

**The Kiwanis Club of Hudson, Inc.**

**v.**

**Town of Hudson**

**Docket No.: 10915-91 EX**

**DECISION**

The "Taxpayer" appeals, pursuant to RSA 76:16-a, the "Town's" 1991 denial of the Kiwanis Club's (Club) request for charitable exemption as provided in RSA 72:23 V of the following:

2.89-acre lot with a function hall on 14 Melendy Road; and  
a vacant, 2-acre lot on 31 Cross Street (the Properties).

The Taxpayer argued the Club is entitled to a charitable exemption because:

- (1) the Club is incorporated as a non-profit corporation in New Hampshire and its Articles of Incorporation were filed with the Secretary of State in September, 1973;
- (2) none of the income or profits of the Club are used for any other purpose than that for which the organization was established which was for the betterment of community;
- (3) the Melendy Road hall is used to conduct bingo games, for the Club and other charities, to hold bi-monthly club meetings and for several special

events such as a yearly Christmas party for underprivileged children;

(4) the Cross Street ball field was constructed by the Club and is used for a fundraising event in September of each year to raise money for the Kiwanis Pediatric and Trauma Center in Boston; the field is open to the public and is used by such organizations as the Hudson Girls Softball League;

(5) both the Melendy Road and Cross properties are maintained by the Club and are located less than one mile from each other;

(6) in accordance with the Articles of Agreement, in the event of dissolution of the Club, the assets would be distributed to another charitable organization; and

(7) the Club meets the requirements of the statute and requests the board grant an exemption.

The Town argued the denial of exemption was proper because:

(1) the Articles of Agreement do not state the Club is obligated to be a charitable organization and it was the Town's opinion that this is a fraternal organization;

(2) part of the Club's income is used to pay off the mortgage and there are no provisions in the Articles of Agreement as to where the assets would go if the Club was dissolved;

(3) the Club pays dues that individual owners would normally have to pay which is a benefit to the members; and

(4) paying taxes would help the taxpayers of the Town.

#### **Board's Rulings**

The board rules that the ball field located on a 2-acre lot at 31 Cross Street is entitled to an entire exemption based on its charitable purpose and use by both the Kiwanis Club and the public at large. However, the board

rules the function hall Property at 14 Melendy Road does not qualify for a full exemption.

The Taxpayer applied for a charitable exemption pursuant to RSA 72:23 V which exempts:

"the real estate and personal property owned by charitable organizations and societies organized or incorporated in this State or having a principle place of business in this state, and occupied and used by them for the purposes for which they are established, provided that none of the income or profits thereof is used for any other purpose than the purpose for which they are established."

Pursuant to RSA 72:23 V for property to be exempt, three conditions must be met:

- (1) it must be owned by a charitable organization, organized or conducting business in this state or having a principle place of business in this state;
- (2) it must be occupied and used by the organization for the purposes for which they were established; and
- (3) none of the income derived from the use of the property can be used for any other purpose other than the purpose for which the organization was established.

Condition (1)

The board finds that the Kiwanis Club of Hudson, Incorporated (Club) is indeed a charitable organization. The Club's Articles of Agreement, while general in nature, clearly state its charitable purpose. The articles also provide in the event of dissolution the assets of the Club would be distributed to another charitable organization in the Town.

Condition (2)

The pivotal issue here, however, is whether the Property in question is "occupied and used by them for the purposes for which they are established..."(RSA 72:23 V).

Condition (3)

The Club also spends all its net proceeds from its fund-raising activities on charitable purposes that provide a general benefit to the public. The board's review of the financial statements for several years as submitted by the Club shows a clear accounting of their funds.

The board rules the dominant use of the Property is for recreational gaming, a use not directly related to the charitable purposes of the Club except that its proceeds are used for the Club's charitable purposes.

Specifically, the Club conducts bingo games at the function hall one night a week and rents the hall to other charitable organizations four nights a week for bingo. The incidental uses of the Property which are directly related to the charitable purpose of the Club entails use of the function hall for business meetings two times a month, several special meetings throughout the year and for a community Christmas party for underprivileged children once a year.

