

**ST 18-08**

**Tax Type: Sales Tax**

**Tax Issue: Exemptions from Tax (Charitable and Other exempt types)**

**STATE OF ILLINOIS  
DEPARTMENT OF REVENUE  
OFFICE OF ADMINISTRATIVE HEARINGS  
CHICAGO, ILLINOIS**

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**THE DEPARTMENT OF REVENUE  
OF THE STATE OF ILLINOIS,**

**v.**

**ABC HOMES,**

**APPLICANT**

**No. 00-ST-000**

**Sales Tax Exemption**

**Kelly K. Yi  
Administrative Law Judge**

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**RECOMMENDATION FOR DISPOSITION**

**APPEARANCES:** Mr. Steven Pflaum, Ms. Tonya Newman, and Ms. Colette Brown, all of Neal Gerber & Eisenberg, LLP, on behalf of ABC HOMES; Ms. Paula Hunter, Special Assistant Attorney General, on behalf of the Department of Revenue of the State of Illinois.

**SYNOPSIS:** On February 23, 2016, the Department of Revenue of the State of Illinois (“Department”) issued a “Denial of Sales Tax Exemption” to ABC HOMES (“Applicant” or “ABC”) denying its request for a sales exemption identification number so that it could purchase tangible personal property at retail free from the imposition of retailers’ occupation tax as set forth in 35 ILCS 105/1 *et seq.* Applicant protested the Department’s decision and requested an administrative hearing. A formal evidentiary hearing held on October 10 and 11, 2017, with testimony from Mr. X (hereinafter “X”), Applicant’s Chief Financial Officer, Mr. Y (hereinafter “Y”), Applicant’s Vice President

of Marketing and Public Relations, and Ms. Z (hereinafter “Z”), a resident living at one of Applicant’s homes. At hearing Applicant has reiterated the Uniformity Clause argument under Illinois Constitution. Following submission of all evidence and a careful review of the record, it is recommended that the Department’s denial be affirmed. The following Findings of Fact and Conclusions of Law are made in support of this recommendation.

**Findings of Fact:**

1. The Department’s case, inclusive of all jurisdictional elements, is established by the admission into evidence of the Department’s denial of exemption dated February 23, 2016. Dept. Ex. 1.
2. Applicant was founded in 1904 to address the plight of elderly adults without homes, resources, or families to care for them. Tr. Vol 1, p.10; App. Ex. 47.
3. Applicant has since increased the number of elderly adults it assists, and added nurses and other professionals to provide advanced healthcare and supportive services. Tr. Vol. 1, p.104.
4. During a corporate restructuring in August 2014, the original ABC HOMES became a subsidiary of ABC TRANSITION NFP and changed its name to XYZ PLACE, currently one of Applicant’s homes facilities. Tr. Vol. 1, p.49.
5. Applicant amended its corporate name from ABC TRANSITION NFP to ABC HOMES on December 1, 2015. App. Ex. 5.
6. XYZ PLACE, the original ABC before the corporate restructuring, has been issued a sales tax exemption as recently as 2016. App. Ex. 64
7. Applicant has been exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code since December 9, 2014. App. Ex. 6.

8. Applicant amended the articles of incorporation on August 7, 2014 to operate exclusively for charitable, educational, religious, or scientific purposes. App. Ex. 4, 8.
9. Applicant is an Illinois not-for-profit corporation and does not have capital stock or shareholders. Tr. Vol. 1, pp.32, 36; App. Ex. 4.
10. Applicant owns and operates three continuing care retirement communities (hereinafter “CCRCs”) and one independent living apartment building. Tr. Vol. 1, p.40.
11. Applicant’s CCRCs include independent living for those who can live on their own; assisted living for those who need help with day-to-day activities; and healthcare, which provides residents with 24-hour skilled nursing care. Tr. Vol. 1, p.70.
12. The three CCRCs are as follows: XYZ PLACE, located in City, Illinois, LP PLACE, located in ANYWHERE, Illinois, and The CLIFFS OF EVERYWHERE, located in EVERYWHERE, Illinois. Tr. Vol. 1, p. 41.
13. XX XX GROVE, located in TOWNSHIP, Illinois, contains only independent living units. Tr. Vol. 1, pp. 40-41.
14. Applicant’s Board of Directors are unpaid volunteers. Tr. Vol. 1, p.33
15. The Governance Committee, a subcommittee of the Board of Directors makes compensation decisions of Applicant’s executives. Tr. Vol. 1, pp.33-34.
16. According to X, the Governance Committee participates in salary studies for senior living organizations and uses the data to review annually compensation for all the executives except for the chief financial officer (hereinafter “CFO”), chief operations officer (hereinafter “COO”) and chief executive officer (hereinafter “CEO”). Tr. Vol. 1, p.34.

17. Compensation for the CFO, COO and CEO (hereinafter “senior executives”) are adjusted every three years based on the Board of Director’s Requests for Proposal from five consultants who provide salary information in the related field. Tr. Vol. 1, p.34.
18. Once a consultant company is chosen by the Governance Committee, the company’s senior executive salary recommendation is presented to the full Board of Directors, which has always accepted the Governance Committee’s recommendation. Tr. Vol. 1, p.35.
19. According to X, Applicant’s executive compensation process is accredited by Commission on Accreditation of the Rehabilitation Facilities (hereinafter “CARF”), recertified every five years, and a review of the reasonable compensation is part of a CARF certification. Tr. Vol. 1, pp.35-36; App. Ex. 29.
20. Applicant operates on a surplus as the surpluses are put back into the organization for additional programming, building improvements, or for charitable needs of the organization. Tr. Vol. 1, p.36.
21. Form 990, Return of Organization Exempt Form Income Tax, for fiscal year 2014 displays that Applicant’s total net asset was \$184 million. Of a total revenue of \$114.5 million, 89%, \$101.4 million came from program service fees, with approximately 8%, \$9 million coming from donations.<sup>1</sup> Applicant also charges for parking and transportation, guest room rentals, and resident events. App. Ex. 31.

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<sup>1</sup> A discrepancy in the amount of contribution reported on Applicant’s Form 990 for fiscal year 2014 and the consolidated financial statements for the same fiscal year is unclear but the Form 990 includes donations received from “related organizations” whereas it appears that the consolidated financial statements for fiscal years 2014-2017 do not include donations from related organizations. App. Ex. 11-14, 24, 31.

22. Applicant's consolidated financial statements show that of \$XXX million total operating revenue earned in fiscal year 2014, approximately 89%, \$XX million came from fees, \$XXXXXXX from contributions, with a net profit of \$X million and \$X million charity care measured at cost provided to Applicant's 232 residents. Tr. Vol. 1, p.47; App. Ex. 11.
23. The audited consolidated financial statements for Applicant and affiliate for fiscal year 2015 show that Applicant had a total net asset of \$XXX million; \$X million in net operating income; \$XXXXXXX in surplus of revenue over expenses and an expenditure of \$XX million on salaries and benefits. Of \$XXX million of total operating revenue earned in fiscal year 2015, approximately 90%, \$XX million came from fees, \$XXXXXXX from contributions,<sup>2</sup> with a net profit of nearly \$X million and approximately \$X million charity care measured at cost provided to Applicant's 246 residents. Tr. Vol. 1, pp. 46-47; App. Ex. 11.
24. Of \$X million charity Applicant provided to its residents in fiscal year 2015, approximately \$X million was from donation to Q Foundation (hereinafter "Q"). Over the years, Q has received nearly \$XX million in donations. Q received similar number of donations in the years since then, most recently in 2017, from more than 1,000 individual donations made to Q. Tr. Vol. 1, p.61-63; App. Ex. 23.
25. Applicant had a net asset of \$XXX million in fiscal year 2016; \$X million in net operating income; \$XX million in surplus of revenue over expenses; and an expenditure of \$XX million on salaries and benefits. Of \$XXX million total operating revenue earned in fiscal year 2016, 89%, \$XXX million came from fees, \$XXXXXXX from contributions, with a net income of \$X million and approximately

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<sup>2</sup> See footnote #1, and App. Ex. 24 shows that contributions from GF for fiscal year 2015 was \$X million.

\$X million charity care, measured at cost, given to Applicant's 233 residents for an average of \$XXXXXX charity care. Tr. Vol. 1, pp. 50-51; App. Ex. 14.

