

**Kendal at Hanover**

**v.**

**Town of Hanover**

**Docket No.: 12827-92EX**

**ORDER**

Kendal at Hanover (Taxpayer) filed an appeal with the board of tax and land appeals (board) for the 1992 tax year. The appeal raised the issues of valuation of the residential units and the application of a 1989 agreement between the parties regarding the taxable status of the Taxpayer's property.

Prior to the scheduled May 18, 1994 hearing, the "Town" filed a motion to dismiss, arguing the board lacked jurisdiction due to the Taxpayer's failure to file an RSA 76:16 request for abatement with the Town. The board issued an order on May 11, 1994, denying the Town's motion, finding the Taxpayer had appealed, pursuant to RSA 72:34-a, the Town's actions in exempting the property under RSA 72:23-k. On May 17, 1994, the Town filed a reconsideration motion of the May 11, 1994 order, stating that RSA 72:23-k was not the basis for the partial exemption of the Taxpayer's property.

The board held the hearing as scheduled on May 18, 1994, and received evidence relative to the issue of the board's jurisdiction in this case.

During the course of the hearing, it became clear that the board needed additional evidence to determine the jurisdictional issue. Therefore, before responding specifically to the Town's reconsideration motion and generally to the board's jurisdiction, the board requested the parties file either stipulations or offers of proof and memoranda of law regarding generally the issue of the board's jurisdiction and specifically the following concerns raised during the hearing:

- 1) Stipulations or further documentation of the parties' respective positions in regard to the basis of the 1989 agreement;
- 2) Whether such agreement is binding on the board?;
- 3) Does the board's general authority contained in RSA 71-B:16 provide jurisdiction to hear any tax matter related to the appealed property?;
- 4) If the appeal is determined to be of an RSA 72:23-k property, does the board have the jurisdiction to review the entire assessed value of the property in its determination of the proper payment in lieu of taxes?;
- 5) If the appeal is determined to be of an RSA 72:23 V property, is the board's jurisdiction limited solely to determining the exempt status of the property or does it additionally have the jurisdiction to hear and determine the assessed value of any portion found to be taxable?; and
- 6) Would the parties be willing to file a motion to transfer either the 1992 appeal filed with this board or the 1991 appeal filed with the superior court to one forum, inasmuch as the issues raised in both appeals raise similar if not identical legal issues?



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The parties indicated that approximately two weeks would be reasonable time in which to respond to the issues summarized above. Therefore, the parties are to file their responses no later than June 10, 1994. The board will then issue an order relative to its jurisdiction in this appeal.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Paul B. Franklin, Member

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Ignatius MacLellan, Esq., Member

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Michele E. LeBrun, Member

CERTIFICATION

I hereby certify that a copy of the within order has been mailed this date, postage prepaid, to Deborah J. Cooper, Esq., Attorney for Kendal at Hanover, Taxpayer; and Chairman, Selectmen of Hanover.

Dated:

Valerie B. Lanigan, Clerk

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**Kendal at Hanover**

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**ORDER**

This order relates to the "Town's" motion to dismiss any claims by the "Taxpayer" that challenge the assessments on any portion of the Taxpayer's property. The board denies the motion.

The Taxpayer appealed, under RSA 72:34-a, the Town's actions in exempting, assessing and taxing the Taxpayer's property under RSA 72:23-k. The Town argued the Taxpayer was required to apply under RSA 76:16, 16-a to raise any issues relating to assessments. Because the Taxpayer only appealed under RSA 72:34-a, the Town asserted the only issue was whether certain portions of the Taxpayer's property were exempt. The board concludes all of the issues relating to the taxation and exemption of the Taxpayer's property are properly brought under RSA 72:34-a.

RSA 72:23-k is a specific statute governing the Taxpayer's type of property--nonprofit housing. The statute includes language on how to calculate the exemption and the payment in lieu of taxes. RSA 72:34-a provides for the appeal of a municipality's actions on the application of determination.

As a remedial statute, RSA 72:34-a should be liberally construed to

enable a taxpayer to appeal all matters addressed in the exemption statute (RSA 72:23-k). Here, the issues raised are all discussed in RSA 72:23-k and thus are properly appealed under RSA 72:34-a.

