

No. A12-0632

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State of Minnesota  
**In Supreme Court**

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Living Word Bible Camp,

Appellant,

vs.

County of Itasca,

Respondent.

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Brief, Addendum of Authorities, and Appendix of  
Respondent County of Itasca

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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## Legal Issues

1. Under *Skyline Preservation Foundation v. County of Polk*, 621 N.W.2d 727, 735 (Minn. 2001), an organization may not retain tax exempt status indefinitely based only on plans, but rather must demonstrate progress towards *implementing* its plans. The Camp acquired the property in 2000, and as of the assessment dates in issue, has not progressed towards implementing its plans as it has yet to procure the permits needed to implement those plans. Is the Camp's Deer Lake property entitled IPPC exemption on the 2008 and 2009 assessment dates without having demonstrated *implementation* progress?

Tax Court Ruling: The tax court answered this question in the negative.  
Most Apposite Authorities: *Skyline Preservation; Christian Business Men's v. State*, 38 N.W.2d 803 (1949); and *State v. Second Church of Christ Scientist*, 240 N.W.2d 532 (1932).

2. The tax court did not err by not considering whether the Camp's Timber Bay uses are exempt from tax.

Tax Court Ruling: The tax court did not decide if the Timber Bay uses are exempt from tax.

Most Apposite Authorities: *Christian Business Men's*; and *Seiz v. Pure Ice Co.*, 290 N.W.2d 802 (1940).

3. Under Minnesota Law, the party claiming property to be exempt under the IPPC exemption must demonstrate that its uses are provided to those who are disadvantaged or are in need, are not restricted to finite individuals or groups, and do not provide dividends in form or substance to private interests. Except for a very small number of intended recipients, the Camp has not demonstrated that its actual uses for adults, and its intended uses for children, both of which are and will be (if allowed) sporadic and ephemeral, provided to those who are disadvantaged or in need or will be provided to an indefinite or unrestricted population. Can the Camp's property on Deer Lake be exempt from ad valorem taxation under the IPPC exemption?

Tax Court Ruling: The tax court held that the actual uses of the Deer Lake property did not qualify for exemption from tax.

Most Apposite Authorities: *Under the Rainbow Child Care Center v. City of Goodhue*, 741 N.W.2d 880 (Minn. 2007); *Christian Business Men's*; and *Camping and Education Foundation v. State*, 164 N.W.2d 369 (1969).

## Statement of Facts

Appellant Living Word Bible Camp (the “Camp”) is a 501(c)(3) tax exempt entity that owns about 270 acres on Deer Lake in Itasca County. Finding of Fact 1, Findings of Fact, Conclusions of Law, Order for Judgment by the Minnesota Tax Court dated March 28, 2011 (hereafter, “Decision”). Its mission is to present the gospel of Jesus Christ and Christ-centered principles of living to children, young people, and adults. Order on post-trial motions dated February 24, 2012, at ¶ 1 (hereafter “Order”). It bought the property in September 2000. Decision at ¶2. In October 2001, it sought to classify the property as a “church” and an “other, i.e. Bible Camp, 501(c)(3)”. Exhibit 139A (Camp’s application for tax exemption). Its application was approved for the 2001 assessment date by then County Assessor Larry Austin, who classified the property: “church, church property, or house of worship”. *Id.*

In March 2001, the Camp applied for conditional use and planned unit development permits to construct “4-5 camper buildings, 10-18 single-family units, a lodge, commercial kitchen, dining area, gymnasium, storage building, craft building, and for a trail system to hike, study nature, etc.”. Exhibits 124 and 125. See also Respondent’s Appendix A, 1-19, Proposed Findings of Fact, Conclusions of Law, and Order for Judgment. After the Camp withdrew those applications, Exhibit 142, and T. at 157, Ls. 9-12 (Deposition of the Camp’s president, Ron Hunt), Austin reclassified the property as taxable. Exhibit 139, T. at 27, Ls. 16-23, and Deposition Exhibit 6 (Deposition of Larry Austin). The

Camp then applied to classify the property under the “institutions of purely public charity (IPPC) exemption”. *Id.* T. at 35, Ls. 22-25, and T. at 36, Ls. 1-10. Austin granted this application, stating: “Ownership and use of the property seems to meet the six Northstar factors used to determine if a property can qualify as a tax-exempt entity. Change 2001 and 2002 assessments to Class 915 church property – sanctuary and educational facilities”. *Id.* T. at 36, Ls. 12-25; T. at 37, Ls. 104, and Deposition Exhibit 12.

In May 2001, the Camp applied to rezone the property. Exhibit 127. The county board denied rezoning, and the Camp brought an action seeking reversal. Exhibit 134 at pg. 1 (*Living Word Bible Camp v. County of Itasca*, Minn. App. December 9, 2003, unpubl.). The district court remanded for further findings. *Id.* The Camp appealed to the court of appeals. *Id.* The court of appeals affirmed the order to remand. *Id.* On remand, the county board, in March 2004, granted the Camp’s rezone request. Exhibit 135 at pg. 3 (*Newton v. County of Itasca, et al.*, Minn. App. March 28, 2006, unpubl.). Newton and other Minnesota citizens appealed the county board’s rezone order to the district court, and the district court reversed the county board’s decision. *Id.* at pg. 3. The county and the Camp appealed that order to the court of appeals. *Id.* at 2. The court of appeals reversed and reinstated the county board’s order to rezone. *Id.* at 9.

In April 2006, the Camp again applied for CUP and PUD permits. Exhibits 130 and 131. In May 2006, a timely citizens’ petition requesting an

environmental assessment worksheet was filed concerning the Camp's plans. Decision, finding of fact ¶ 8. The county board denied the citizens' petition. *Id.* at 9. In August 2006, the county's planning commission granted the CUP and PUD applications. *Id.* at ¶ 12. In September 2006, Minnesota citizens appealed the county board's denial of the EAW petition to the district court. *Id.* at 10. In April 2007, the district court reversed the county board, and ordered that an EAW for the Camp's project be completed; but affirmed the planning commission orders granting the CUP and PUD permits. *Id.* at 10. In July 2007, Minnesota citizens appealed the order granting the CUP and PUD permits to the court of appeals. *Id.* at ¶ 14. In that same month, the Camp appealed the order requiring an EAW to the court of appeals. *Id.* at 15. In June 2008, the court of appeals affirmed the district court's order requiring an EAW, but reversed its order on the permits and directed that those permits be remanded for a redetermination once the EAW was done. Decision at 16; and Exhibit 136 at pg. 2-3 (unpublished opinion of court of appeals in consolidated files A06-1374, A06-1850, and A07-1231).

In December 2009, the county board approved the EAW for distribution, which triggered a public comment process. Decision at 17. In February 2010, after its receipt of comments and deliberations, the county board ordered that an EIS be completed for the Camp's project. *Id.* at 19, citing Exhibit 137. The Camp then brought a declaratory judgment action challenging the order for an

EIS. That action was still pending when the trial in this matter was held on June 1, 2010.

**The property's characteristics and the Camp's plans for development.**

In the county's assessment list, the Camp's property consists of 13 parcels:

| Parcel ID   | Acreage | Parcel ID   | Acreage |
|-------------|---------|-------------|---------|
| 65-034-1400 | 19.85   | 65-035-2300 | 40      |
| 65-034-4301 | 11.5    | 65-035-3112 | 0.03    |
| 65-034-4100 | 38.79   | 65-035-3204 | 38.88   |
| 65-034-4200 | 3.85    | 65-035-3302 | 25.64   |
| 65-034-4201 | 12.73   | 65-530-0020 | 9.79    |
| 65-034-4300 | 5.74    | 65-530-0030 | 3.56    |
| 65-034-4400 | 40.95   |             |         |

Exhibit 138, pg. 2-3.

The Camp's plans include the following:

**Cabins.** Five winterized cabins, each with three levels, with the first two 1,872 square feet apiece, and the third (loft) 800 square feet. Exhibit 132 [Master Building Plan]. The lower level of each has two units, each with its own living room, kitchen, two bedrooms, and two bathrooms. Exhibit 108. The main level of each has a single unit with a living room, kitchen, three bedrooms, and three bathrooms. Exhibit 109. The loft of each has a gathering room, bunkroom, and bathroom. Exhibit 110. Each has 18 exterior doors, three of which are accessed via exterior staircases. Exhibits 104-107.