26. Applicant had a net asset of \$XXX million in fiscal year 2017; \$X million in net operating income; \$XX million in surplus of revenue over expenses; and an expenditure of \$XX million on salaries and benefits. Of \$XXX million total operating revenue earned in fiscal year 2017, over 92%, \$XXX million came from fees, \$XXXXXX from contributions, with a net income of \$X million and approximately \$X million charity care, measured at cost, given to Applicant's 94 residents for an average of \$XXXXXX charity care. Tr. Vol. 1, pp.51-52; App. Ex. 14.
27. Q, a separate 503(c) corporation, is Applicant's fundraising arm and its purpose is to exclusively carry out Applicant's charitable, religious, literary, and educational activities. Tr. Vol. 1, pp.60-61; App. Ex. 11, 24.
28. Surpluses are maintained and kept, rather than given away to other charities, for the safe and long-term viability of the organization. Tr. Vol. 1, p.37.
29. Applicant donates old appliances, cabinetry, countertops and vehicles to charitable organizations such as Habitat for Humanity and Cars for Veterans. Tr. Vol. 1, p.38; App. Ex. 34.
30. Applicant donates space for use for various social and religious meetings to benefit the residents and the public. Tr. Vol. 1, p.38; App. Ex. 10, 28, 34.<sup>3</sup>
31. According to X, all of Applicant's residents regardless of level of care they receive, independent living or assisted living, they are eligible for free or reduced cost of room/board and medical care. Tr. Vol. 1, p.41.

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<sup>3</sup> The font to what appears to be an excel spreadsheet in Exhibit 34 are too small to read the details.

32. According to X, those residents who receive cost reductions are not treated differently from the rest of the residents but its benevolence policy allows for different levels of accommodation. Tr. Vol. 1, p.41; App. Ex. 18.
33. The cost reduction is called “fellowship” given under the Applicant’s benevolence policy, established in 2014, is a guideline for the decision makers to either grant or deny fellowship applications. Tr. Vol. 1, pp.42, 45
34. There is no cap in the number of residents or the amount of reductions or charity care some residents receive under the fellowship, but the benevolence policy has a failsafe provision that limits the amount of benevolence but thus far has not been invoked. Tr. Vol. 1, pp.42, 44,.53; App. Ex. 18.
35. There are two types of residents: contractual and non-contractual residents. Contractual residents come into the community under a life care agreement. Non-contractual residents come through a rental agreement. Tr. Vol. 1, p.43.
36. Since 2012, all the residents, both contractual and non-contractual, who have satisfied the prerequisites for the benevolence policy have been given a fellowship. Tr. Vol. 1, pp.42-43.
37. Applicant’s benevolence policy states that its president, CEO, and CFO have ultimate authority to make decisions to approve or deny fellowship according to the guidelines set in the benevolence policy. App. Ex. 18.
38. The criteria for the guidelines take into consideration the amount and timing of anticipated need, the availability of housing and/or medical care in the community where the applicant is requesting considering for occupancy, and the financial situation of the applicant. Fellowship will not be provided to any individual who has failed to fully and truthfully disclose their financial situation at the time of application

for residency. Residents who enter a community, and enter based on anticipated charitable need, shall not be considered benevolent until they have fully depleted own financial resources through no fault of their own. Resident(s) requesting to receive financial assistance through the fellowship fund will be required to make an application to the program, provide a full and complete financial disclosure as required by administration, and must enter into a new Residence and Services Agreement and/or Medical Service Agreement which may also require a relocation of residential or medical services accommodations. App. Ex. 18.

39. All of Applicant's residents who have applied for and needed charity care under the benevolence policy in fiscal years 2014-2017 received it. During the fiscal years 2013 through August 2016, Applicant has provided financial assistance to its residents a total of \$XX million, averaging \$X million annually. Tr. Vol. 1, p.53; App. Ex. 10.

40. Not everyone who lives at ABC is required to pay an entrance fee. Only those ABC residents who are first admitted to independent living for a life care agreement pay an entrance fee based on calculation of future health insurance risk, meaning looking at the life expectancies. Tr. Vol. 1, pp.54-56.

41. The entrance fees range from a little over \$100,000 up to \$1.5 million and depend on the risk of future health care needs of a resident. There are three levels of refundability from nonrefundable to 90% refundable. Tr. Vol. 1, p.56; App. Ex. 35, 38

42. For residents paying \$XX million entrance fee, the fee is 90% refundable to the surviving family. Tr. Vol. 1, pp.73-74.

43. Of 1,664 total admissions in fiscal year 2016, 1,136 residents (66%) did not pay an entrance fee when they were first admitted to a ABC facility, as they came as renters or directly into assisted living or skilled nursing care. Tr. Vol. 1, pp. 59-60, 72; App. Ex. 38.
44. During the first 7 months of fiscal year 2017, of the total 900 admissions to bi-level care, 589 (65%) did not pay the entrance fee when they were first admitted to a ABC facility. Tr. Vol. 1, pp.59-60, 72; App. Ex. 38.
45. In fiscal years 2016-2017, there were approximately 1,500 residents. Tr. Vol. 1, pp. 72-73.
46. Non-contractual residents in all three levels of care live under a rental agreement without paying an entrance fee and they pay a monthly rent of \$3,000-\$4,000. Tr. Vol. 1, pp.56, 68.
47. According to Y, the monthly rent for non-contractual independent living unit ranges \$XXXX-\$XXXX plus one month's rent as a security deposit. Security deposit goes as high as \$XXXXX on a larger unit. Tr. Vol. 1, p.97.<sup>4</sup>
48. Applicant gives a "first priority" of financial assistance or charity care to all residents with life care agreements, whose assets were expected to last through their lifetime of residency but have depleted through no fault of their own. Tr. Vol. 1, pp.65-67; App. Ex. 18.
49. A "second priority" is given to prospective community admissions who do not fully financially qualify for admission in an ABC facility and accept a charitable accommodation determined by staff. Residents in this priority must be able to fully

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<sup>4</sup> There is a logical fallacy here because if a security deposit equates to one month's rent of \$3,000-\$5,000, the security deposit cannot go as high as \$10,000. Applicant did not offer into evidence the rental agreement to clarify this discrepancy.

fund both entrance/monthly fees for 8 years, have benevolent risk of no greater than \$XXXXXX, and apply for external sources of assistance including government benefits. Tr. Vol. 1, pp.66-67; App. Ex. 18.

50. Applicant currently does not have a specific charitable accommodation, but is allowed under the policy and can be fully enforced at its sole discretion. Tr. Vol. 1, pp.66-67; App. Ex. 18, 23.

51. The “third priority” of charity care is given to non-contractual health care residents who have depleted funds, a residency of more than 4 years and spent \$XXXXXXX on Applicant’s care. Residents in this priority are required to apply for all external sources of assistance including both state and federal government programs. App. Ex. 18.

52. The final priority of charity care is given to non-contractual residents who have depleted funds and a residency of less than 4 years, only if the total benevolent program spending is less than 3% of annual revenues in the prior fiscal year. Tr. Vol. 1, p.69; App. Ex. 18.

53. According to X, Applicant’s benevolence policy is used as a guideline for administering charity care and have never been thus far fully enforced in denying charity care to residents who apply for it. Tr. Vol. 1, p.66-67.

54. There is no guarantee of continual health care for a non-contractual resident under the benevolence policy. Tr. Vol. 1, p.69.

55. According to X, Applicant’s residents, regardless of different levels of priorities contained in the benevolence policy receive financial assistance if they’re unable to pay for room, board, and medical care. Tr. Vol. 1, pp.74-75

56. Applicant's benevolence policy is not provided to anyone but its "sales counselors" discuss with the residents that no eviction would occur if they run out of funds through no fault of their own. Tr. Vol. 1, p.70; App. Ex. 22.
57. Applicant's resident accounts receivable collection policy includes a legal remedy. App. Ex. 26.
58. Applicant's Residence and Services Agreement included a provision for financial assistance to those residents who face hardship not due to willful depletion of assets and have exhausted financial assistance from family and government programs. App. Ex. 23.
59. The financial assistance provision at LP PLACE, THE CLIFFS OF EVERYWHERE, and XX XX GROVE states that financial assistance from ABC shall be within the sole discretion of ABC and the resident receiving it may be required to move to a residence with a lesser monthly fee and that subsidies paid to a resident will be deducted from the refundable portion of the entrance fee. App. Ex. 23.
60. In addition to the FAQ section and the hyperlinked pages devoted to Q on Applicant's website, it publishes in its XX newsletter sent to people who have inquired about their services and to current residents and their families, most of whom are donors to Q, highlighting the financial assistance aspect. Tr. Vol. 1, pp.82, 88-91; App. Ex. 22, 36, 37, 40-42, 71.
61. Also, a brochure is sent based on a purchased income list to upwards of 20,000 area senior citizens aged 70 plus informing them of Applicant's services, including guarantee of continued residence. Tr. Vol. 1, p.88.
62. Availability of rental units or not having to pay entrance fees are not explicitly specified in any of Applicant's brochures and mailings. Tr. Vol. 1, p.98; App. Ex. 36.

