for a Charitable Purpose Test

Court decisions applying these principles to particular properties are fact-specific, and outcomes are difficult to predict. In determining whether an adult care facility or senior housing project satisfies the charitable purpose requirement, courts have considered the income level and special needs of the residents and whether the rents paid by residents are below the market rate. Generally, where a facility or housing project serves predominantly low-income residents who

⁴ See N.Y. Public Health Law §2801(1). *But see Matter of Miriam Osborn Memorial Home Assoc. v. Assessor of City of Rye*, 80 A.D.3d 118, 138-39 (2d Dept. 2010) (property tax exemption denied where nursing home was not principal use of property and did not serve Medicaid beneficiaries).

⁵ Some courts have recognized a rebuttable presumption that a not-for-profit entity with tax-exempt status granted by the Internal Revenue Service is entitled to a tax exemption under section 420-a. *Matter of Greater Jamaica Dev. Corp. v. New York City Tax Commn.*, 111A.D.3d 937, 975 N.Y.S.2d 749 (2d Dept. 2013); *Matter of Plattsburgh Airbase Redevelopment Corp. v. Rosenbaum*, 101 A.D.3d 21, 23; *Yeshiva Beth Yehuda V'Chaim D'Betlan v. Town of Shandaken*, 100 A.D.2d 641, 642; *but see Matter of Swedenborg Found. v. Lewisohn*, 40 NY2d 87, 95. However, these courts have also held that the property in question must be used “exclusively” or “solely” for a charitable purpose.

⁶ *Matter of Symphony Space v. Tishelman*, 60 N.Y.2d 33, 38 (1983); *Paws Unlimited Fdn. v. Maloney*, 91 A.D.3d 1173 (3rd Dept. 2012) (animal shelter that also boarded pets for a fee was exempt, where only 25 percent of the kennels was used for boarding, and all of the revenue realized from the pet boarding was used to support the organization’s charitable purpose).

⁷ *Matter of Miriam Osborn Memorial Home Assoc. v. Assessor of City of Rye*, 80 A.D.3d at 138-39.

⁸ *Matter of St. Luke’s Hospital v. Boyland*, 12 N.Y.2d 135 (1962); *Matter of Vassar Brothers*, 97 A.D.3d 756 (2d Dept. 2012).

are elderly or disabled, and charges them a below-market rate, the courts have held that the property is entitled to an exemption.

For example, in *Matter of Adult Home at Erie Station v. Assessor*, the court held that because 50 percent of the adult home's residents were on SSI, and 40 percent paid rent on a sliding fee scale that allowed them to retain assets and income only up to the SSI limits, the property was entitled to an exemption.⁹ Similarly, in *United Church Residence v. Newell*,¹⁰ an adult home that served low-income, elderly individuals was granted an exemption because all of the residents paid below-market rents based on qualifying income levels. Although HUD subsidies raised the rent revenue to the market rate, the court concluded that the receipt of market rate rents through HUD subsidies did not disqualify the property from receiving a tax exemption.¹¹ Likewise, in *Matter of Association for Neighborhood Rehabilitation v. Board of Assessors*, the residents were low-income people at risk of becoming homeless, with mental illness and/or substance use disorders, who paid below-market rents.¹² As in *United Church Residence*, the court held that the project served a charitable purpose which was not lost as a result of HUD subsidies.¹³

On the other hand, adult care facilities and senior housing that serve predominantly middle income or affluent residents have not been as successful in litigation concerning property tax exemptions based on their charitable activities. According to the Court of Appeals, “[r]enting homes to elderly people who are not poor, is not a charitable activity.”¹⁴ The courts have not been persuaded by policy arguments that middle-income senior housing relieves a public burden by ensuring the wellbeing of seniors.¹⁵ Nor have they accepted the argument that providing supportive services to residents of market-rate housing is a charitable purpose sufficient to justify a property tax exemption.¹⁶ Below-market rents or housing subsidies have been a prerequisite for the charitable purpose exemption in these cases.¹⁷