**Lodge.** A single building with three levels, the first two 9,000 square feet apiece, and the third – the loft – 2,500 square feet. Exhibit 132. It will have a

commercial kitchen, and rooms for dining, a nurse, mechanical, game, storage, classrooms, and other uses.

**Office Building.** A building with two levels 1,800 square feet apiece.

**Maintenance and Storage Buildings.** Two single-level buildings, 6,000 square feet apiece. Exhibit 132.

**Activity Building.** A building of 2,700 square feet.

Wayne Davis, a Camp director, testified it will cost several million dollars to build and furnish the Camp's project, Trial T. at 166-7, Ls. 25 & 1, but that the Camp has yet to obtain an actual estimate of costs. *Id.* T. at 166, Ls. 21-23.

Camp President Hunt testified that the Camp did not have the funds needed to build the improvements, and that its building fund was about \$2,000.00.

Exhibit 142, T. at 69-70, Ls. 21-25 and Ls. 1-2; and T. at 80, Ls. 10-16.

The five cabins and the lodge are the centerpiece of the Camp's plans. *Id.* T. at 164, Ls. 13-15. Hunt admits that the Camp cannot build its project if it cannot obtain the zoning permits. *Id.* Ls. 3-12. He admits environmental reviews must be completed before the CUP and PUD permits can be decided. *Id.* at 166-7, Ls. 25 and 1-4. He admits no one can say when those reviews will be done. *Id.* Ls. 5-17. He knows there's no guarantee the CUP or PUD permit will be granted. *Id.* at 168, Ls. 7-17.

At times, portions of the property were used for work and marriage retreats and counselor training. *Id.* T. at 137, L. 9 to 138, L. 9. The Camp reported to the IRS it had 15 retreats per year for 2008. Exhibit 119 (IRS Form

990 - 2008). It reported it had retreats on 21 and 22 evenings respectively during 2007 and 2006. Exhibits 120 and 121 (IRS Forms 990 - 2007 and 2006). Participants in the retreats are not restricted to those who are “disadvantaged” or in “need” such as those suffering due to economic disadvantage, physical, mental, emotional, or chemical impairments or disadvantage, homelessness, joblessness, or having served time in jail or prison. *Id.* at 108, Ls. 1-25. There are no income or asset-based eligibility guidelines, and individuals participate without charge regardless of whether they are millionaires or on public assistance. *Id.* at 103, Ls. 6-13, Ls. 18-21, and Trial T. 114-5, Ls. 21-25, and L. 1. Of the adult participants in the marriage retreat program in the years 2007-09, all were donors to the Camp. *Id.* T. at 142, L. 3 to 143, L. 11.

**The parcel with a house.**

Parcel 65-034-4201 has 12.73 acres, 200 feet of lakeshore, and a two-level, year-around house with five bedrooms and four bathrooms. *Id.* at 176-7. The Camp’s president and his wife stay there rent-free, with electricity, insurance, telephone, garbage, and computer charges paid by the Camp. *Id.* at 187, Ls. 20-22; and T. at 187-8. They receive shelter, privacy, security, sleeping, and other uses typical to dwelling uses. *Id.* at 180, Ls. 5-10. They lived there about 50 percent of the time from 2006-09. *Id.* at 179, Ls. 9-20. They could have stayed there full-time if they wanted. *Id.* at 185, L. 20. They control guests, *Id.* at 180, Ls. 11-13, and do mowing, yard work, snow shoveling, and other upkeep, and control use of the shore. *Id.* at 185, Ls. 9-20.

## Summer Camp at Timber Bay in Aitkin County.

The Camp rents lake property in Aitkin County 3-4 consecutive weeks each year for its summer camp activities. Decision, Finding of Fact ¶ 22-3. This gives each child one week of camping with bible studies, swimming, canoeing, arts and crafts, music, singing, hiking, and environmental instruction. Trial T. at 28-30. Third- to eighth-graders partake. *Id.* Participation is not based on “need” or “disadvantage” such as those who are economically disadvantaged or who are physically, mentally, or emotionally disadvantaged, or who have been maltreated or neglected, or have delinquency, alcohol, or drug problems. Exhibit 142, T. at 91, L. 19, to T. 94, L. 20. Campers pay about \$35-40, and the Camp pays the rest (about \$216 per child). *Id.* at 91, Ls. 1-16. Campers stay without regard to parental income or assets regardless of whether their parents are billionaires or under the poverty level. *Id.* at 88, Ls. 22-24. Preference is given to past campers and their siblings. *Id.* at 145-6, Ls. 23-16. Most campers come from those preferences. *Id.* at 147, Ls. 4-11. Occasionally, the fee is waived or reduced, but this is the exception. *Id.* at 89, Ls. 11-13. The Camp doesn’t keep records on fee waivers or reductions. Trial T. 47, Ls. 16-20, and 48, Ls. 11-25. About 85 children partake each week. Decision at Finding 23. These uses have not been held at the Deer Lake property. Decision at memorandum pgs. 10-11 (the Camp has not used the Deer Lake property for its intended purpose – summer camp activities) and Order at ¶ 2.

The Deer Lake property was classified as exempt from 2001 to 2007. County Assessor Tom Gilmore (Austin's successor) inspected the property in November 2005 but did not change the exemption. Exhibit 140, T. at 50, Ls. 17-25; T. at 35, Ls. 1-21; and Deposition Exhibit 2. Deputy Assessor Tom Pagel, who also went to the property in 2005, went to the property in January 2008, and saw no change. Trial T. at 119, Ls. 6-21. Gilmore removed the exemption, except for two parcels, for the January 2, 2008, assessment date. Exhibit 140, T. at 77-8, Ls. 11-25 and Ls. 1-16; and T. at 90 Ls. 20-25. Brian Connors, Gilmore's successor, removed the exemption for the remaining two parcels, making all of the parcels taxable for the 2009 assessment date. Trial T. 226-228. The tax court affirmed the classification of the Deer Lake property for 2008 and 2009, and the Camp appeals from that ruling.

## Argument

### Standard of Review

The Respondent agrees with the Appellant that the Minnesota Supreme Court reviews Minnesota Tax Court decisions to determine whether they are supported by the evidence and are in conformity with the law, and that legal determinations are reviewed de novo. Appellant's Brief at pg. 5. One additional standard is this: "But, before we will overrule the tax court, we must conclude the court's decision is clearly erroneous because the evidence as a whole does not reasonably support the decision". *Bond v. Commissioner of Revenue*, 691 N.W.2d 835-6 (Minn. 2005).

### Principles Governing Taxation and the IPPC Exemption

There are several fundamental principles of taxation. It is important to have those principles in mind when addressing the issues in this case, and when discerning and applying the specific principles determinative of the exemption claim in this case.

#### A. The Nature of the Power to Tax.

The power of taxation is an attribute of sovereignty, and its exercise, by the levy and collection of taxes is a governmental function. McQuillen *Municipal Corporations*, Section 44.03, citing *Reed v. Bjornson*, 253 N.W.2d 102 (Minn. 1934). The exercise of this power, unless restricted by the Constitution, is vested exclusively in the legislative branch. *Id.* Of all the customary powers of

local units of government, that of taxation is most effective and valuable. *Id.*  
Local government without this would be little better than a mockery... "a body  
without life, incapable of acting, and serving no useful purpose". *Id.*

#### **B. The Power to Tax.**

One of the most essential powers of government is the right to raise  
revenue and no government can maintain itself without such power. *Id.* at  
Section 44.05. Constitutional provisions relating to taxation are not grants of  
power, but limitations on the exercise of a power necessarily possessed by every  
sovereign state. *Id.* Except as restricted by such provisions, the power of the  
state to tax is unlimited. *Id.*, citing *Reed v. Bjornson*, *supra*.

#### **C. Tax Exemption.**

Tax exemption is a privilege. *Id.* at Section 44.63. It is never presumed,  
and property claimed to be exempt must clearly fall within the boundaries of the  
provision granting the exemption. *Id.* The burden of proving an exemption is  
upon the party claiming it. *Id.* See *Camping and Education Foundation vs.*  
*State of Minnesota*, 164 N.W.2d 369, 372 (Minn. 1960):

One of the rules that is well established is that taxation is the rule  
and exemption is an exception in derogation of equal rights.  
Therefore, there is a presumption that all property is taxable. In  
consequence, the burden of proof is on the one seeking the exemption  
to establish that he is entitled to the exemption.