63. Availability of rental units are advertised on Applicant's website only. Tr. Vol. 1, p.99.
64. The Women's Board is Applicant's fundraising arm, consists of all volunteers, and has raised a total of \$X million over the years, approximately \$XXXXXXX yearly. Tr. Vol. 1, pp. 102-105.
65. The Women's Board has made specific grants, \$XXXXXXX in the last few years, to the fellowship funds of Q to provide support, money or resources, to Applicant's residents who need it. Tr. Vol. 1, pp. 105-106.
66. Whatever funds the Women's Board raises go to Q and the funds are distributed through GF. Tr. Vol. 1, p.107.
67. Since 2013 Applicant has been donating appliances, stoves and refrigerators, occasionally cabinets to Habitat for Humanity, a not-for-profit organization. Tr. Vol. 2, pp. 120-124; App. Ex. 27.
68. Applicant has submitted several affidavits by current residents, Applicant's employees, and directors of third party charitable organizations praising Applicant's charitable activities. App. Ex. 43-53.
69. At LP PLACE, the entrance fee for a life care agreement starts at \$XXXXXXX for a one-bedroom apartment with a monthly fee of \$3,335; \$XXXXXXX for a two-bedroom apartment with a monthly fee of \$XXXX, and \$XXXXXXX for a cottage with a monthly fee of \$XXXX. The fees are based on the size of the home and the type of agreement selected. Dept. Ex. 2.
70. At THE CLIFFS OF EVERYWHERE, the entrance fee for a life care agreement starts at \$XXXXXXX for a one-bedroom apartment with a monthly fee of \$XXXX; \$XXXX for a two-bedroom apartment with a monthly fee of \$XXXX, and

\$XXXXXXX for a villa with a monthly fee of \$XXXX. The fees are based on the size of the home and the type of agreement selected. Dept. Ex. 3.

71. A rental option is available at XX XX GROVE. The entrance fee there starts at \$XXXXXXX for a one-bedroom apartment with a \$XXXX monthly fee, \$XXXXXXX for a two-bedroom apartment with a \$XXXX monthly fee, and \$XXXXXXX for a three-bedroom apartment with a \$XXXX monthly fee. The fees are based on the size of the home and the type of agreement selected. The monthly service fees include a wide array of educational programs, entertainment, physical fitness and social activities along with housing keeping services each week. Dept. Ex. 4.

**Conclusions of Law:**

The Use Tax Act (35 ILCS 105/1 *et seq.*) imposes a tax upon the privilege of using in Illinois tangible personal property purchased at retail from a retailer. 35 ILCS 105/3. Section 3-5 of the Act provides a list of tangible personal property that is exempt from tax, and includes the following: “(4) Personal property purchased by a governmental body, by a corporation, society, association, foundation, or institution organized and operated exclusively for charitable, religious, or educational purposes, or by a not-for-profit corporation, society, association, foundation, institution, or organization that has no compensated officers or employees and that is organized and operated primarily for the recreation of persons 55 years of age or older. A limited liability company may qualify for the exemption under this paragraph only if the limited liability company is organized and operated exclusively for educational purposes. On and after July 1, 1987, however, no entity otherwise eligible for this exemption shall make tax-free purchases unless it has an active exemption identification number issued by the

Department. 35 ILCS 105/3-5(4). Section 2-5(11) of the Retailers' Occupation Tax Act (35 ILCS 120/1 *et seq.*) contains a similar provision. (See 35 ILCS 120/2-5(11)).

Applicant has requested an exemption identification number pursuant to these provisions, which the Department has denied on the basis that it did not demonstrate that it operates exclusively for charitable purposes. Dept. Ex. No. 1. The Department's denial of an applicant's claim for an exemption identification number is presumed to be correct, and the applicant has the burden of clearly and conclusively proving its entitlement to the exemption. See Wyndemere Retirement Community v. Department of Revenue, 274 Ill. App. 3d 455 (2<sup>nd</sup> Dist. 1985). To prove its case, an applicant must present more than just testimony denying the Department's determination. Sprague v. Johnson, 195 Ill. App. 3d 798 (4<sup>th</sup> Dist. 1990). Rather, the applicant must present sufficient documentary evidence to support its claim. *Id.*

It is well established in Illinois that there is a presumption against exemption and that therefore, "exemptions are to be strictly construed" with any doubts concerning the applicability of the exemptions "resolved in favor of taxation." Van's Material Co. Inc. v. Department of Revenue, 131 Ill. 2d 196 (1989). The applicant bears the burden of proving "by clear and convincing" evidence that the exemption applies. Evangelical Hospitals Corp. v. Department of Revenue, 223 Ill. App. 3d 225 (2<sup>nd</sup> Dist. 1991).

An examination of the record establishes that Applicant has not demonstrated, by the presentation of exhibits, evidence sufficient to warrant an exemption from sales tax as an association organized exclusively for charitable purposes. Accordingly, under the reasoning given below, the determination by the Department denying Applicant a sales tax exemption number should be affirmed. In support thereof, I make the following conclusions:

In Methodist Old Peoples Home v. Korzen, 39 Ill. 2d 149 (1968), (hereinafter “Korzen”), the Court articulated the criteria and guidelines for resolving the constitutional question of exclusive charitable use of property. These guidelines are (1) the organization’s funds are derived mainly from private and public charity, and the funds are held in trust for the objects and purposes expressed in the charter; (2) the organization has no capital, capital stock or shareholders and does not provide gain or profit in a private sense to any person connected with it; (3) the benefits derived are for an indefinite number of persons, for their general welfare or in some way reducing the burdens on government; (4) the charity is dispensed to all who need and apply for it; and (5) the organization does not appear to place obstacles of any character in the way of those who need and would avail themselves of the charitable benefits it dispenses. Korzen at 157. These factors are balanced with an overall focus on whether and how the organization serves the public interest and lessen the State’s burden. See DuPage County Board of Review v. Joint Comm’n on Accreditation of Healthcare Organizations, 274 Ill. App. 3d 461 (2<sup>nd</sup> Dist. 1995). Thus, the issue before this tribunal is whether Applicant is “an institution of public charity” under the terms of Korzen. I conclude, based on the documentary evidence presented, that it is not an “institution of public charity.”

In determining whether an organization is charitable in its purpose and therefore exempt from taxation, it is proper to consider provisions of its charter. Rotary International v. Paschen, 14 Ill. 2d 387 (1957). Applicant has amended the articles of incorporation on August 7, 2014 to operate exclusively for charitable, educational, religious, or scientific purposes. App. Ex. 4, 8. Its mission is to establish and maintain quality residential communities and health care programs including, but not limited to, nursing, home care and hospice programs and other services for elderly adults from

diverse social and economic backgrounds; and to provide financial assistance to elderly Presbyterians and others in need of long term care. App. Ex. 4, 8. While the articles of incorporation state that it operates for a charitable purpose, such wording in its governing legal documents is not determinative of this fact. Rather, an analysis of applicant's activities is necessary to determine whether it is a charitable institution. Morton Temple Association, Inc. v. Department of Revenue, 158 Ill.App.3d 794, 796 (1956).

After a thorough review of the evidence presented, I conclude that Applicant's primary purpose is not charitable, in the legal sense. Applicant exists primarily because of the sizeable commercial activity generating millions of dollars yearly in net income, providing rental and residential care services to seniors with substantial assets. Charity care provided to the residents is secondary, likely designed to attract more business and remain competitive in the field of CCRCs. Referring to charity care provided to residents, Y testified that "There aren't many of any organizations that spend the level of charity on actual residents, supporting actual residents. So being the marketing person, that is an opportunity for us to create value." Tr. Vol. 1, p. 84. If indeed charity care were Applicant's primary purpose, why would it impose the residency requirement that only a select group of senior citizens with large assets would qualify. In Meridian Village Association v. Hamer, 2014 IL. App (5<sup>th</sup>) 130078, the appellate court upheld an exemption denial where charitable care was available only to existing residents. It appears counterproductive to charity care that Applicant would selectively send out sales brochures only to certain area seniors based on a purchased income list, likely to people who can afford Applicant's high entrance/monthly fees. It is likewise inconsistent to charity care that Applicant imposes a multitude of lengthy conditions, unassociated with lack of funds, even for residents to receive charity care. App. Ex. 18. It is quite telling

that Applicant refers to its employees who consult with prospective residents for admission to one of its facilities as “sales counselors.” Tr. Vol. 1, p.70.

While Applicant provides charity care to some of the residents, there was no documentary evidence or testimony that charity was provided to any potential residents who appeared from the outset to be unable to afford to live on the property were admitted as a resident without paying the fees. Given Applicant’s financial screening of prospective residents before they can move into ABC facilities, the likelihood that these residents will ever need financial assistance is minimal, by ABC’s design. Incidental charity incorporated to suit Applicant’s business model, “to create value” as Y noted, is not charity under Korzen.