The absence of a sufficiently charitable purpose was the basis for the Second Department's decision to uphold the revocation of a longstanding tax exemption in *Matter of Miriam Osborn Home Association v. Assessor of the City of Rye*. The *Osborn* case presented a particularly challenging set of facts for the not-for-profit. The property had initially operated as an adult care facility for low-income women, but had been redeveloped to provide assisted living units, independent living units and skilled nursing care for affluent seniors. Residents were required to pay entrance fees of up to \$825,000 plus monthly fees of nearly \$2,600 to \$4,000, or monthly fees of up to \$6,000 plus additional fees for home care in the assisted living units. A failure to pay monthly fees could result in termination of the resident's contract. In addition, according to the court, the *Osborn*'s nursing home did not accept Medicaid beneficiaries, only 6 percent of its residents were “scholarship residents,” and its charity care policy limited charitable expenses to five percent of the balance of its endowment fund. The court noted the six-figure salary of the campus's executive chef and the high-end amenities available to the residents. It concluded that

⁹ *Matter of Adult Home at Erie Station v. Assessor*, 10 N.Y.3d 205(2008)

¹⁰ *United Church Residence v. Newell* 10 NY3d 922 (2008).

¹¹ *Id.*

¹² *Matter of Association for Neighborhood Rehabilitation v. Board of Assessors*, 81 AD3d 1214 (3rd Dept. 2011).

¹³ *Id.*

¹⁴ *Matter of Adult Home at Erie Station v. Assessor*, 10 N.Y. at 214.

¹⁵ *Matter of Quail Summit, Inc. v. Town of Canandaigua*, 55 A.D.3d 1295 (4th Dept. 2008).

¹⁶ *Lake Forest Senior Living Community v. City of Plattsburgh*. 72 A.D.3d 1302 (3rd Dept. 2010).

¹⁷ See also *Matter of Pine Harbour, Inc. v. Dowling*, 89 A.D.3d 1192 (3rd Dept. 2011)(assisted living facility that does not serve low-income residents not entitled to exemption notwithstanding benevolent purpose and provision of discounted rents to some residents).

the residents were “largely limited to wealthy seniors,” and the slightly more than 5 percent who relied on the Osborn’s charity “was too few to support the conclusion that the property was being used principally or primarily for a charitable purpose.”¹⁸

Notably, the *Osborn* court not only rejected the charitable purpose exemption, but also the argument that any portion of the property was entitled to a hospital use exemption based on its use as a nursing home. In order to qualify for even a partial hospital use exemption under section 420-a, the property must be principally or primarily used as a hospital. The court found that the property was not principally used to provide nursing facility services, but rather to provide independent and assisted living units for “healthy and wealthy senior citizens.” The nursing facility was “merely incidental or auxiliary” to this non-exempt principal purpose. According to the court, the use of a small portion of the property for an exempt purpose did not justify a partial use exemption under the applicable statutes and case law.¹⁹

b. Incidental to a Charitable Use Test

The circumstances under which a non-exempt use (e.g., market rate housing) may be deemed incidental to a principally charitable or hospital use (e.g. a Medicaid assisted living program or nursing home) are not entirely clear. As a general matter, it appears that if the non-exempt use directly contributes to the principal and charitable purpose of the property, it is considered “incidental,” and the exemption applies. However, the courts have reached inconsistent conclusions regarding the availability of the exemption where the non-exempt use merely raises money to support the charitable purpose.

For example, in *Matter of Adult Home at Erie Station*, the court held that providing housing for RECAP clients with addictions and at risk of homelessness was incidental to RECAP’s principal social work purpose.²⁰ Similarly, in several hospital cases involving parking garages, staff housing, and office space, the non-hospital portion of the property that was used for the direct benefit of the hospital’s activities (e.g., parking for staff) was deemed incidental to the hospital purpose and exempt from property taxes.²¹

On the other hand, when hospitals have used their property to produce revenue, but not to otherwise support their services, the courts have held that the non-charitable use does *not* serve a purpose incidental to the hospital purpose and is not exempt.²² Likewise, the Court of Appeals has held that property leased by a not-for-profit local development corporation to a for-profit manufacturing company was not entitled to an exemption because the property was not being “used” by the non-profit, even though the lease provided revenue “in furtherance of [the local development corporation’s] purpose of spurring economic development.”²³

¹⁸ *Matter of Miriam Osborn Memorial Home Assoc. v. Assessor of City of Rye*, 80 A.D.3d 118 (2^d Dept. 2010).