*Camping and Education Foundation*, 164 N.W.2d 369 at 372 citing *In Re:*  
*Petition of Junior Achievement of Greater Minneapolis, Inc. v. State*, 135

N.W.2d 881; and *Christian Business Men's Committee of Minneapolis vs. State*, 38 N.W.2d 803.

#### D. Exemption Provisions are Strictly Construed.

The taxing power is never presumed to be surrendered. McQuillen *Municipal Corporations*, Section 44.67, citing *Afton Historical Society Press vs. County of Washington*, 742. N.W.2d 434 (Minn. 2007). It is the generally accepted rule that exemption statutes and constitutional provisions should receive a strict rather than a liberal construction in the interest of the public. *Id.*, citing *Afton Historical*, and *Under the Rainbow Childcare Center v. County of Goodhue*, 741, N.W.2d 880 (Minn. 2007). In *Under the Rainbow*, the Supreme Court summed up the importance of that principle:

Because tax exemptions are "an exception in derogation of equal rights", all property is presumed to be taxable, and that the taxpayer bears the burden of proving entitlement to an exemption. *Camping and Education Foundation v. State*, 164 N.W.2d 369, 372 (1969); See also *Croixdale, Inc. v. County of Washington*, 726 N.W.2d 483, 487 (Minn. 2007). Furthermore exemptions from property tax liability must be strictly construed. e.g. *Camping and Education Foundation*, 164 N.W.2d at 72. We have also observed:

As the burdens of government should be born by all of the citizens in equal proportions, no property should be exempt from taxation in the absence of clear and explicit legislation authorizing the same, and in the construction of a law exempting property from taxation, courts will indulge no presumption that will extend the exemption beyond the plain requirements of the law itself.

*St. Peter's Church, Shakopee v. Board of County Commissioners*, 12 Minn. 395, 397 - 8 (Gil. 280, 282)(1867). We must therefore construe the purely public charity exemption narrowly and take care to avoid extending the exemption under Minn. Stat. 272.02, subd.7 "beyond the plain requirements of the law itself".

The rule of strict construction does not require a court to give the narrowest construction; rather strict construction must still be reasonable construction. *McQuillen Municipal Corporations, Id.*, citing *Afton Historical Society*. But, "... in all cases of doubt as to legislative intention, or as to the inclusion of particular property within the terms of the statute, the presumption is in favor of the taxing power. *McQuillen Municipal Corporations, Id.*, citing *Ramaley v. City of St. Paul*, 33 N.W.2d 19 (Minn. 1948). See also *Under the Rainbow*, supra 884 ("... no property should be exempt from taxation in the absence of clear and explicit legislation authorizing the same...").

**E. The Minnesota Constitution's Exemption for Purely Public Charities.**

The Minnesota Constitution provides in relevant part:

ARTICLE X

TAXATION

Section 1. Power of taxation; exemptions; legislative powers. The power of taxation shall never be surrendered, suspended, or contracted away. Taxes shall be uniform upon the same class of subjects and shall be levied and collected for public purposes, but... institutions of purely public charity... shall be exempt from taxation. Except as provided in this section.... the legislature by law may define or limit the property exempt under this section.....

**F. The Statutory Law in Effect on the January 2, 2008 Assessment Date and the "Northstar" Factors.**

Minn. Stat. § 272.01, which was in effect on January 2, 2008 provides in relevant part:

Property subject to taxation.

Subd. 1. Generally taxable. All real ... property in this State... is taxable except... such other property as is by law exempt.

Minn. Stat. § 272.02, which was in effect at that time, contains the purely public charity exemption and states in part:

Exempt property.

Subd. 1. Exempt property described. All property described in this section shall be exempt from taxation.

\* \* \*

Subd. 7. Institutions of public charity. Institutions of purely public charity are exempt.....

**The "Northstar" Factors.**

The six factors listed in *Northstar Research Institute v. County of Hennepin*, 236 N.W.2d 754, 757 (1975) consists of the following:

- (1) Whether the stated purpose of the undertaking is to be helpful to others without immediate expectation of material rewards;
- (2) Whether the entity involved is supported by donations and gifts in whole or in part;
- (3) Whether the recipients of the "charity" are required to pay for the assistance received in whole or in part;
- (4) Whether the income received from gift and donations and charges to users produces a profit to the charitable institution;
- (5) Whether the beneficiaries of the "charity" are restricted or unrestricted, and if restricted, whether the class of persons to whom the charity is made available is one having a reasonable relationship to the charitable objective; [and]
- (6) Whether dividends, in form or substance, or assets upon dissolution are available to private interests.

*Under the Rainbow*, supra at 884-5. In *Under the Rainbow*, the Supreme Court made it clear that the six "Northstar" factors are *not* a multi-part test to determine if an organization is an institution of purely public charity (IPPC). Rather, those factors are intended to serve only as guidelines. *Id.* at 885. Not all of those factors must be satisfied to qualify for the exemption. *Id.* Each case

must be decided on its own facts. *Id.* The Supreme Court expressly overruled its earlier opinions indicating that the Northstar factors are a "six-factor test":

Nevertheless, we have referred to all six Northstar factors in virtually every subsequent case in which the charitable exemption was at issue, and we have recently described the factors as a "six-factor test", Croixdale, 726 N.W.2d at 488. As a result, we may have created the impression that all six factors must be examined in every case addressing the charitable exemption issue. But as Northstar itself illustrates, that is not true. *In the circumstances of a particular case, one or more of the Northstar factors may not be helpful in assessing whether an organization is an institution of public charity, and if that is true, those factors need not be analyzed. And if other analytical tools are more helpful in identifying whether an organization is an institution of purely public charity, those tools should be utilized.*

*Under the Rainbow*, supra at 886 (Emphasis added). The Court provided some additional guidance as to Northstar factor six ("... we cannot envision an organization qualifying as an institution of purely public charity if it makes available to private interests either dividends, in form or in substance, or assets upon dissolution...") and Northstar factor three ("...must be satisfied if an organization is to be deemed an institution of purely public charity") *Id.* at 886.

#### **G. The Statutory Law in Effect on the January 2, 2009 Assessment Date**

Minn Stat. 272.02 - the exemption statute - was amended in 2009. That section which applies to the classification of property on and after January 2, 2009 states as follows:

**272.02, Subd. 1. Exempt property described.** All property described in this section to the extent limited in this section shall be exempt from taxation.

\* \* \*

**Subd. 7. Institutions of public charity.**

(a) Institutions of purely public charity that are exempt from federal income taxation under section 501(c)(3) of the Internal Revenue Code are exempt if they meet the requirements of this subdivision. In determining whether real property is exempt under this subdivision, the following factors must be considered:

- (1) whether the stated purpose of the undertaking is to be helpful to others without immediate expectation of material reward;
- (2) whether the institution of public charity is supported by material donations, gifts, or government grants for services to the public in whole or in part;
- (3) whether a material number of the recipients of the charity receive benefits or services at reduced or no cost, or whether the organization provides services to the public that alleviate burdens or responsibilities that would otherwise be borne by the government;
- (4) whether the income received, including material gifts and donations, produces a profit to the charitable institution that is not distributed to private interests;
- (5) whether the beneficiaries of the charity are restricted or unrestricted, and, if restricted, whether the class of persons to whom the charity is made available is one having a reasonable relationship to the charitable objectives; and
- (6) whether dividends, in form or substance, or assets upon dissolution, are not available to private interests.

A charitable organization must satisfy the factors in clauses (1) to (6) for its property to be exempt under this subdivision, unless there is a reasonable justification for failing to meet the factors in clause (2), (3), or (5), and the organization provides to the assessor the factual basis for that justification. If there is reasonable justification for failing to meet the factors in clause (2), (3), or (5), an organization is a purely public charity under this subdivision without meeting those factors. After an exemption is properly granted under this subdivision, it will remain in effect unless there is a material change in facts.

\* \* \*

The language of the 2009 statute "was intended to neither expand nor contract the historical guidelines for granting property tax exemptions, but to make the language clearer and more predicable for assessors and charitable

institutions alike, and to provide for greater consistency in exemptions statewide". Minn. Department of Revenue Bulletin dated March 1, 2010 entitled "Property Tax Exemptions for Institutions of Purely Public Charity", at Page 4, last paragraph. That Bulletin, which was prepared in accordance with Minnesota Laws 2009, Chapter 88, Article 2, Section 53 (*Id.* at Page 1) goes on to state: "It is not expected that this clarifying language will greatly change the number or types of exempt properties in any county". *Id.* at Page 5, last paragraph. That Bulletin is attached to the County's Memorandum of Law dated June 23, 2010 filed with the tax court in this matter.