In each of fiscal years 2014-2017, Applicant has provided charity care to the residents between \$X million-\$XX million annually, constituting 3.5%-5.7% of Applicant’s total annual revenues. Tr. Vol. 1, p.47; App. Ex. 11-14. “To be charitable, an institution must give liberally.” Provena I at 750. These numbers do not permit me to conclude that Applicant has given “liberally.” The disparity between Applicant’s charity care and its revenues is extreme that it would not be reasonable to conclude that Applicant’s primary purpose is to provide charity, as is required by statute. Applicant’s primary purpose is to provide residential care services to seniors who can afford to live there at a significant profit. The charity care amounts ranging 3.5%-5.7% of Applicant’s annual revenues with 89%-92% of which comes from fees paid by residents, fall far short of meeting the primary purpose standard. App. Ex. 11-14.

Applicant has offered into evidence several exhibits detailing its charitable giving to various community organizations. They show that Applicant has donated used goods and the use of meeting space for social/religious events, continuing education, and

health/welfare events. App. Ex. App. Ex. 10, 27, 28, 34. While beneficial to the public, donation of meeting space and used goods to not-for-profit organizations are acts of charity incidental to Applicant's primary purpose of providing senior residential care for significant fees and cannot be attributed as its primary purpose. To be exempt from taxes under the UTA and the ROTA, an institution must be organized and operated "exclusively" for charitable purposes. 35 ILCS 105/3-5(4) and 35 ILCS 120/2-5(11). An "exclusively" charitable purpose need not be interpreted literally as the entity's sole purpose; it should be interpreted to mean the primary purpose, and not a merely incidental or secondary purpose or effect. Gas Research Institute v. Department of Revenue, 154 Ill. App. 3d 430 (1<sup>st</sup> Dist. 1987). In determining whether an institution is exempt from taxation, the test is whether its primary purpose is charitable. People v. Young Men's Christian Ass'n of Chicago, 365 Ill. 118 (1936). It is well settled in Illinois that incidental acts are legally insufficient to establish that the applicant is "exclusively" or primarily a charitable organization. Rogers Park Post No. 108 v. Brenza, 8 Ill. 2d 286 (1956).

**Korzen factor (1): The organization's funds are derived mainly from private and public charity, and the funds are held in trust for the objects and purposes expressed in the charter.**

The documentary evidence demonstrates that virtually all of Applicant's income comes from entrance and program service fees. App. Ex. 11-14. There is no dispute regarding the sources of Applicant's revenues. Applicant's Form 990, Return of Organization Exempt Form Income Tax, for fiscal year 2014 reveals that of its total revenue of \$XXX million, 89%, \$XXX million, came from program service fees, with approximately 8%, \$X million coming from donations from GF. App. Ex. 31. The

consolidated financial statements show that during each of fiscal years 2014-2017, Applicant has generated a comparable percentage of revenues, between 89%-92%, from fees in proportion to the total annual revenues. App. Ex. 11-14. In fiscal year 2016, during which the sales tax exemption application was filed, of \$XXX million in total revenues, 89%, approximately \$XXX million came from entrance fees, health care fees, and fees for independent/assisted living. App. Ex. 13. These numbers are inconsistent with Applicant's contention that a "significant portion of its funds" came from public and private charity.

In Riverside Medical Ctr. v. Dept. of Revenue, 324 Ill. App. 3d 603, 608 (3<sup>rd</sup> Dist. 2003), the court noted that 97% of Riverside's net revenue of \$10 million came from patient billing. According to the court, "this level of revenue is not consistent with the provision of charity." Similarly, in Alivio Medical Ctr. v. Department of Revenue, 299 Ill. App. 3d 647 (1<sup>st</sup> Dist. 1998), Alivio argued that 59% of its revenue was from patient fees and 25% was derived from charitable contributions. The court found that Alivio was not a charitable institution. As the above cases indicate, the exchange of services for payment, at the level enjoyed by ABC, is not a characteristic that has been recognized by Illinois courts as "charitable." Charity is an act of kindness or benevolence. "There is nothing particularly kind or benevolent about selling somebody something." Provena Covenant Medical Center v. Department of Revenue, 384 Ill. App. 3d 734, 750 (4<sup>th</sup> Dist. 2008), aff'd, 236 Ill. 2d 368 (2010).<sup>5</sup> Having an operating income derived almost entirely from contractual charges goes against a charitable identity. Small v. Pangle, 60 Ill. 2d 510, 517 (1975).

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<sup>5</sup> In this Recommendation, the Provena Appellate Court case will be cited as "Provena I" and the Provena Supreme Court case will be cited as "Provena II."

As to the donations Applicant received from Q, the Department points out that Applicant has not cited any authority for its claim that the charitable acts of an affiliate corporation to Applicant, Q, a separate legal entity with its own 501(c)(3) status, may be attributed to Applicant's charitable status. In Meridian Village Association, the applicant attempted to establish that it possesses this Korzen characteristic by showing that most of its funds came as donations from Lutheran Senior Services, an organization that derived its funds mainly from private and public charity. The appellate court rejected this argument and concluded that the primary sources of the appellant's income was from fees for services, adding that "Lutheran Senior Services is a separate entity from the appellants, and the appellants cannot acquire charitable status through the acts of a separate entity." 2014 IL App. (5<sup>th</sup>) 130078. Given Riverside Medical Ctr. and Alivio, this issue of whether Applicant can acquire charitable status through the acts of a separate, but affiliate corporation is immaterial to the outcome of the case, as 89-92% of Applicant's annual revenues for fiscal years 2014-2017 came from service fees. Accordingly, I conclude that Applicant has failed to meet the first Korzen characteristic that the funds are derived mainly from private and public charity and held in trust for the objects and purposes expressed in the charter.

**Korzen factor (2): The organization has no capital, capital stock or shareholders, and does not provide gain or profit in a private sense to any person connected with it.**

Of this two-prong inquiry, the Department concedes that Applicant has no capital, capital stock, or shareholders, and earns no profit or dividends. Dept. Brief, p.3. The remaining inquiry is whether there is gain or profit in a private sense to any person connected with it. Korzen at 157. Applicant contends that it satisfies this Korzen factor

by limiting its executives to reasonable salaries and benefits comparable to those provided to the executives of other non-profit CCRCs. App. Brief, p.8. Testimony was offered that Applicant is certified by CARF and the certification process includes reasonable executive compensation, but no documentary evidence was provided that its executive salaries are comparable to those paid to executives at other CCRCs. The CARF certification letters sent to each of Applicant's facilities do not attest to reasonableness of executive compensation. App. Ex. 29. While testimony was given that Applicant participates in an annual executive compensation study in the related field, Applicant did not offer into evidence either the CARF certification or the executive compensation study detailing the reasonableness of executive compensation.

For fiscal year 2014, the only year in which Applicant caused to be admitted into evidence Form 990 federal return, Applicant's top five highest paid employees were as follows: Chief Operating Officer earned \$XXXXXXX plus \$XXXXXX in estimated amount of other compensations; Executive Director at XYZ PLACE earned \$XXXXXXX plus \$XXXXXX in estimated amount of other compensations; Executive Director at the THE CLIFFS OF EVERYWHERE earned \$XXXXXXX plus \$XXXXXX in estimated amount of other compensations; Chief Financial Officer X earned \$XXXXXXX plus \$XXXXXX in estimated amount of other compensations; and Vice President of Medical Services earned \$XXXXXXX plus \$XXXXXX in estimated amount of other compensations.

"The employees of a charitable institution are not compelled to perform free services in order that the institution may be charitable." Yates v. Board of Review, 312 Ill. 367 (1924). "The payment of reasonable salaries to necessary employees for services actually rendered does not convert a nonprofit enterprise into a business enterprise." 86 Ill. Admin. Code §130.2005(h). The problem in the instant case is that no documentary

evidence was presented at the evidentiary hearing by the Applicant to support the testimony about the reasonableness of executive compensation. In the absence of documentary evidence showing salaries of senior management at similar organizations, I conclude that Applicant has failed to satisfy by presentation of clear and convincing evidence that there is no gain or profit in a private sense to any person connected with Applicant.

**Korzen factor (3): The benefits derived are for an indefinite number of persons, for their general welfare or in some way reducing the burdens on government.**

The evidence presented demonstrates that the benefits derived are not for an indefinite number of persons but available only to Applicant's residents. For an independent living resident under a life care contractual agreement, Applicant requires entrance fees between over \$XXXXXX to \$XX million, determined by risk assessment of future health care needs of a resident and the level of refundability. Non-contractual residents come through a rental, paying a monthly rent of \$XXXX-\$XXXX, possibly more<sup>6</sup> and an equal amount of security deposit. Testimony was offered regarding fees but Applicant chose not to offer into evidence Lease<sup>7</sup> or Residence Services Agreement that the residents sign when they move into ABC. Absence of the Lease or Residence Services Agreement is a serious omission from the record in this case and it negatively impacts any conclusion that Applicant possesses the characteristics of a charitable organization, as determined in Korzen. Despite some relevant testimony, without the

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<sup>6</sup> See footnote #3.