All the proceeds from the recreational gaming goes towards its charitable purposes, however, the actual activity of bingo is not related one iota to the purpose for which the Club was organized. For property to be exempt it must be used directly for its charitable purposes. Wentworth Home

v. City of Portsmouth, 108 N.H. 514 (1968).

One could argue that RSA 287-E, which sets out the legal parameters and administration of bingo games, causes bingo to become by edict a charitable use. It does not, however, create such a use for the purpose of exempting property under RSA 72:23. RSA 287-E simply creates and regulates bingo as a fund raising vehicle for charitable organizations. It limits who can perform bingo in the state, the frequency of the games and how the finances of the games are to be accounted for. In fact, RSA 287-E:6 limits the number of games a charitable organization may perform in one calendar month to five games. Thus, it is clear that the intent of RSA 287-E was to allow bingo to be a fund raising event for charitable organizations but on a limited scale.

The Property in question however holds bingo five nights a week as a result of other charitable organizations holding separate licenses and renting the Club hall. The building was designed, constructed and mortgaged with recreational gaming being its primary function and providing its repayment capabilities. There is a seating capacity for 686 players with all the attendant bathroom and kitchen facilities. It is clear from its original design and its intensity of use that the dominant use of this Property is for recreational gaming.

While this may appear to be an overly strict reading of the statutes at first glance, the legislature and the court have held there is a definitive line between what uses qualify for an exemption and what uses do not. The

legislature in RSA 72:23 V has stated that only uses related to their purposes shall qualify. The legislature has not stated that recreational gaming, whose proceeds are used solely for the purpose of the organization, qualifies as a use on which an exemption is based. The court held in Appalachian Mountain Club v. Meredith, 103 N.H. 5 (1960) that due to statutory revisions in 1957, its former ruling (profits from realty if used to further the ends of the charity, qualify the realty for exemption) in Hedding Camp Meeting Association v. Epping, 88 N.H. 321 (1937) no longer applied.

The court has held in Wentworth and Franciscan Fathers v. Pittsfield, 97 N.H. 396, 401 (1952) that the distinction between exempt and non-exempt may be a narrow one but one, nonetheless, well established. Clearly, if an organization's property is used on an infrequent basis for bingo and other common fund raising events and where the dominant use of the Property is for the charitable purposes of the organization an exemption is warranted. However, when the dominant purpose of the building is not for the charity's purpose but for a fund raising activity whose only relationship to the organization's purpose is its net proceeds then the line has been crossed and a total exemption is not warranted. It's a case of the tail wagging the dog.

An analogous situation would be a charitable organization that on an infrequent basis has a bake sale to raise funds. Clearly, that is an incidental use to the primary purpose of the building from which the sales take place. If however, the organization owns and operates a bakery five days a week (regardless of the fact the net proceeds are all used for charitable

purposes), such a building would not qualify for an exemption because its use as a bakery is not related to any charitable function.

In conclusion, we find that the majority of the Property does not qualify for a charitable tax exemption. However, an apportionment is reasonable between the nonqualifying uses and the Club's meetings and other uses related to their charitable purposes. Alton Bay Camp Meeting Assoc. v. Town of Alton, 109 N.H. 44 (1968); St. Paul's School v. City of Concord, 117 N.H. 243 (1977). While the exact magnitude of the Club's use of the Property for those uses related to its charitable purposes, versus those not, is difficult to ascertain from the evidence submitted to the board. The board rules that a reasonable apportionment of such uses and assessment is 25% exempt and 75% nonexempt.

In closing, this decision does not conclude that all bingo activities would preclude an exemption; where bingo is an incidental use of the Property, a total exemption is proper. However, where the design of the building and the frequency of bingo results in the dominant use of the Property being recreation gaming, a total exemption is not proper.