Subparts (1), (5), and (6) of the 2009 statute are identical to "Northstar Factors" (1), (5), and (6). Subparts (2), (3), and (4) of the 2009 statute vary and have some language changes from their "Northstar" counterparts, and the new statute includes a "reasonable justification" analysis provision applicable to subparts (2), (3), and (5). When the reasonable justification element is met, the need to meet the particular subpart is dispensed with. But, from the modest language changes, and based upon the Bulletin, it is fair to conclude that the 2009 statute was enacted to clarify the IPPC exemption, and not create a sea change altering of that exemption.

1. Under *Skyline Preservation Foundation v. County of Polk*, 621 N.W.2d 727, 735 (Minn. 2001), an organization may not retain tax exempt status indefinitely based only on plans, but rather must demonstrate progress towards *implementing* its plans. The Camp acquired the property in 2000, and as of the assessment dates in issue, has not progressed towards implementing its plans as it has yet to procure the permits needed to implement those plans. Is the Camp's Deer Lake property entitled IPPC

**exemption on the 2008 and 2009 assessment dates without having demonstrated *implementation* progress?**

The Camp takes issue with the tax court's ruling that it had not made demonstrated progress to meet IPPC criteria. The tax court made certain findings of fact, which are pertinent:

\* \* \*

2. As of 2008 and 2009, [the Camp] did not use the Subject Property as a summer bible camp. Amended Finding of Fact 2, Order dated February 24, 2012

\* \* \*

21. [The Camp] used the Subject Property for incidental uses, such as seasonal office, for counselor training, and for work or family retreats. Finding of Fact 21, Decision dated March 28, 2011.

\* \* \*

[The Camp] acknowledges it has not used the Subject Property for its intended purpose – holding summer camp activities. Instead, for the last 20 years, [the Camp] has rented lake property at Timber Bay to hold its summer camp activities. *Id.* Memorandum of tax court, pages 10-11.

Citing the *Skyline*, *Christian Business Men's*, *Second Church*, and other decisions of this Court, the tax court concluded that because the Camp “has not demonstrated progress towards developing the Subject Property, and it is uncertain whether the Subject Property can legally be developed for [the Camp’s] intended use, [the Camp] does not qualify for exemption...”. Decision, Memorandum at pg. 14. The tax court’s factual findings are not clearly erroneous and its ruling is a correct one under those authorities. This Court should affirm the tax court.

In *Skyline Preservation*, this Court concluded:

We neither hold nor suggest that an organization can maintain exempt status as a purely public charity indefinitely based only on goals, plans, and projections. An organization may not merely buy and hold property and continue to maintain an exemption as a purely public charity based only on planned future use of the property where there is no evidence of efforts to bring the plans to fruition. To retain exempt status over time, an organization must *demonstrate progress towards implementing* its plans and eventually that it is an ongoing institution of purely public charity. If it fails to do so, the property may be reclassified.

*Skyline Preservation, Id.* at 735. (Emphasis added). See also *Christian Business Men's Committee of Minneapolis, Inc. v. State*, 38 N.W.2d 803, at 810 ("A use of a property which merits tax exemption is a present use and not an intended future use subject however to the proviso that where a corporation or other institution entitled to hold its property exempt from taxation acquires property with the intention of devoting it to a tax exempt use, the right of the exemption carries with it, *as an incident* the opportunity to adapt and fix the property for use within a reasonable time *in execution of plans* or arrangements made for the purpose, but during the period of adaptation the right of tax exemption does not exist..."; held that as to building purchased to be put to an IPPC use, that portion of the building that could not be put to the intended use for the next 2 years due to commercial leases could not qualify for IPPC exemption). (Emphasis added).

From the time the Camp acquired the Deer Lake Property in 2000 until January 2, 2008, seven plus years has elapsed, and at the time of trial another 2 ½ years elapsed. Yet, its plans for the property remain just that: "plans".

The Camp's "rights-incident" claim under *Christian Business Men* is that it is excused and blameless for its want of progress to implement due to opposition and alleged interference by others. Appellants brief at pgs. 14 and 21.

The record shows conflicts arose when the Camp sought to bring its plans under the zoning and environmental laws. But those conflicts do not imply interference, bias, etc.. Rather, the record shows that meritorious zoning and environmental issues arise from the Camp's intended uses. Both the district and appellate courts have directed that those issues be addressed and decided. See Exhibit 136 (unpublished opinion of court of appeals dated 6/3/2008, which reverses district court's affirmation of planning commission's granting of CUP and PUD permits; orders remand for redetermination of those permits after an EAW; affirms district court order that overturned county board's denial of citizen's petition for an EAW; dismissed Camp's claims of malicious prosecution and abuse of process against citizens supporting an EAW). The court of appeals summed up: "From our review of the record, we conclude that the board's refusal to order an EAW was arbitrary and capricious because [the Minnesota citizens'] petition for an EAW contained material evidence demonstrating that "because of the nature or location of the proposed action, there may be potential for significant environmental effects". Exhibit 136, page 5.

A CUP-PUD application stage is more akin to "planning" than "implementing", since there are processes that need to occur with public input

and discretionary zoning standards and decision making. Because zoning boards have broad discretionary powers to grant or deny conditional use permits, what the outcome of that process will be on the Camp's CUP and PUD applications is uncertain. See *White Bear Docking and Storage v. White Bear Lake*, 324 N.W.2d 174, 175-6 (Minn. 1982) (Where the district court set aside the city's denial of a special use permit, this Court reversed and recognized that the governing body's discretionary power to deny such a permit is "very broad"; that the court's authority to interfere in the management of municipal affairs is, and should be, limited and sparingly invoked; that the setting aside of routine municipal decisions should be reserved for those rare instances in which the city's decision has no rational basis; and that except in such cases, it is the duty of the judiciary to exercise restraint and accord appropriate deference to civil authorities in the performance of their duties). See also *Swanson v. City of Bloomington*, 421 N.W.2d 307, 311 (Minn. 1988). On the two assessment dates in issue the Camp was at - the CUP and PUD application stage, which is distinguishable from the CUP and PUD *procured* stage. The latter permits *implementing* the project, while the former clearly doesn't.

At best, the record shows that after many years, the Deer Lake uses are one of plans and not demonstrated progress implementing plans. See *Skyline Preservation*, *supra*; and see also page 733, footnote 7 of that decision ("*Skyline's* failure to make substantial progress towards implementation of its program two years later could be relevant to its tax status at that time, but not for the tax

year at issue here"). Since two years was relevant on the "substantial progress towards implementation" issue in *Skyline*, then more than seven years - as here - should be strongly relevant on that issue. Also, just as the entity in *Christian Business Committee* was contractually (and hence *legally*) precluded from presently using part of its newly acquired building for charitable uses and the IPPC exemption was held not to be available for that portion of the building, the Camp - which on both assessment dates in issue - was *legally* precluded from implementing its alleged charitable uses and plans for the "property", and should likewise be held not to meet the exemption on those dates. See also deposition testimony of County Assessor Tom Gilmore (testified that six years was too long to get a building permit, and that the Camp did not even have a "building fund"; that he was concerned the Camp might split the property and develop it for profit - something that happened to some vacant church property; and that fairness to taxpayers is a concern because the costs of exemptions are spread out to everyone [Exhibit 140, T. at 59-60 and 63]; also testified that the Camp had done nothing since 2005 [T. at 77-8 and 90]). As to Camp's "interference" allegations, see *Id.* T. at 131, L. 2 to 132, L. 14 (Gilmore testified his training, knowledge and experience, when making decisions about the property, was not compromised). See also the deposition testimony of the Camp's president, [Exhibit 142 at 166-7, Ls. 25 and 1-4 (knows that environmental review needs to be completed before the CUP and PUD issues can be decided); *Id.*, at 167, LS 5-17 (knows that one cannot say when that review

will be done); and *Id.* at 168, Ls. 7-17 (knows there is no guarantee the CUP and PUD permits will ever be granted)]. Also, see *Under the Rainbow*, supra (Rejects expansive view of the IPPC exemption; exemptions from taxation are strictly construed because they are in derogation of equal rights; and in the construction of a law exempting property from taxation, courts will indulge no presumption that will extend the exemption beyond the plain requirements of the law itself).