<sup>7</sup> Havrilka testified that no lease is required for rental residents, but an affidavit by a current resident refutes this. Tr. Vol. 1, p.68; App. Ex. 50.

Lease or Residence Services Agreement, it is not clear under what exact terms residents move into Applicant's facilities.

Illinois courts have consistently refused to grant charitable exemptions to retirement homes that charge entrance and up-front fees because these fees prevent "an indefinite number of persons" from benefitting from the home. In Methodist Old People's Home v. Korzen, 39 Ill. 2d 149, 158 (1968), where prospective residents paid a "Founder's Fee" of \$6,250 to \$25,000 and a monthly charge from \$175 to \$375, the Supreme Court stated that the Founder's Fee and monthly charges, *inter alia*, were "certainly sufficiently restrictive to prevent our saying that the property is used for the benefit of an indefinite number of people..." In People ex rel. Nordland v. Home for the Aged, 40 Ill. 2d 91, 101 (1968), where candidates for admission paid a mandatory \$4,000 entry fee, the Supreme Court stated that the defendant's insistence upon the payment of a sizeable admission fee, *inter alia*, constitutes a serious impediment to the tax-exempt status it was seeking. The Court could not "reconcile" the entrance fee "with our requirements of the application of benefits to an indefinite number of persons..." In Eden Retirement Center v. Dept. of Revenue, 213 Ill. 2d 273, 293 (2004) where Eden charged up-front entrance fees ranging from \$65,000 to \$76,900 for a duplex unit or a \$5,000 security deposit for a rental unit, the Supreme Court noted that "most certainly, the benefits derived are only for persons who can pay the substantial entrance fees."

Similarly, in Wyndemere Retirement. Comm. v. Dept. of Revenue, 274 Ill. App. 3d 455, 460 (2d Dist. 1995), the court denied a sales tax exemption to a retirement community whose funding was "provided by the substantial entrance and monthly fees charged to those who can afford to avail themselves of Wyndemere's services." In Plymouth Place, Inc. v. Tully, 54 Ill. App. 3d 657, 661 (1<sup>st</sup> Dist. 1977), where candidates

for admission paid an initial “Foundation Fee” which was “rarely below \$10,000” plus monthly fees, the court stated that the fact that most applicants are required to pay a substantial Foundation Fee clearly represents an obstacle to the receipt of benefits.

Applicant charges fees/rent for both contractual and non-contractual residents based on the size and services selected. Dept. Ex. 2-4. At LP PLACE, the entrance fee for a life care agreement starts at \$XXXXXX for a one-bedroom apartment with a monthly fee of \$XXXX; \$XXXXXX for a two-bedroom apartment with a monthly fee of \$XXXX, and \$XXXXXX for a cottage with a monthly fee of \$XXXX. Dept. Ex. 2. At THE CLIFFS OF EVERYWHERE shows that for a life care agreement entrance fees start at \$XXXXXX for a one-bedroom apartment with a monthly fee of \$XXXX; \$XXXXXX for a two-bedroom apartment with a monthly fee of \$XXXX, and \$XXXXXX for a villa with a monthly fee of \$XXXX. Dept. Ex. 3. At XX XX GROVE, where the rental is available, the entrance fee starts at \$XXXXXX for a one-bedroom apartment with a \$XXXX monthly fee, \$XXXXXX for a two-bedroom apartment with a \$XXXX monthly fee, and \$XXXXXX for a three-bedroom apartment with a \$XXXX monthly fee. The monthly service fee covers a wide array of educational programs, entertainment, physical fitness and social activities along with housekeeping services each week. Dept. Ex. 4.

Illinois courts have consistently held that rental of units, based on size and/or location, is not indicative of charitable use. In Wyndemere Retirement Comm. v. Dept. of Revenue, 274 Ill. App. 3d 455, 460 (2nd Dist. 1995), the court noted that the “variance in charges based on the size of the unit is also a factor indicative of noncharitable use.” In Small v. Pangle, 60 Ill. 2d 510, 517 (1975), the court noted that the variance of the monthly charges, based upon the size and location of the room, “smacks” as being

indicative of a noncharitable use. In Methodist Old Peoples' Home v. Korzen, 39 Ill. 2d 149, 158 (1968), the Court noted that the monthly service charge, *inter alia*, was based on the size and location of the quarters to be assigned, "corresponding in principle with the type of rate structure one would find in a commercially operated cooperative multiple dwelling property." The fact that the "old peoples' home" allocated living space from the standpoint of desirability of location and size seemed to the Supreme Court to be "lacking in the warmth and spontaneity indicative of a charitable impulse." "Rather, it seems more related to the bargaining of the commercial market place."

Applicant has offered into evidence the percentage of residents who did not pay an entrance fee as they came as renters or directly into assisted living or skilled nursing care: 66% (1,136) of 1,664 total admissions in the fiscal year 2016; and 65% (589) of 900 admissions through first 7 months of fiscal year 2017. During fiscal years 2013 through August 2016, Applicant has provided financial assistance to the residents a total of \$24.2 million, averaging \$6 million yearly. App. Ex. 10, 39. Of about 1,500 residents during fiscal years 2016-2017, 233 residents received an average of \$XXXXXX in charity care in 2016, and in 2017, 94 residents received an average of \$XXXXXX in charity care. Tr. Vol. 1, pp.50-51, 72-73; App. Ex. 14. According to X, there is no cap on the amount Applicant spends on the residents who need charity care and that all residents who have applied for and needed charity care in fiscal years 2014-2017 received it. Tr. Vol. 1, pp.41, 53. The benevolence policy, however, allows for a cap on the expenditure on charity care for certain residents and can be fully enforced at Applicant's discretion. App. Ex. 18.

These facts are concerned with what occurs after a senior becomes a resident and receives charity care. What Applicant has failed to present is evidence that a poverty-

stricken prospective resident could become a resident at Applicant's facilities without paying fees or rent. In the absence of such evidence, it is largely irrelevant under Korzen whether all of Applicant's residents who have applied for and needed charity care received it. It is not charity under Korzen when it's available only to people Applicant determines would most likely not need it based on the tight financial screening performed before a person moves into the facilities in the first place. Without such evidence in the record, the number of residents and the average amount of charity care provided to the resident is largely irrelevant under Korzen. None of these numbers can overcome that Applicant presented no evidence that a poverty-stricken senior was ever admitted to Applicant's facilities without paying fees or rent. This Korzen factor requires that the benefits derived are for an indefinite number of persons. Clearly that is not the case here. In sum, among lengthy testimony and documentary evidence admitted, Applicant has not produced any evidence that anyone who was unable to pay its fees or rents was ever allowed to live at Applicant's facilities. This is inconsistent with the Korzen factor that the benefits derived are for an indefinite number of persons.

The Korzen factor at issue also requires a consideration of whether Applicant's benefits reduce a burden on government. "The fundamental ground upon which all exemptions in favor of charitable institutions are based is the benefit conferred upon the public by them and a consequent relief, to some extent, of the burdens upon the state to care for and advance the interests of its citizens." School of Domestic Arts and Sciences v. Carr, 322 Ill. 562 (1926). It is a *sine qua non* of charitable status that those seeking a charitable exemption can demonstrate that their activities will help alleviate some financial burden incurred by the affected taxing bodies in performing their governmental functions. Provena II at 395. There is no credible evidence in the record of this case

showing that Applicant's operations reduce any burden on government. Applicant's benevolence policy requires that some of the residents who apply for charity care must apply for all external sources of assistance, including family and state/federal governmental programs. App. Ex. 1, 23. Considering this prerequisite for charity care, I fail to see how Applicant reduces a governmental burden in this regard. If a resident seeking charity care were to qualify for governmental assistance, the funds therefrom would go towards Applicant's revenues. There is no governmental burden to provide a senior housing or residential care at "some of the most desirable locations...offering "a range of lifestyle choices" surrounded by "beautiful flowers, attractive fountains, and comfortable benches," as Applicant offers at a premium. App. Ex. 17, 36-37. There is simply nothing of fact in the record of this case which would lead me to conclude that Illinois government would have an increased burden if Applicant did not own and operate PH. The evidence does not support a conclusion that the benefits derived from PH are for an indefinite number of persons or that these benefits reduce a burden on Illinois government.