The board rules on the Taxpayer's requests for finding of fact and rulings of law as follows:

Finding of Fact

1. Granted.
2. Granted.
3. Granted.

4. Granted.
5. Granted.
6. Granted.
7. Denied.
8. Granted.
9. Granted.
10. Granted.
11. Granted.
12. Granted.
13. Granted.
14. Granted.
15. Granted.

Rulings of Law

1. Granted.
2. Granted.
3. Granted.
4. Granted.
5. Denied.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Paul B. Franklin, Member

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Michele E. LeBrun, Member

**DISSENTING OPINION**

This is the first minority opinion in a tax case which I have had occasion to write since the Board was created in 1983. I wish to emphasize the great respect I hold for my colleagues and the sincerity of their conviction in this matter.

However, I must respectfully dissent from the majority decision for the following reasons.

The Kiwanis Club is entitled to a 100% charitable exemption for the tax year 1991; the same as they have received since their inception in September, 1973.

Facts regarding use of Kiwanis Hall:

- 1) Kiwanis Club regular meetings
- 2) Kiwanis Special Meetings
- 3) Kiwanis Club Bingo nights (52 per year)
- 4) Kiwaniannes' (ladies) functions
- 5) Christmas Party for underprivileged youth
- 6) The Town of Hudson uses the Kiwanis Hall at no charge for special and emergency meetings where a large number of people can be

accommodated. The Public School used the club building when the students had to be evacuated in a life threatening emergency situation.

The variety and number of youth, sports, self-development, social and health programs which receive significant financial support are also worth noting in the following list:

Winn Park - expenses of maintaining ball field for use by Little League,

Softball League and all other townspeople at no charge  
Alvirne High School - twelve college scholarships (1990);  
fourteen (1991); and fifteen (1992)

Future Farmers of America

Bronco Boosters

Key Club

Post Prom Party

Christmas Party - for underprivileged children

Youth Programs - sports programs, self-development programs,  
social programs and health programs for the youth of  
our community;

Hudson Suicide Prevention Task Force

Boys' Club of Greater Nashua

Miss Pre-Teen Pageant

Nottingham West School Athletic Day

Hudson Jr. Womens' Post Prom Party

N.H. Amateur Athletic Union

Library St. School PTO

N.H. Special Olympics

DARE

CHIP's

American Legion - Boys' State

Bicycle Safety Rodeo

N.H. Amateur Athletic Union

American Miss Pre-Teen Pageant

Hudson Girls' Softball League

Swiftwater Council Girl Scouts

Drug and Alcohol awareness speaker

N.H. Colonials

New Hampshire AAU

Hudson Memorial School music concert

Boys' State - American Legion

Girls' Club

Boys' Club

Hudson Girls' Softball League

Assistance to needy families and individuals

Kiwanis Pediatric Trauma Institute

N.H. Lung Assn.

Muscular Distrophy Assn.

N.H. Assn. for the Blind

Hudson Kiwaniannes

Hudson Community Playground Committee

First Baptist Church  
Peterborough Kiwanis Club  
Keene Kiwanis Club  
Kiwanis International Foundation  
Trip to Kiwanis Pediatric Trauma Institute for  
educational benefit of officials of Town of Hudson  
Hudson International Foundation  
Hudson Senior Citizens  
Jaffrey-Rindge Kiwanis Club  
Nashua Kiwanis Club  
N.H. Network - Post Polio Support Groups  
Bedford Kiwanis Club  
Nashua Childrens Assn.  
Easter Seals Society  
Hudson Fire Department Centennial  
Souhegan Valley Assn. for the Handicapped  
Hudson Historical Society  
College scholarships - fourteen(1991) and fifteen (1992) scholarships  
for Alvirne High School graduates and Hudson residents  
The use of the Club's building by other charities and by the Town of  
Hudson is at no charge.

In addition to the thousands of "volunteer" hours donated by members in performing their stewardship responsibilities - the club's cash contributions to these activities and organizations average approximately \$50,000 per year.