The Camp cites *State v. Second Church of Christ*, 185 Minn. 242, 240 N.W. 532 (1932) in support of its argument why the “rights-incident” rule requires tax-exemption here. But the holding there warrants just the opposite: denial.

In *Second Church*, the following occurred:

|                                |   |
|--------------------------------|---|
| 1924-25                        | Claimant acquired the subject property. <i>Id.</i> at 533.                                |
| December 1926                  | Claimant hired architect. <i>Id.</i>  |
| December 1927                  | Claimant was presented architect’s first set of plans. <i>Id.</i>                         |
| March 1928                     | Claimant approved final plans for buildings. <i>Id.</i>                                   |
| September 1929                 | Claimant called for bids, and thereafter (date not reported) let the contract. <i>Id.</i> |
| May 1930                       | Construction started. <i>Id.</i>  |
| Trial Date (date not reported) | Construction of buildings was nearly completed. <i>Id.</i>                                |

Two assessment dates were an issue in *Second Church*: 1927 and 1928. *Id.* at 533. The district court held that the property qualified for exemption those years and this Court affirmed:

The test is the use to which the property is devoted, or about to be devoted. It is not necessarily the use or non-use of the property the exact time when the tax is levied. The location of the property with reference to buildings in which the institution carries on its activities, the present need of the organization for the use of the property, and its present good-faith intention to make use of the property *in the near future* are elements to consider.

*Id.* at 533 (emphasis added): Though the Court held that hiring the architect triggered the exemption, the Court did not hold that architect-hiring always triggers the exemption. Rather, each case is fact-specific. Once hired, what did the architect do, and when? Once the architect acted, what did the entity do and when? When did it solicit and enter into contracts? When did construction start and finish? For the two dates in issue, the entity in *Second Church* met the exemption not simply by its goals, but rather by its goals plus its demonstrated progress to implement them such that it would, in fact, make use of the property for exempt purposes “in the near future”. *Id.* at 533. In sum, the facts in *Second Church* are inapposite to those here. See *Christian Business Men’s, supra* at 809-10 (denied exemption for portions of building leased to third parties, which leases prevented use for intended uses for the next two years; distinguished the facts presented from those in *Second Church* because in the latter “...an architect had been employed, plans had been drawn, the contract for construction had been let, and in fact improvements were nearing completion at the time of trial...”) See also *Skyline Preservation Foundation v. County of Polk*, 621 N.W.2d 727 (Minn. 2001) and analysis above.

While the Camp's architect completed building plans (there's no evidence blueprints have been prepared), implementing them has been stalled for many years. There is no contract to build the buildings. There is no time-table for building. There is no bid or cost estimate for building costs. But in *Second Church*, each of these acts were done promptly during the two years in issue, and construction was nearly completed at the time of trial. Thus, the facts in *Second Church* are dissimilar to those here, where building plans for the intended uses have been on hold for – as of the date of the trial – nearly a decade. In *Second Church*, implementing building goals was not barred by lawfully imposed requirements. But in this case, they are. Unlike *Second Church*, where construction was nearly done at the time of trial, the Camp couldn't begin construction at that time.

The Camp's uses are modest when compared with the buildings, their numbers, sizes, uses, costs and impacts reflected in its plans. Those uses should not equate to demonstrated progress towards implementation. A contrary rule will swallow the "rights-incident" rule that prohibits the granting of the exemption for indefinite periods of time on the basis of plans. Reasoning to the contrary not only interprets the exemption law expansively, but also blurs the distinction between "plans" (an abstract concept) and "demonstrated progress towards implementing plans" (a more concrete and objectively ascertainable standard). Appellant's reasoning invites a slippery rule, i.e., that demonstrated "ambition" to implement, rather than the demonstrated progress "implementing"

standard in *Skyline*, will control. It also opens the door to tolling the “demonstrated progress” standard while zoning and environmental disputes, and perhaps other types of disputes (financial, contractor, employment, etc.), are pending with the result of tax-free treatment without charitable uses for long periods of time. That reasoning should be declined because it is too broad, unwieldy, and inconsistent with *Skyline*, *Christian Business Men’s*, and *Second Church*.

The record doesn’t support the Camp’s claims of interference and bias by county officials, and error by the tax court. Appellant’s brief pgs. 18-21. While the record shows Commissioner McLynn communicated with the county assessor, the Camp has not shown the assessor acted wrongly or with bias. See testimony of Gilmore discussed above at pg. 13. The Camp, on pg. 12 of its Memorandum dated May 6, 2011, concedes that after McLynn communicated to the assessor in 2005, no change resulted. Nor has the Camp demonstrated misconduct by the assessor just because he spoke to inquiring citizens. A county assessor should not be faulted when he or she is asked about “classification” issues. See Minn. Stat. § 273.121, subd. 2 (value and classification data is public data). That Gilmore looked into and acted on an issue following external contacts is consistent with his duties, and is inconsistent with wrong-doing. See Minn. Stat. § 273.061, subd. 8(11) (assessors must diligently search for real property omitted from assessment each year).

That McLynn asked about a tax issue isn't wrong-doing or bias. See Minn. Stat. § 274.13, subd. 1 (county commissioners are members of board of equalization, with duties relating to taxation fairness). There is no evidence she subjected Gilmore to improper pressure. See Exhibit 140 (Deposition of Gilmore, received in evidence at trial).

The record as a whole fails to show interference or bias by McLynn. See Exhibit 136 (court of appeals decision dated June 3, 2008, in which it affirms district court's order directing that an EAW be completed for the Camp's intended uses). That ruling, in effect, vindicated McLynn's judgment made two years earlier when she supported an EAW when a majority of the board didn't. See Appellant's appendix A0028 – A0030 (transcript of county board dated May 23, 2006). Also, in stating that "McLynn declared she represented Newton" (Appellant's brief pg. 20, top paragraph), the Camp misstates what McLynn said at that meeting, and then draws conclusions alleging bias and interference without regard to the context in which she spoke. See *Id.* McLynn spoke about the planned unit development, the intensity of its uses and its impacts on a critical and sensitive area; also spoke about the PUD's situs in her district, and stated, "In representing them..." (referring to the EAW petitioner's – one of whom was Newton), implored her fellow board members to allow the EAW petitioners to speak to the environmental issues. See *Christian Business Men*, 38 N.W.2d 803, 815 (The emphasis on a phrase isolated from its context distorts the meaning of the opinion.). In sum, that transcript indicates that McLynn's

words rested upon appropriate factual underpinnings, evinced even some sagacity given the court decisions that followed, and negates interference or bias. Nor does the partial transcript of the county's November 2009 meeting (Appellant's appendix at pgs. A0035-40) show, as the Camp argues, bias or interference by McLynn. Rather, that the transcript shows McLynn wanted input from others – not just for herself – but for the entire board, before deciding if the EAW was complete. Appellant's appendix A0035-0040. Wanting input shows an eclectic approach to problem-solving and hardly proves bias or interference. Contrary to the Camp's argument that the county's EAW consultant felt it would be wrong to acquire that input, that same consultant acknowledged, "I am not an expert on this," after the county's environmental services director pointed out that the public was allowed to inspect the draft EAW. *Id.* at A0040. See also Minn. Stat. § 13.03, subd. 1 (unless a statute provides for a different classification, government data is "public"). The claims alleging interference and bias by county officials should be declined.

Nor does the Camp show, as it argues on pgs. 18-19, that the tax court denied it from deposing Commissioner McLynn. The Camp admits that, at the pretrial hearing, it withdrew its notice to depose. Appellant's appendix A0023. Affidavit of G. Craig Howse at ¶ 3. The Camp didn't procure a transcript of that hearing, and there are fact issues over just what was said. See Affidavit of the undersigned dated May 18, 2011, Respondent's appendix at 20. Even *assuming arguendo* that withdrawal was prompted to avert attorney fees, the Camp must

Camp must be deemed to have waived its asserted right to depose. See *Coler v. Smith*, 158 N.W.2d 574, 579 (1968) (waiver is defined as a voluntary relinquishment of a known right); see also *Farnum v. Peterson Biddick Company*, 234 N.W.2d 646, 647 (1931) (an intent to waive may be determined as a matter of law on a showing that conduct is so inconsistent with a purpose to stand on one's rights as to leave no room for a reasonable inference to the contrary). Thus, if a court signals that a basis for discretionary attorney's fees is made during a hearing on discovery, and informs the parties of that fact, the parties can still pursue their respective claims and ask that the court make a final ruling. If, after such a signal, a party "stands-down" by withdrawing from the position theretofore asserted, that party should not be heard to say later that, by standing-down, he or she was standing his/her ground. To rule otherwise will allow litigants to get two bites of the apple when faced with a claim for discretionary fees. The first bite occurs when they make the tactical decision to stand-down from their asserted right before trial, knowing they'll get a second bit after trial by asserting that they would not have stood-down but for the attorney's fees claim. Such a rule would surely generate anomalous results, lengthen litigation, decrease efficiency, and diminish finality to litigation. For these reasons, the Camp, by withdrawing its notice to depose, must be deemed to have waived deposing that witness, even if it acted wholly or partially in response to its exposure to fees sought and allowed under Rule 37.01(d), M. R. Civ. P.. It should not be allowed to resurrect it now.