**Korzen factor (4): Charity is dispensed to all who need and apply for it.**

In the Brief, Applicant argues it dispenses charity to all "eligible" persons who need it and apply for it. App. Brief, p. 14. There is no qualifier "eligible" in this Korzen factor. The law is clear that the charity is dispensed to all who need and apply for it. The record demonstrates that Applicant does not dispense charity to all who need and apply for it. Here, Applicant's cost reduction or charity care is available only to its residents. The Applicant's benevolence policy states:

The purpose of this policy is to set forth the operational administration of offering benevolence through the fellowship fund to *residents* of Presbyterian Homes. App. Ex. 18. (Emphasis added).

No one outside of ABC residency can apply for and receive charity care. In Meridian Village Association, the court noted that “any benevolent care...limited to existing residents and does not extend to those who wish to become residents...do not dispense charity to all who need it.” 2014 IL App. (5<sup>th</sup>) 130078. As previously discussed, to become a contractual resident at Applicant’s independent living requires a significant amount of financial resources up to \$1.5 million entrance fee and up to \$10,000 security deposit for non-contractual residents. Tr. Vol. 1, pp.56, 97; App. Ex. 35, 38.

Adding to the bright line restriction that only Applicant’s residents may benefit from varying degrees of charity care, imposition of detailed guidelines under the benevolence policy for charity care affirm that Applicant’s charity is not universally dispensed. While there was testimony that everyone who have applied for and needed charity care received it during fiscal years 2014-2017, Applicant’s benevolence policy sets forth lengthy eligibility criteria for charity care based on factors unassociated with lack of funds, such as contractual status, levels of care, amount of benevolent risk, number of years in residency, amount of fee paid thus far, and the percentage of annual revenues spent on benevolence program in the prior fiscal year. Tr. Vol. 1, pp.65-67; App. Ex. 18. The “first priority” of charity care is given to all residents with life care agreements, whose assets were expected to last through their life time of residency but have depleted due to no fault of their own. Tr. Vol. 1, pp.65-67; App. Ex. 18. A second priority is given to prospective community admissions who do not fully financially qualify for admission in a ABC facility and accept a charitable accommodation determined by staff. Residents in this priority must be able to fully fund both entrance/monthly fees for 8 years, have benevolent risk of no greater than \$125,000, and apply for external sources of assistance including government benefits. Tr. Vol. 1, pp.66-

67; App. Ex. 18. By testimony, Applicant currently does not have a specific charitable accommodation, but is allowed under the written benevolence policy. Tr. Vol. 1, pp.66-67; App. Ex. 18. The “third priority” of charity care is given to non-contractual health care residents with depleted funds, who have a residency of more than 4 years and have spent \$XXXXXX on Applicant’s services. They are required to apply for all external sources of assistance including both state and federal government programs. App. Ex. 18. The final priority of charity care is given to non-contractual residents with depleted funds and a residency of less than 4 years. The residents in the “fourth priority” do not qualify at all for charity care unless a total benevolence program spending is less than three percent (3%) of annual revenues in the prior fiscal year. Tr. Vol. 1, p.69; App. Ex. 18.

Testimony was offered that the benevolence policy is mere a guideline for administering charity care and has never been thus far fully enforced in denying charity care to residents who apply for it. Tr. Vol. 1, p.66-67. No evidence, however, was presented that the residents or prospective residents are informed of this flexibility in the policy to grant charity care to a wide range of residents who wouldn’t otherwise qualify for charity care under the benevolence policy. Testimony and documentary evidence both show that Applicant has a full discretion to enforce the benevolence policy as written. Tr. Vol. 1, p.67; App. Ex. 18.

In each of fiscal years 2014-2017, Applicant has provided charity care to the residents between \$X million-\$XX. million annually, constituting 3.5%-5.7% of Applicant’s total annual revenues. Tr. Vol. 1, p.47; App. Ex. 11-14. In fiscal year 2014, of \$XXX million total revenue, approximately 5%, \$X million in charity care measured at cost was provided to Applicant’s residents. Tr. Vol. 1, p.47; App. Ex. 11. In fiscal

year 2015, of nearly \$XXX million total revenue, approximately 5%, \$X million in charity care measured at cost was provided. Tr. Vol. 1, p.47; App. Ex. 11, 13. Of \$XXX million of total revenue earned in fiscal year 2016, 5.7%, \$X million in charity care measured at cost was provided. App. Ex. 13. Of \$XXXmillion total revenue earned in fiscal year 2017, approximately 3.5%, \$X million in charity care measured at cost was provided. App. Ex. 13. “To be charitable, an institution must give liberally.” Provena I at 750. I cannot conclude that Applicant has given “liberally.” The disparity between Applicant’s charity care and its revenues is extreme that it would not be reasonable to conclude that Applicant’s primary purpose is to provide charity, as is required by statute. Applicant’s primary purpose is providing residential care services at a significant profit to seniors who can afford to live there. The charity care amounts, ranging 3.5%-5.7% of the annual revenues, with 89%-92% of which comes from fees paid by residents, fall far short of meeting the primary purpose standard.

As similarly addressed earlier, these numbers are concerned with what happens after a senior becomes a resident and receives charity care. What Applicant has failed to present is evidence that a poverty-stricken senior could live at Applicant’s facilities without paying entrance/monthly fees or rent. Without this evidence in the record, whether all of Applicant’s residents who have applied for and needed charity care received it is largely irrelevant under Korzen. Without this evidence in the record, the amount of charity care residents received is largely irrelevant under Korzen. None of these numbers can overcome the fact that no evidence was presented that a poverty-stricken senior was ever admitted to an ABC facility as a resident without paying required fees or rent. This Korzen factor requires that the charity is dispensed to all who need and apply for it. No evidence exists in the record to show that Applicant meets this

Korzen factor. Applicant's benevolence policy by design prevents the public from applying for charity care as no one outside the residency is even considered for charity care.

Under the benevolence policy, if a health care resident depletes funds, there is no guarantee of continual health care for a non-contractual resident. Tr. Vol. 1, p.69. Havrilka, however, testified that regardless of different levels of priorities contained in the benevolence policy, Applicant's residents receive financial assistance if they're unable to pay for room, board, and medical care. Tr. Vol. 1, pp.74-75. X further testified that the residents who receive cost reductions or charity care are not treated differently from the rest of the residents. Tr. Vol. 1, p.41. However, the documentary evidence presented shows that Applicant's benevolence policy allows for a specific charity care accommodation, determined by Applicant's staff. App. Ex. 18. In addition to Applicant's general benevolence policy, the financial assistance provision at LP PLACE, THE CLIFFS OF EVERYWHERE, and XX XX GROVE states that financial assistance shall be within the sole discretion of PH, the resident receiving it may be required to move to a residence with a lesser monthly fee, and that subsidies paid to a resident will be deducted from the refundable portion of the entrance fee. App. Ex. 23. This is inconsistent with charity care. In Eden Retirement Center v. Dept. of Revenue, 213 Ill. 273, 287 (2004), the Illinois Supreme Court held the denial of an exemption to a retirement home that reimbursed itself from entrance fees if it is required to reduce the maintenance fee.

Given the substantial entrance fee as high as \$XX million and a monthly fee/rent as high as more than \$XXXX, and Applicant's failure to present evidence that anyone has been admitted to Applicant's facilities without paying the entrance/monthly fee/rent, it appears highly likely that the residents have met Applicant's financial requirements for

living there before moving in. The likelihood then that these residents will ever need financial assistance is minimal, by ABC's design. Moreover, charity care is not given to those residents who have failed to accurately disclose their finances at the time to admission. App. Ex. 18. Applicant's website notes that approximately 7% of the residents received financial assistance. App. Ex. 41. The record reveals that Applicant spends as high as 5.7% of its annual revenues on charity care. There was no evidence or testimony that charity was provided to any member of the public or prospective resident who appeared from outset to be unable to afford to live at ABC facilities.

Whereas charging fees and rendering benefits to persons not poverty-stricken does not destroy the charitable nature of an organization, this is only true to the extent that the organization also admits people who need and seek the benefits offered but are unable to pay. Small v. Pangle, 60 Ill. 2d 510 (1975). I conclude from the record that Applicant provides charity to residents who were previously determined to be able to afford to live at the facilities but later encountered financial difficulties. The evidence does not allow me to conclude that Applicant provides charity to people who cannot afford to live there from the outset. Accordingly, I conclude that Applicant does not provide charity to all who need it.