¹⁹ *See Paws Unlimited Foundation, Inc. v. Maloney*, 91 A.D.3d 1173 (3rd Dept. 2012).

²⁰ 10 N.Y.3d at 216 (the *Erie Station* decision also incorporated a decision in *Matter of RECAP v. Bernaski*).

²¹ *Matter of St. Luke’s Hospital v. Boyland* (partial exemption granted to residential property leased by a hospital to hospital staff, but portion leased to unrelated tenants was not exempt); *Matter of Vassar Bros. Hosp. v. City of Poughkeepsie* (portion of hospital’s parking garage used by hospital employees and visitors was entitled to exemption, but portion leased by physician practice was not incidental to the hospital’s purpose); *Genesee Hospital v. Wagner*, 47 A.D.2d 37, 364 N.Y.S.2d 934, 943 (4th Dept., 1975) (citations omitted), *aff’d*, 39 N.Y.2d 863, 352 N.E.2d 133, 386 N.Y.S.2d 216 (1976) (offices leased to physicians by hospital not entitled to tax exemption).

²² *Id.*

²³ *Matter of Lackawanna Community Dev. Corp. v. Krakowski*, 12 N.Y.3d 578 (2009).

Several Appellate Division decisions have reached the opposite conclusion in relation to revenue-producing, non-charitable uses, where the non-charitable use was transient or only involved a small portion of the property. In *Paws Unlimited*, for example, the court held that an animal shelter's use of 25 percent of its parcel as a kennel for boarding pets for a fee did not defeat the charitable purpose tax exemption, where the fees were used to support the shelter's charitable purpose.²⁴ Similarly, in *Congregational Rabbinical College v. Town of Ramapo*,²⁵ the court held that land leased to a for-profit corporation to operate a religious summer camp was still tax exempt because the lease had a short duration, the religious entity participated in the operation of the camp, and the money raised from the camp would be used for the construction of a religious college on the site. These decisions may support an argument that a market-rate assisted living or housing use is incidental to an exempt purpose when it subsidizes a nursing home or facility serving low-income residents. However, our research has not yielded any analogous cases in the assisted living or housing context.

Conclusion

Not-for-profit operators of market-rate senior housing and assisted living residences should be cognizant of the fact that not-for-profit status does not guaranty an exemption from property taxes. Eligibility for an exemption is fact-specific, based on use of the property principally for a charitable purpose and the degree to which any non-charitable use is incidental to the exempt purpose. As a general matter, to qualify for an exemption, operators will have to show that a significant portion of their residents are low-income and that rents are below market rates. Some operators of market-rate housing or assisted living residences may be able to demonstrate that their non-exempt use is incidental to a charitable purpose (e.g., incidental to the operation of affordable housing, a nursing home or a Medicaid assisted living program); however, the case law to support that argument is undeveloped in this context.

In order to obtain or defend charitable use exemptions, operators that do not serve predominantly low-income residents should be prepared to demonstrate their benefits to the community. When a community is terminating an existing exemption or refusing to approve a new one, not-for-profit operators may be able to negotiate a partial exemption or PILOT with their local governments. However, PILOTs typically expire after a specified time period, and municipalities may decide to revoke tax exemptions previously granted. Since municipalities have broad discretion in negotiating PILOTs and conferring property tax exemptions, operators may be able to influence these decisions by demonstrating and documenting the community benefits of their not-for-profit facilities (e.g., the percentage of services or units provided to low-income tenants; services that prevent transitions to higher levels of care; volunteer hours; community use of the facility; and education, wellness and social programs that benefit the broader community). Financial support that the market rate units provide to the operator's other charitable or hospital/nursing home services may also be relevant. Operators might also quantify any increase in resident rents that would be needed to support payment of new property taxes. In renegotiating a PILOT agreement, discussions with local officials should start significantly before the termination of the PILOT.

²⁴ *Paws Unlimited*, 91 A.D.3d at 1174.

²⁵ 72 A.D.3d 869 (2d Dep't 2010), *affd.* 17 N.Y.3d 763 (2011).

LeadingAge NY members seeking to analyze and strengthen their level of community benefit may want to consider the strategies described in “[Social Accountability and the Long Term Care Continuum](#)” published by the Catholic Health Association and LeadingAge.

Contact: Karen Lipson, klipson@leadingageny.org

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