The Camp's retracting of its notice to depose should be deemed a waiver for additional reasons. When it acted, it had the county's submissions requesting protective relief and may have considered them meritorious. See the county's motion for a protective order, affidavit of the undersigned and memorandum of law, each dated February 2, 2010. Also, it may have had in mind that the deposition may not be fruitful. This is so because two months earlier, it deposed the county assessor, Gilmore, who denied being affected by third-party inquiries. Exhibit 140, Deposition of Gilmore dated December 10, 2009, at pgs. 131-2. That Gilmore exercised independent and professional judgment to make decisions about the Camp's property is reflected throughout his deposition, as he was examined on all of the factors he took into account. For these reasons, its standing down from its notice to depose made during the pretrial hearing is binding, and must be deemed a waiver of the Camp's asserted right to depose.

**2. The tax court did not err by not considering whether the Camp's Timber Bay uses are exempt from tax.**

The Camp alleges that by not considering the Camp's uses on leased property in a different county, the tax court erred and, in doing so, adopted two new rules of law. Appellant's brief pgs. 21-27. The Camp's interpretation is mistaken, and should be declined.

The tax court held:

It is well-established and [the Camp] correctly states that for an organization to qualify for property tax exemption there must be:

1) a concurrence of ownership of the property by an institution of the type described by the Constitution, in this case, an institution of purely public charity; and 2) a use of the property for which such institution was organized.

Post-trial order and memorandum at pg. 4 dated February 24, 2012. The tax court reasoned:

In the instant case there is no concurrent ownership and use of the subject property. Petitioner leases, but does not own the Timber Bay Lake property where it holds summer bible camp activities that the petitioner is organized to conduct under its Articles of Incorporation. If petitioner owned the Timber Bay Lake property or conducted the summer bible camp activities on the subject property, then the summer bible camp activities could be considered whether or not these activities are exempt under *Christian Business Men's*.

*Id.* at 5. The county submits that the tax court identified the correct law, appropriately applied it to the facts, and did not create a new rule of law. The tax court should be affirmed.

Although the tax court did not rest its decision on it, an issue of justiciability is presented by the Camp's claim that IPPC analysis to its Timber Bay uses is required, though never held on the Deer Lake property, and the uncertainty if they ever will because of the unresolved environment and zoning issues and building fund's status. While the parties extensively briefed the exemption in light of the Camp's planned uses, the unresolved uncertainties over those plans are long-standing; hence, the hypothetical issue. See *Onvoy, Inc. v. Allete, Inc.*, 736 N.W.2d 611, 617 (Minn. 2007) (no jurisdiction over declaratory judgment action absent a justiciable controversy); See *Seiz v.*

*Citizens Pure Ice Company*, 207 Minn. 277, 290 N.W. 802, 804 (1940) (real controversy is indispensable to jurisdiction; a justiciable controversy is one that involves definite and concrete assertions of right and the contest thereof touching the legal relations of parties having adverse interests in the matter with respect to which the declaration is sought, and must admit of specific relief by a judgment or decree of a specific character as distinguished from an opinion advising what the law would be upon a hypothetical statement of facts; the Supreme Court, on its own motion, will reverse for want of jurisdiction of the subject matter where it appears that no real controversy on the ground that there is no proper case for declaratory judgment and the judicial function does not comprehend the giving of advisory opinions). Because applying IPPC analysis to the Deer Lake property based upon nearly a decade of plans to have children’s bible camp uses – uses that may not come to fruition – raises a hypothetical, and thus a non-justiciable issue, a separate and independent basis exists to affirm the tax court’s decision not to analyze uses elsewhere.

The Camp relies on Minn. Stat. § 272.02, subd. 7, to claim the tax court erred by focusing on uses of the Deer Lake property alone. The Camp misses the phrase in that section: “In determining whether real property is exempt under this subdivision, the following factors must be considered”. That quoted phrase and § 272.02, subd. 1, directs focus upon uses of the property asserted to be exempt; not uses elsewhere. The tax court’s application of the statute is correct, and should be affirmed.

Finally, the Camp argues the tax court's analysis is contrary to *State v. Fairview*, 114 N.W.2d 568 (Minn. 1962). Appellant's brief at 25. But the facts in *Fairview* are not those here. There, exempt uses were being made of non-adjacent real property claimed exempt. *Id.* at 570. Nothing in that case alters the analysis and principles in *Skyline*, *Christian Business Men's*, and *Second Church* that govern here – where exempt uses have yet to be made of the property, and where progress to implement plans for them is lacking. The Camp's reliance on *Fairview* to assert error is misplaced.

3. **Under Minnesota Law, the party claiming property to be exempt under the IPPC exemption must demonstrate that its uses are provided to those who are disadvantaged or are in need, are not restricted to finite individuals or groups, and do not provide dividends in form or substance to private interests. Except for a very small number of intended recipients, the Camp has not demonstrated that its actual uses for adults, and its intended uses for children, both of which are and will be (if allowed) sporadic and ephemeral, provided to those who are disadvantaged or in need or will be provided to an indefinite or unrestricted population. Can the Camp's property on Deer Lake be exempt from ad valorem taxation under the IPPC exemption?**

The Camp argues the IPPC exemption applies based on its uses on the Deer Lake property alone, or in light of its Timber Bay uses.

The Minnesota Tax Court found that the IPPC exemption applied where the property was used for parent-substitute care, control, and guidance of small children when their parents couldn't (daycare services), provided by a non-profit corporation for families who paid a substantial fee, where the provider showed that it had no profit in any year, and where its articles of incorporation limited disposing of its assets upon dissolution to prohibit benefiting private interests.

The tax court ruled this exemption was allowed under Minnesota Constitution Article X, Section 1, and Minn. Stat. 272.02, subd. 7 (2006). *Under the Rainbow Childcare Center, Inc. v. County of Goodhue*, Minn. Tax Court File Nos. C9-05-706 and CV-06-743 dated January 18, 2007 (Judge Perez).

This Court reversed. *Under the Rainbow*, 741 N.W.2d 880, 898 (Minn. 2007). Chief Justice Russell Anderson, writing for the majority, analyzed the IPPC exemption and its narrowness. From the Court's analysis of "need" or "disadvantage" in the context of Northstar factor "three", it is clear that to qualify for the exemption, claimants must show that the activities or services are based upon recipient "need" or "disadvantage". The following analysis in *Under the Rainbow*, makes this principle clear:

The Utah Supreme Court observed that an entity was exempt from property taxes exclusively for "charitable purposes." (Citations omitted). An essential element of charity is an *act of giving*. (Citations omitted). The Utah Court then adopted the following identifying features of a gift: "*Either ... a substantial imbalance in the exchange between the charity and the recipient of the services or the lessening of a government burden through the charity's operation.*"

\* \* \*

The Illinois Supreme Court similarly required that an entity exempt from payment of property taxes as a charitable institution, among other requirements, "dispense charity to all who *need* and apply for it,... not to provide gain or profit in a private sense to any person connected with it, and ... 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." Citation omitted.

\* \* \*

Under this standard, we held in *Rio Vista* that a private non-profit entity providing housing to *moderate and low income people* was an institution of purely public charity entitled to the exemption. 277 N.W.2d 187, 192 (Minn. 1979).

\* \* \*

Similarly, in *SHARE*, we affirmed denial of the purely public charity exemption to a health maintenance organization. 363 N.W.2d 47, 48 (Minn. 1985). The HMO, SHARE, provided no service without a fee, except for a one-time short term project, and had no policy to provide substantial discounts to those *for whom cost of treatment would be an unreasonable burden*. *SHARE*, at 52.