To the benefit of the residents and the community, Applicant donates meeting space for social/religious events, continuing education classes, and health/welfare events such as "Raise awareness and funds for Alzheimer's disease," "Aging Well Conference Committee and Expo," "Information for choices for senior housing," and "Cancer celebration with Northwest community hospital." App. Ex. 10. Applicant also donates used goods to charitable organizations. Tr. Vol. 1, p.38; App. Ex. 10, 28, 34. As discussed earlier, these acts of charity are not Applicant's primary purpose, but incidental

or secondary. Moreover, the Illinois Supreme Court has never recognized community-based benefits, which encompasses the activities described above, as charitable acts sufficient to justify a tax exemption. These activities unquestionably benefit the community but is not the test for tax exemption in Illinois. While considering the question of whether “free health screenings, wellness classes and classes on handling grief” were charitable endeavors, the Illinois Supreme Court noted that “private for-profit companies frequently offer comparable services as a benefit for employees and customers and a means of generating publicity and goodwill for the organization.” Provena II at 404. Applicant’s election to participate in these programs must be viewed as intelligent business decisions, rather than as charity that would qualify for a sales tax exemption. The Korzen criteria that a charitable organization dispense charity to all who need and apply for it is “more than a guideline.” It is an “essential criteria” and it “goes to the heart of what it means to be a charitable institution.” Provena I at 750. Accordingly, I conclude that Applicant has failed to satisfy its burden of demonstrating by clear and convincing evidence the fourth Korzen factor of a charitable organization that charity is dispensed to all who need and apply for it.

**Korzen factor 5: The organization does not appear to place obstacles of any character in the way of those who need and would avail themselves of the charitable benefits it dispenses.**

The evidence shows that Applicant places several obstacles in the way of those who needed and would have availed themselves of its charitable care. Foremost, Applicant’s charity is available only to its residents who have likely met ABC’s financial requirements for living there before moving in. As addressed in the discussion of fourth Korzen factor, a multiple layer of restrictions is imposed even on the residents as to who

may qualify for charity care such as contractual status, levels of care, amount of benevolent risk, availability to residents of external sources of assistance including governmental assistance, number of years in residency, amount of fee a resident has paid thus far, and the percentage of annual revenues spent on benevolence program in the prior fiscal year. App. Ex. 18. Under the benevolence policy, when an Applicant's resident in health care depletes the funds, there is no guarantee of continual health care for a non-contractual resident. Tr. Vol. 1, p.69.

Applicant makes a concerted effort to target certain income demographics in its direct mail of sales brochures. Y testified that the brochures are mailed to qualified area seniors aged 70 plus based on a purchased income list in the primary market area. Tr. Vol. 1, pp.86, 88. While no direct evidence was provided as to how extensive the financial screening of prospective residents is, Applicant's benevolence policy notes that "individuals who failed to fully disclose or who failed to accurately disclose their finances at the time of admission into a ABC community shall be denied use of fellowship fund." App. Ex. 18. These facts along with evidence that high entrance/monthly fees required for contractual residency and the absence of evidence that anyone has been allowed to live at ABC facilities without paying entrance/monthly fees support a conclusion that there is an extensive financial screening of prospective residents. A financial screening of prospective residents to see if the person has sufficient assets to pay entrance fees and be admitted as a resident is counter to charity care. In Eden Retirement Center v. Dept. of Revenue, 213 Ill. 273, 287 (2004), the Illinois Supreme Court upheld the denial of an exemption to a retirement home that required residents to complete a very detailed financial statement.

Referring to direct mail marketing, Y testified that Applicant was “in a unique situation in our marketing efforts,” because its target demographic of people over the age of 70 still open their physical mails. Tr. Vol. 1, p.86. Applicant’s direct mail sales brochure does not advertise the rental option as it is advertised only on its website. Tr. Vol. 1, pp.98-99; App. Ex. 36,71. If Applicant’s primary purpose were charity care, it’s puzzling why Applicant chose not to advertise its rental option without an entrance fee in the direct mail sales brochure sent to seniors who they know still open their mails, as opposed to only advertising it online on its website, wherefrom the senior citizens are less likely seek information. This appears to be another means to financially screen out people who cannot afford to pay Applicant’s substantial entrance fees, thus, minimizing the likelihood of a non-contractual resident from seeking charity care in the future. While Applicant’s resident accounts receivable collection policy was admitted into evidence, it is unclear if late fees or interest are imposed on late payments of the rental or services, but it does permit a legal remedy. App. Ex. 26.

Applicant’s brochure titled “Take charge of your future,” sent to targeted income demographics, mentions availability of charity care but omits that Applicant is a 501(c)(3) organization or even a “not-for-profit.” App. Ex. 36. Juxtaposed to an entrance fee reference, under “Guarantee of Continued Residence,” it states that “Our pledge to you that whatever physical or financial changes you might face, your home will always be there.” App. Ex. 36. It is vague, but there is no misunderstanding that a guarantee of continued residence is premised upon residency after the payment of entrance fees. There is no explicit indication of fee waivers for the public, as intended, as charity care is, indeed, opened only to the residents. This lack of availability of charity

care to the public is a significant obstacle in the way of anyone who needs and would avail themselves of Applicant's charity.

The cost and benefit guide to Applicant's facilities does state that Applicant is a not-for-profit organization. Dept. Ex. 2-4. The guide is direct mailed to "qualified" area seniors aged 70 plus based on a purchased income list in the primary market area. Tr. Vol. 1, pp.86, 88; App. Ex. 22. Two of the guides state under "The Security of Life Care," there is "Financial Security (even if you outlive your assets)." Dept. Ex. 2-3. However, there is no mention that any poverty-stricken senior citizen can live there without paying substantial entrance/monthly fee itemized on the subsequent page. Again, the premise is that charity care is available only to the residents who are initially determined by Applicant to have sufficient assets after a financial screening. A rental option is available at XX XX GROVE facility, but there is no "(even if you outlive your assets)" guarantee under "Financial Security," making it more unlikely that the public would know the availability of fee waivers. This is an obstacle in the way of any potential resident who would like to avail themselves of Applicant's charity.

Applicant advertises on its website availability of fee waiver policy opened only to the residents. App. Ex. 40, 71. It states that "Through the Q, ABC HOMES assists residents that have depleted their financial resources through no fault of their own." App. Ex. 40. It certainly lacks details of the benevolence policy setting forth priorities of charity care not exclusively based on lack of funds. Applicant's residents, let alone the public, are not provided a copy of the benevolence policy. Rather, Applicant's "sales counselors" discuss with the residents or prospective residents that no eviction would occur if they run out of funds through no fault of their own. Tr. Vol. 1, p.70. There is a gulf between the benevolence policy and the fee waiver policy communicated by the

“sales counselors.” App. Ex. 18. A list Applicant prepared for the Department, titled “Public Awareness of Charitable policy & guaranteed continued care,” sparsely describes a distribution of Applicant’s fee waiver policy. App. Ex. 22. The top three listed refers to a distribution of “section of contract that addresses financial security” to residents who sign contracts as well as prospective residents who want to view contracts during their decision-making process. Again, the complete contract is not part of the record, only the referenced section is. The financial assistance provision for LP PLACE, THE CLIFFS OF EVERYWHERE, and XX XX GROVE reflects that financial assistance is limited to the extent that it can operate on a sound financial basis and shall be within the sole discretion of the facility. In Meridian Village Association v. Hamer, 2014 IL. App (5<sup>th</sup>) 130078, the appellate court upheld an exemption denial where charitable care was available only to existing residents and the appellant’s bylaws provided charity could be denied if it would jeopardize its ability to operate in a financially stable manner. Also, *see* Wyndemere Retirement Community v. Department of Revenue, 274 Ill. App. 3d 455, 457 (2<sup>nd</sup> Dist. 1985).

According to X, the benevolence policy is a mere guideline for administering charity care and thus far has not been fully enforced in denying charity care to the residents who have applied for it. Tr. Vol. 1, p.66-67. No documentary evidence was provided in this regard. No evidence was presented that any prospective residents, let alone the public, are informed that the written benevolence policy can be deviated from to grant charity care to a wide range of residents who wouldn’t otherwise qualify for charity care under the policy. Under Korzen, it is largely irrelevant that Applicant’s residents, regardless of different levels of priorities contained in the benevolence policy, currently receive financial assistance if they’re unable to pay for room, board, and

medical care, as X testified. Tr. Vol. 1, pp. 74-75. This is because both the benevolence policy and the financial provision for each of Applicant's facilities could fully be enforced as written at Applicant's sole discretion to deny charity care. Tr. Vol. 1, p.67; App. Ex. 18, 23. Moreover, in Meridian and Wyndemere, the appellate court concluded that even though no resident had bene denied charity, a policy that provide for assistance only when the appellant could afford to provide it and remain financially viable was not charitable. Meridian, 2014 IL. App. (5<sup>th</sup>) 130078 at para. 8; Wyndemere, 274 Ill.App.3d at 460.