**"The pivotal issue", according to the majority opinion, "is whether the Property in question is occupied and used by them for the purposes for which they are established". . . RSA 72:23 V.**

**The majority concludes, "the dominant use of the Property is for recreational gaming, a use not directly related to the charitable purposes of the club - except that its proceeds are used for the club's charitable purposes.". . . emphasis added.**

The majority has a problem with the fact that the Kiwanis Club rents the

hall four nights a week to other charitable organizations who lack suitable facilities of their own for bingo.

I believe this logic constitutes the narrowest of statutory interpretation. What the majority are saying is: If the Kiwanis Club restricted the use of the hall to one Bingo game per week (for themselves) they would be 100% tax exempt. But, for the reason that the Kiwanis Club rents the hall to four other charitable organizations on the otherwise open and available nights during the week, the Kiwanis Club will be penalized and have their total exemption reduced from 100% to a fractional 25% of the total assessment on the property located at 14 Melendy Road.

Under the provisions of RSA 72:23 V-a, the following real estate and personal property shall be exempt from taxation:

**V-a. The real estate and personal property owned by any organization described in paragraphs I, II, III, IV or V of this section and occupied and used by another organization described in said paragraphs, but only to the extent that such real estate and personal property would be exempt from taxation under said paragraphs if such property were owned by the organization occupying and using the property, as long as any rental fee and repairs, charged by the owner, are not in clear excess of fair rental value.**

Where does it say that a charitable organization who rents a facility on a full time basis to another charitable organization and retains their

exemption will lose some part of that exemption if they rent to multiple charitable organizations who exercise their respective rights to hold "not more than" 5 bingo nights per month.

Surely, as a matter of legislative intent, it was never envisioned that an exempt entity should be penalized for renting to several other exempt organizations for any purpose, including bingo.

Did the legislature intend that every charitable organization build a hall of their own large enough to accommodate 686 bingo players? How many tax exempt bingo halls does any town need or want?

What a scandalous duplication of bingo space that would be!

What an unconscionable waste of an organization's precious financial resources which could otherwise be used to fund the charitable activities for which the funds were raised. Such a duplication of bingo facilities would also result in more land being removed from the tax rolls to support tax exempt buildings.

Bingo supplies the fuel (money) which drives the charitable engine (activities) of the Kiwanis and other similar organizations.

The majority offers a flawed analogy when they postulate that if a charity which can hold a "bake sale" is prohibited from running a bakery, then it follows that a charity which can run one bingo game a week cannot rent to four other charities who seek to run their own weekly bingo games on the same site. It should be noted that the rents charged by the Kiwanis Club are limited to the direct expenses of operating their hall and the user fees are

set by the New Hampshire Sweepstakes Commission. All rents and user fees received by the Club are used to further its charitable purposes. The Kiwanis Club is a non-competitive charitable landlord located in a state where human needs are widely financed through a highly sophisticated electronic array of state of the art gambling, on every conceivable element of chance.

The precedent which this decision sets gives real meaning to the expression, "throwing the baby out with the bath water."

Ironically, the quality of life for residents of the Town of Hudson would have been enhanced to a greater degree by the Kiwanis Club retaining their 100% charitable exemption than they will from the additional tax dollars collected by the Town as a result of a 75% reduction in the Kiwanis charitable exemption.

Granted, the Board's decisions must be grounded by statute, but they must also be rational, fair and practical if we are to retain the confidence of the taxpayers and the municipalities we serve.

When reading this decision the cynics may well conclude that "no good deed goes unpunished" . . . . in Hudson.

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George Twigg, III, Chairman

CERTIFICATION

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Philip R. Currier, Esq., Attorney for The Kiwanis Club of Hudson, Inc., Taxpayer; and Hudson Board of Assessors.

Dated: October 18, 1993  
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Valerie B. Lanigan, Clerk

The Kiwanis Club of Hudson, Inc.

v.