\* \* \*

*Community Memorial Home* was another case in which we affirmed the tax court's denial of the purely public charity exemption for an organization that charged essentially market rates. 573 N.W.2d 83, 85, 87 (Minn. 1997). .... The record is void of evidence demonstrating that [the organization's] intended purpose is to promote housing for the *economically disadvantaged or that it will continue to do so in the future*. *Id.*

*Under the Rainbow, supra*, 890-2 (emphasis added). The Court made it more clear that recipient "need" or "disadvantage" is needed for this exemption:

\* \* \*

Rather, in *Community Memorial Home*, [exemption denied] we looked to the purpose of the organization and found *no evidence of overall intent to serve the disadvantaged on a charitable basis*.

\* \* \*

In contrast, in *Rio Vista*, [exemption granted] where government rents subsidies for some families appear to have been considered by the court in making its determination, the overall purpose of the corporation *was to provide housing to people of low and moderate means*, and the overall rental rate structure was well below market value.

*Under the Rainbow, supra* at 895 and footnote 10 (emphasis added).

The Camp admits that individuals participate in retreat and training uses regardless of if they are millionaires or get public aid. [Exhibit 142, T. at 103, Ls. 6-13]. Adults are not charged for retreats. [*Id.* at Ls. 18-21, and Trial T. 114-5, Ls. 21-25, and L. 1]. Adults who attend are not restricted to the

"disadvantaged" or "needy", such as those suffering poverty, physical, mental, emotional, or chemical impairments or disadvantage, homelessness, joblessness, or served time in prison. [Exhibit R 142 at 108, Ls. 1-25].

Mr. Hunt testified that the intended uses for third to eighth graders is not restricted to children:

- from economically poor families, such as those receiving public aid;
- who are physically disabled or impaired;
- who are mentally or emotionally impaired;
- who are or have been maltreated, abused, or neglected;
- with delinquency problems; or
- with drug and/or alcohol problems. [Exhibit 142, T. at 92-3].

In sum, it is clear that attendance in the Timber Bay uses is not restricted to primarily disadvantaged youth or disadvantaged families.

Under the bible camp, campers pay \$40 apiece for one week of camping that costs about \$216. [Exhibit 142, T. at 91, Ls. 1-11 and 94, Ls. 9-16]. For a family that's economically poor, a fee of \$40.00 in exchange for a week of camping that costs \$216.00 is a substantial imbalance in the exchange. But for families able to pay market rates, the imbalance between the fee and the cost is attenuated.

The imbalance between the fee charged and the cost of the activities, without “need” or “disadvantage” to the recipient is, under the Supreme Court's analysis, fatal to the Camp's exemption claim.

One conclusion can be drawn from the analysis in *Under the Rainbow*, *Rio Vista*, and *Community Memorial Home*: if recipients pay market rates, denial of the exemption is required because “need”, or “disadvantage” is absent.

But, if the product or service is provided at no charge or a nominal fee without evaluating recipients' ability to pay market rates, should the organization be given the benefit of the doubt and be assumed to meet the recipient “need” or “disadvantage” predicates to the exemption? Or should the exemption be denied due to its “narrowness”, and the failure of proof? These issues are ripe for adjudication.

The Camp argued against being required to prove the recipient's inability to pay for the donated product or service in whole or in part because recipient “need” or “disadvantage” is not part of the IPPC exemption. Petitioner’s Post-trial Reply Brief dated July 9, 2010. If adopted, this rule will allow organizations to be exempt under the IPPC exemption regardless of whether recipients are able to pay market rates. Under that reasoning, so long as recipients pay nothing or a nominal charge, and the organization meets the remaining criteria, the organization will then be entitled to the IPPC exemption.

But that reasoning, it is submitted, contradicts the reasoning applied in *Rio Vista* in 1979, then followed in *Community Memorial Home* in 1997, and now anchored into Minnesota's juris prudence in *Under the Rainbow*, namely that "economic need" or other "disadvantage" on the part of recipients is essential to the IPPC exemption, and it also contradicts the rule that the burden

of proof is on the exemption claimant. That reasoning is likely to produce anomalies. If the exemption cannot apply where recipients pay market rates (see *Camping and Education Foundation*), how can the exemption be justified where recipients are capable of, but do not pay market rates? Such reasoning does not make logical sense. Such reasoning would defeat, not promote, equal and uniform tax treatment under the law. Under that reasoning, similarly situated organizations will be treated differently if both have recipients capable of paying market rates. The only difference will be that those in the first category (recipients pay market rates) will be denied the exemption, but those in the other category (recipients pay zero or a nominal fee) are granted the exemption. Such a rule will unduly expand the IPPC exemption, produce anomalous and unequal results, and should be rejected.

**Other analysis in *Under the Rainbow* reinforces that "need" or "disadvantage" and not the organization's "purpose" is the exemption's touchstone.**

In *Under the Rainbow*, the Court cautioned against overly rigorous reliance on the six Northstar factors. *Id* at 885. The Court stated:

In the circumstances of a particular case, one or more of the Northstar factors may not be helpful in assessing whether an organization is an institution of purely public charity, and if that is true, those factors need not be analyzed. And if other analytical tools are more helpful in identifying in whether an organization is an institution of purely public charity, those tools should be utilized.

*Under the Rainbow*, at 886.

In *Under the Rainbow*, the majority rejected the view held by the dissenting justices that "the essence of a charity lies in the nature of the service

provided." *Id.* at 887. That view put too much emphasis on "purpose", concomitantly marginalized the "gift" factor, and produced an "expansive view of charity" that is contrary to the majority of cases applying the exemption. *Id.* at 887-8. In rejecting that expansive view, the majority in *Under the Rainbow* recognized and reaffirmed the vitality of numerous prior cases declining the IPPC exemption *despite the fact that the organizations provided traditionally charitable objectives and operated without profit to any individuals.* *Id.* at 888, citing *SHARE*, 363 N.W.2d at 53 ("although providing low cost health care on a non-profit basis is certainly worth encouraging, we are unable to conclude it satisfies the requirements of that narrow charitable exemption"). *Under the Rainbow, supra* at 888.

These principles should compel the same result here – denial of the IPPC exemption. While a week of camping, recreation, bible study, and informal nature study activities for a child and occasional retreats for adults and children who are not disadvantaged economically or in some other significant way, on a non-profit basis, may be worth encouraging, it does not justify the granting of the IPPC exemption. See *Camping and Education Foundation v. State*, 282 Minn. 245, 164 N.W.2d 369, 370, 371, and 373 (1969) (non-profit's eight-week camp program to develop and improve skills and values of boys, where 96 out of 108 recipients paid full tuition, representing the bulk of the non-profit's income – did not qualify for IPPC exemption; concluded the use had commercial aspects to it, and was not subordinate to or incidental to charitable activities; echoed

recipient “indigency” or “defectiveness” in process distinguishing exempt from non-exempt uses by quoting *State v. Bishop Seabury Mission*, 90 Minn. 92, 95, 95 N.W. 882: “A ‘purely charitable institution’ within the meaning of this constitutional provision may be said to be an institution organized for the purpose of rendering aide, comfort, and assistance to the indigent and defective, open to the public generally, conducted without a view to profit, and supported and maintained by benevolent contributions.”). The holding in *Camping and Education Foundation*, like *Under the Rainbow*, requires substantial generosity to indigent, defective, or disadvantaged recipients for the IPPC exemption. Substantial generosity alone does not suffice.

In *Under the Rainbow*, the thesis held by the dissent – that an entity is exempt if it is exempt from Federal taxation under 501(c)(3), serves a beneficial purpose, and operates on a non-profit basis. *Id.* 888-9. The Court stated that such a broad rule was incompatible "with the actual rulings in our cases applying the charitable tax exemption", and "is contrary to the principle that tax exemptions must be construed narrowly". *Id.* at 888, citing *Camping and Education Foundation*, 164 N.W.2d at 372. The Court reasoned that the dissent’s thesis:

...flies in the face of our observation that Northstar factor 3 "is intended to assess whether people will benefit from the organization's activities to an extent greater than if the organization were merely providing a service as part of the private market".