In Highland Park Hospital v. Department of Revenue, 155 Ill. App. 3d 272 (2d Dist. 1987), the court found that an immediate care center did not qualify for a charitable exemption because, *inter alia*, the advertisements for the facility did not disclose its charitable nature. The court stated that "the fact is that the general public and those who ultimately do not pay for medical services are never made aware that free care may be available to those who need it." *Id.* at 281. Similarly, the court in Alivio Medical Center v. Department of Revenue, 299 Ill. App. 3d 647 (1<sup>st</sup>. Dist. 1998), denied a charitable exemption to a medical care facility in noting, *inter alia*, that "[A]livio does not advertise in any of its brochures that it provides charity care, nor does it post signs stating that it provides such care." Alivio Medical Center at 652.

Here, no evidence was presented that Applicant displays a sign at its facilities advertising to the public the availability of a fee waiver. If charity care were Applicant's primary purpose, it's puzzling why an organization with frequent community engagement meetings where the public is invited to attend would not actively advertise this information on its premises. This, along with the absence of availability of charity care opened to the public in the direct mail brochures, the failure to provide a copy of the

benevolence policy to anyone, even to the residents, and a multitude of conditions unassociated with lack of funds the residents must meet to qualify for charity care, is an obstacle to receiving benefits to those who need and avail themselves of the benefits dispensed. A charity dispenses charity and does not obstruct the path to its charitable benefits. Eden Retirement Center v. Dept. of Revenue, 213 Ill. 273, 287 (2004). Accordingly, I conclude that Applicant has not met by clear and convincing evidence the fifth Korzen characteristic of a charitable organization that no obstacles of any character in the way of those who need and would avail themselves of the charitable benefits it dispenses. Assuming, *arguendo*, Applicant had an effective advertised fee waiver policy, its use is extremely limited as there is a financial screening to be admitted to ABC facilities. Once admitted, the likelihood that these residents will ever need financial assistance is minimal, by ABC's design. Currently, approximately 7% of the residents receive financial assistance. App. Ex. 41. It is not an effective fee waiver policy if it is only opened to the residents and the public likely cannot qualify financially to be a resident from the outset. This is a significant obstacle in the way of anyone who wishes to reside or be a patient at ABC, but could not afford the entrance/monthly fees or rent.

In balancing Applicant's characteristics of a charitable organization with an overall focus on whether and how the organization serves the public interest and lessens the State's burden, I conclude that Applicant confers no direct public benefit, as the benefits only flows to the residents after having paid large entrance/monthly fees or rent, nor reduces a government burden. Applicant operates CCRCs for a substantial net profit, and targets in direct mail marketing area seniors with large assets to cherry-pick seniors whose assets would last through a life care at ABC. Once a resident is admitted into an ABC facility, having paid large entrance fees/rent, there are a multitude of requirements

based on clearly enumerated priorities in the benevolence policy that determines which resident qualifies for charity care and in what order. While charity care is cited in Applicant's some of the advertisements, it is only for the residents, and the level of specificity is contained only in the benevolence policy, which no one, including the residents, is given a copy of but merely communicated without details by Applicant's "sales counselors." A fee waiver policy opened only to the residents is not effective if the public cannot qualify financially to be a resident in the first place. The fourth and fifth Korzen characteristics that a charitable organization dispense charity to all who need and apply for it and place no obstacles in their way, are "more than guidelines." They are "essential criteria" and "go to the heart of what it means to be a charitable institution." Provena Covenant Medical Center v. Department of Revenue, 384 Ill. App. 3d 734, 750 (4<sup>th</sup> Dist. 2008), aff'd, 236 Ill. 2d 368 (2010). Although Applicant has no stocks or shareholders, without it meeting the "essential criteria" above, I conclude that Applicant is not an institution of public charity.

Tax exemptions are inherently injurious to public funds because they impose lost revenue costs on taxing bodies and the overall tax base. To minimize the harmful effects of such lost revenue costs, and thereby preserve the Constitutional and statutory limitations that protect the tax base, statutes conferring property tax exemptions are to be strictly construed in favor of taxation. People ex rel. Nordland v. Home for the Aged, 40 Ill. 2d 91 (1968). Great caution must be exercised in determining whether exemption should be granted to ensure that "sound principles" are preserved, unwarranted exemptions from taxation are avoided and that only the limited class of properties meant to be exempt actually receives the exempt status that the Legislature intended to confer. Otherwise, any increases in lost revenue costs attributable to unwarranted application of

the charitable exemption will cause damage to public treasuries and the overall tax base. In this case, Applicant bears the burden of proving “by clear and convincing” evidence that the exemption applies. Evangelical Hospitals Corp. v. Department of Revenue, 223 Ill. App. 3d 225 (2<sup>nd</sup> Dist.1991). Applicant has failed to prove by clear and convincing evidence that it is an exclusively charitable organization, as required for exemption under Illinois statutes, and that it falls within the limited class of institutions meant to be exempt for charitable purposes.

**The Uniformity Clause:** Now, before addressing the issue of uniformity clause which Applicant has raised at hearing, the procedural history is as follows: During discovery, Applicant filed a Motion to Compel Discovery of comparative Applicant information as follows: 1) identification for all non-profit Continuing Care Retirement Communities (“exempt CCRCs”) that currently possess charitable sales tax exemptions 2) Exempt CCRCs that require some or all of its residents to pay an entrance fee; 3) the amount of charitable assistance provided by exempt CCRCs to its residents; and 4) documents used by exempt CCRCs to communicate availability of charitable assistance to the general public. Applicant argued that this discovery is relevant to whether it satisfies the exemption criteria to at least as great an extent as other CCRCs that have received exemptions from the Department so that issuance of a sales tax exemption to Applicant would be required by the uniformity clause under the Illinois Constitution. Administrative Law Judge Ken Galvin (hereinafter “ALJ”) who was assigned to this case prior to retirement denied the Applicant’s motion citing that the requested discovery is not relevant and will not lead to relevant information. ALJ Galvin’s Order dated May 11, 2017. Subsequently, Applicant requested the same information from the Department under the Freedom of Information Act. The Department responded with information

concerning 24 CCRCs that have received renewal exemptions. This information was subject of a Motion in Limine on the date of the scheduled hearing which was denied for failing to satisfy the notice requirement and on the same grounds previously cited by ALJ Galvin. Tr. Vol. 1, p.9. At hearing, Applicant raised the issue of uniformity clause under Article IX, Section 2 of Illinois Constitution.

Applicant asserts that as its uniformity clause challenge is not an attack on the lawfulness of a classification contained in the language of a statute but is based on the inconsistent application of an otherwise constitutional provision. App. Brief, pp. 21, 25. The crux of Applicant's uniformity clause challenge necessarily rests on an assumption that Applicant is in a tax classification by being a CCRC. However, Applicant is applying for a sales tax exemption as a charitable organization, not as a CCRC, and there is no such tax classification as a CCRC in the statute under the Use Tax Act (35 ILCS 105/1 *et seq.*) or the Retailers' Occupation Tax Act (35 ILCS 120/1 *et seq.*).<sup>8</sup>

Moreover, the evidence in this matter does not show that Applicant has presented any evidence that there is an uneven treatment between it and other CCRCs that have been given sales tax exemptions. Applicant argues that "there is absolutely no evidence that the Department did...apply the *Korzen* factors when it granted those applications." App. Reply Brief, p.8. No evidence was presented by the Applicant that the Department has treated any CCRCs, including the Applicant, differently in their applications for a sales tax exemption. This burden lies with the Applicant, not the Department. The party objecting to an assessment on lack of uniformity grounds bears the burden of proving the disparity by clear and convincing evidence. Kankakee County Board of Review v.

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<sup>8</sup> There is a tax exemption under the Property Tax Act (35 ILCS 200/15-65(c)) for old people's homes, but Applicant here is only seeking exemption from sales tax, not property tax. Even under the Property Tax Act, an applicant, such as an old people's home, must meet the Korzen factors to qualify for an exemption. See Korzen at 157. There is no automatic exemption merely by being an old people's home.

Property Tax Appeal Board, 131 Ill.2d 1, 22 (1989). “Each individual claim [of exemption] must be determined from the facts presented.” Rogy’s New Generation, Inc., et al. v. The Department of Revenue, 318 Ill.App.3d 765 (1<sup>st</sup> Dist. 2000). Here, Applicant has failed to present evidence that the Department has not applied the same Korzen factors to applications for sales tax exemptions of the 24 CCRCs that it imposed upon the Applicant. *See* App. Ex. 15. This fact, alone, makes Applicant’s argument unpersuasive.

For the above stated reasons, I recommend that the Department’s determination denying the Applicant a sales tax identification number be affirmed.

ENTER:

October 24, 2018

Kelly K. Yi  
Administrative Law Judge