Town of Hudson

Docket No.: 10915-91EX

**ORDER ON MOTION FOR REHEARING**

On November 4, 1993 the board received a motion from The Kiwanis Club of Hudson, Inc. (Kiwanis Club). The board denies the motion for the following reasons.

Kiwanis Club details its basis for rehearing in its motion which need not be reiterated. In short however, the question before the board is: to qualify for an RSA 72:23 V exemption, must the actual and dominant use of the property be directly related to the charitable purpose of the organization or is it enough that the proceeds from the use be dedicated to the charitable purpose and be derived from a normal and customary fundraising event.

These two possible conclusions hinge on two interpretations of the word "use" as contained in RSA 72:23 V. "Use" can mean, in this case, either 1)

the objective nature of the activity, i.e., bingo or recreational gaming; or  
2) the organization's purpose of the activity, i.e., fundraising. The board  
chose to interpret "use" narrowly as the actual activity and functions carried  
out in the building versus the general fundraising nature of the use. The

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interpretation of "use" would establish fundraising as a criteria by which to  
measure whether certain uses were directly related to an organization's  
purpose. Such an interpretation goes beyond the existing statutes and case  
law.

Most charitable organizations have a need for raising funds. If the  
fundraising activity is incidental to the organizations purpose, it ordinarily  
does not raise the exemption question. In this case, however, the fundraising  
event, bingo, is no longer an incidental use of the property. Not only is it  
the dominant use of the property but the size, design and construction of the  
building is more directly related to recreational gaming than to the general  
purpose of the Kiwanis Club as outlined in their charter. This was the  
concept the bakery analogy was intended to illustrate in the board's decision

There is scant case law that is directly on point with the facts  
presented in this case. However, in the discussion that occurs in the  
Appalachian Mountain Club v. Meredith, 103 NH 5 (1960), it is clear that the

court, following the significant changes to the statute in 1957, attempted to define the line between those uses which are indirectly related to the purpose of an organization and do not qualify for an exemption and those uses which are directly related to the charitable purpose and would qualify for an exemption.

In particular, Appalachian Mountain Club states at 13: "the language of subsection IV relating to educational institutions plainly abrogates the rule laid down in Hedding Camp Meeting Association v. Epping, 88 NH 323, supra, that the property indeed not be directly used for charitable purposes so long as the 'final devotion of the property or its income is to those purposes' Id., 324."

While the issue in Appalachian Mountain Club related more to the use of the property for the benefit of the membership versus the general public, the wording  
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in the above citation and the balance of the decision indicate the 1957 statute change no longer allowed income derivation from a property to be the sole qualifying factor for exemption.

Kiwanis Club is correct in their motion in that ideally it would be desirable for the legislature to more definitively establish what type of uses qualify a property for exemption. However, based on the board's participation on the recent legislative subcommittee reviewing the tax exemption statutes,

(see attached) it is difficult to obtain a consensus on such issues in the policy forum. Consequently, such issues are often deferred to the board or the courts to make case specific findings and rulings.

In conclusion, the board rules the use alone of the proceeds from bingo for charitable purpose does not exempt the property in question because the use of the property that generates those funds is not in and of itself a charitable activity. For the property to receive an exemption, there must be a ruling that if the dominant use of the property is for a fundraising activity, regardless of the nature type of the activity, the mere use of the property for fundraising qualifies the property for exemption. The majority of the board is not able to reach such a ruling in this case based on its reading of the statute and the limited case law related to this issue.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Paul B. Franklin, Member

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Michele E. LeBrun, Member

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**DISSENTING OPINION**

I would grant the Taxpayer's motion for a rehearing for all of the reasons stated in the minority's five page dissenting opinion contained in the board's October 18, 1993 decision.

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George Twigg, III, Chairman

CERTIFICATION

I hereby certify that a copy of the foregoing order has been mailed this date, postage prepaid, to Philip R. Currier, Esq., Attorney for The Kiwanis Club of Hudson, Inc., Taxpayer; and Hudson Board of Assessors.

Dated: December 13, 1993

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Valerie B. Lanigan, Clerk