*Id.* at 889, citing *Skyline Pres. Found v. County of Polk*, 621 N.W.2d 727, 733 (Minn. 2001). This, along with the foregoing, indicates that “need” or “disadvantage” is the exemption’s touchstone, and not the organization’s stated purposes. Under the narrowed analysis of the Court, “need” or “disadvantage” must be present, whereas under the dissent’s broader analysis, “need” or “disadvantage” is not necessary.

Mr. Hunt testified that campers partake, regardless of whether their parents are billionaires or are under the poverty level, at the price of \$40.00. Under the analysis in *Under the Rainbow*, a nominal fee cannot in itself support the exemption. This is so because there is no “necessity” to be fulfilled by the so-called “gift”. *Unlike* gifts of food baskets to families in need, the Camp’s so-called gift is *more like* gifts of food baskets to wealthy. It’s a shallow form of giving. It’s giving something to others they don’t necessarily need. It bespeaks of “donative intent” in a broad sense. But in the legal sense, it “marginalizes the ‘gift’ factor and produces an expansive view of charity”, which the majority of courts, including this Court, have rejected. *Under the Rainbow* at 887-8. Reasoning to the contrary will defeat the rule that the exemption is narrowly construed, will marginalize “gift”, and could make way for other upscale and tax-free activities for those capable of paying actual costs or market rates, and could open the door to more palatial facilities for financially able families than those planned here. The Camp’s claims for IPPC exemption must be denied.

There are other reasons why the Camp’s claim should be denied.

In the weekly camp, preference is given to a finite group, i.e. past campers; and the vast majority benefit by that advantage. [Exhibit 142, T. at 145, Ls. 23 to 146, Ls. 16 and 147, Ls. 4-11.]. That practice precludes meeting the fifth factor under “Northstar” and the 2009 statute because, rather than opening up to an indefinite and unrestrictive population, that population is restricted by the Camp’s preferences.

Mr. Hunt testified that each of the marriage retreat goers in the years 2007 to 2009 were donors to the Camp. That one-to-one correlation strongly indicates that participation is restricted and not open to an indefinite and unrestricted population; a practice at odds with factor five under “Northstar” and the 2009 statute.

The Camp's intended camping uses runs 4 weeks or about 8% of the year. Work, family, and marriage retreat uses happen sporadically at other times of the year. Except for the house on parcel 4201, the "property's" uses are, and will be, ephemeral followed by dormant or vacant uses. Large amounts of dormant or vacant uses do not lessen the burdens of government, do not benefit an indefinite or unrestricted population, and should not be rewarded as exempt. As stated above, the IPPC exemption is qualified by the term “purely” where this Court has held:

The word “purely” means “highly”, “solely”, and “exclusively” in such exemption provisions, and qualifies the use that may be made of the institution’s property. *State v. Willmar Hospital*, 212 Minn. 38, 41; 2 N.W.2d 564, 566.

*What is meant by a purely or exclusively charitable use of property is a direct, immediate, and actual application of the property itself to the purpose for which the charitable institution is organized.*

*Christian Business Men's*, *supra* at 809 (emphasis added). Ephemeral and vacant uses do not fit the definition of “purely” since they lack a direct, immediate, and actual application of the property to charitable uses. Instead, for most of the year, no charitable uses occurs. In tax court, the Camp compared and equated its intended uses with those in *Christian Business Men's*. Petitioner's post-trial brief June 23, 2010, at pgs. 10-11. But there, the charitable uses occurred year-long and seven days per week. 38 N.W.2d at 807-8. See *Camping and Education Foundation* (six to eight weeks of camping). Retreat-goers enjoy an expense-paid, lake-experience on 270 acres with resort-like accommodations – amenities most would agree as having significant monetary value. Is this a purely and exclusively charitable use of the property? The county submits the answer is, “No.” See *World Plan Executive Counsel – United States v. County of Ramsey*, Minnesota Tax Court, filed April 17, 1996, (file nos. C9-94-5252 and C5-95-2858), affirmed 560 N.W.2d 87, 90 (Minn. 1997) (tax court, and this Court, refuse to assume factual elements of the exemption are met; anecdotal evidence by claimant's representatives and other witnesses, including professionals, and FDA endorsement of program was insufficient to meet IPPC elements; denied exemption for private school offering meditation and stress-reducing techniques asserted to have lessened burdens of government

by transforming the lives of thousands of Minnesotans by bringing their hearts under the influence of education, relieving their bodies from disease and constraints, and assisting to establish themselves for life.).

**Parcel 4201, which includes 200' of lakeshore and a single family dwelling does not qualify for the IPPC exemption for the added reason that it is used for personal dwelling uses.**

Parcels of real property used for single family dwelling uses, whether riparian or not, are subject to ad valorem taxation. Minn. Stat. § 272.01, subd. 1.

Parcel 4201 consists of 200' of lakeshore and a house. [Exhibit 142, T. at 176]. It has five bedrooms, four bathrooms, a kitchen and a dining area, and is winterized. *Id.* at 176-7. The Hunts, who are directors of the corporation, stayed there about 50% of the time in the years 2006, 2007, 2008 and 2009. *Id.* at 179. They use this house for their shelter, privacy, security, dining, sleeping, personal affairs, and other normal daily uses. *Id.* at 180. They do not pay rent, but do perform work for the entity. *Id.* at 187, Ls. 20-22. Because the uses are the same as seasonal and non-seasonal dwelling uses, the classification of this parcel as taxable should be affirmed.

In the tax court, the Camp argued that other uses occur on Parcel 4201 warranting the exemption. But there are at least three reasons why that argument should be rejected.

First, it ignores or at least unduly minimizes the personal dwelling uses of the parcel, which are substantial and distinctly personal uses. See, Minnesota

Dunnell's Digest, Taxation, Section 4.06 (b), citing *Stevens Brothers Foundation v. Commissioner*, 324 F.2d 633, 638 (8th Cir. 1963), cert. denied 377 U.S. 920 (1964), (if there is present in its operation a single non-charitable purpose substantial in nature, though it may have other truly and important charitable purposes, it is not entitled to exemption). Further, to the extent the corporation provides free use of the house to, and pays various household expenses on behalf of select individuals, it is inescapable but to conclude that those uses of that parcel are not provided to an indefinite and open population.

The second reason for rejecting the Camp's argument is that it relies heavily upon the "stated purpose" approach to IPPC exemption analysis. Its argument goes: That since the *purpose* of the uses of Parcel 4201 are now or possibly in the future will be integral to the "charitable" activities on the remaining parcels, it must also be exempt from taxation. But the *stated purpose* approach to exemption analysis was rejected in *Under the Rainbow*, and that analysis must fail in this case as well.

Finally, the Camp's argument is that the close physical proximity of the dwelling in relation to the rest of the property and the existing and planned-for uses thereon is what brings the dwelling parcel under the exemption. But many employed by, or directors of, charities live nearby to conveniently meet their duties. Their dwellings are not exempt from taxation - even if they work from their homes, as many do. No government burdens are lessened by exempting such dwellings from taxation. In the interests of fairness and uniformity in

taxation, parcel 4201 should be subject to taxation - the same as other full or part-time dwelling uses. See *Under the Rainbow*, supra at 884 (exemptions from property tax liability must be strictly construed; no property should be exempt from taxation in the absence of clear and explicit legislation authorizing the same; and in the construction of a law exempting property from taxation, courts will indulge no presumption that will extend the exemption beyond the plain requirements of the law itself). Parcel 4201 is not entitled to the IPPC exemption.

### **Conclusions**

As of the 2008 and 2009 assessment dates, the Camp's uses and intended uses of the Deer Lake property, after seven years, rests more upon plans, goals, and projections that may never come to fruition than they do upon progress towards their implementation.

In addition, the Camp's uses and intended uses of the Deer Lake property do not qualify for exemption from ad valorem taxes under the IPPC exemption under either the "Northstar" factors or the 2009 statute because:

- They are not premised upon recipient "need" or "disadvantage" and because allowing the exemption would marginalize the "gift" element of charity in violation of the doctrinal law of Minnesota;
- They do not lessen the burdens of government;
- They provide dividends in form or substance to private interests;

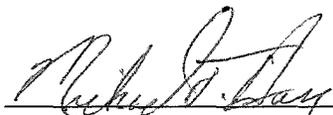
- They are based upon preference practices that restrict participation in those uses and intended uses; and
- The use of parcel 65-034-4201 for personal dwelling uses do not qualify for the exemption.

For these reasons, the tax court should be affirmed.

Dated this 31<sup>st</sup> day of May, 2012.

Respectfully submitted,

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