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SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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George Twigg, III, Chairman

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Paul B. Franklin, Member

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Ignatius MacLellan, Esq., Member

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Michele E. LeBrun, Member

**CERTIFICATION**

I hereby certify that the foregoing order has been sent, postage prepaid to Deborah J. Cooper, Esq. counsel for Taxpayer; Adele M. Fulton, counsel for Town of Hanover and courtesy copy to Chairman, Board of Selectmen, Hanover.

Date: May 11, 1994

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Valerie B. Lanigan, Clerk

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**Kendal at Hanover**

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**DECISION**

**HISTORY OF APPEAL & DESCRIPTION OF PROPERTY**

On April 29, 1993, Kendal at Hanover (Kendal) filed an RSA 72:34-a appeal of their 1992 tax bill. The basis for the appeal was threefold:

1) the agreement reached between Kendal and the "Town," during the planning board review of the project relative to the taxation of the improvements, had not been properly applied by the Town;

2) Kendal is a charitable nonprofit community housing and community health care facility exempt under the provisions of RSA 72:23-k (Supp. 1992); and

3) the assessment of the residential units was in excess of market value and therefore, disproportionally assessed.

The Town filed a motion to dismiss the third basis of the appeal related to the assessment of the residential units and to limit the board's

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jurisdiction to determining the exemption status of the health care center, community center and the mechanical building. The Town argued because the

Taxpayer had not filed

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an RSA 76:16 abatement request with the Town, the board did not have jurisdiction

to determine the disproportionality issue.

In an order dated May 11, 1994, the board denied the Town's motion to dismiss. The Town filed a motion for reconsideration followed shortly by Kendal's objection to the motion for reconsideration.

Before ruling on the reconsideration motion, the board held a hearing on May 18, 1994, to receive further evidence from the parties relative to the board's jurisdiction. Subsequent to the hearing, the parties submitted lengthy memoranda as to the basis of the agreement between the parties, the exemption status of Kendal and the jurisdiction of the board to hear the appeal. Following a review of the parties' submittals, the board scheduled a view of the property and a hearing to receive further evidence relative to Kendal's eligibility for exemption under RSA 72:23-k or RSA 72:23 V.

Kendal is located on approximately 65 acres and is improved with a pre-existing farm house, 248 apartments, a health care center, a community center and a maintenance garage (the Property). In 1992, approximately 340

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individuals resided in the apartments or health care center.

There are eight styles of apartments ranging from a studio to a two-bedroom with den configuration. All units have full kitchen and bath facilities, their own deck or balcony, individually controlled heating and air conditioning, weekly housekeeping and linen services and direct emergency contact to the health care center.

The community center includes offices for administration of Kendal, several meeting rooms, an auditorium, library, swimming pool and other exercise

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and recreational facilities, a dining hall and a luncheon cafe and several retail spaces for the convenience of the residents.

The health care center consists of approximately 76 inpatient beds and provides various health services, such as outpatient services for residents, inpatient care for individuals no longer capable of residing in their apartments, physical and occupational therapy, prescription drug services, periodic dental services, a dining room and a child care center for Kendal employees.

Residents pay two basic fees: a one-time entry fee and monthly fees. Both the entry fees and the monthly fees vary based on the style of unit and single or double occupancy. In 1992, the entry fees ranged from a low of

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\$68,000 for a single-occupancy studio unit to a high of \$242,000 for a double-occupancy, two- bedroom/den single-story unit. The monthly fees, in 1992, ranged from a low of \$1,350 for a single-occupancy studio unit to a high of \$3,125 for double-occupancy, two-bedroom/den single-story unit. The monthly fees could also reflect some options by the residences, such as varying meal plans and credit for "away allowance" when residents are traveling or temporarily not residing at Kendal. The entrance fees and monthly fees are used for amortization of the cost of constructing the facility, property maintenance, meals, and lifetime health care services.

#### **ISSUES BEFORE THE BOARD**

There are three general issues before the board:

1) the basis of the board's authority and jurisdiction in this appeal (inclusive is the ruling on the Town's reconsideration motion);

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2) the significance of the agreement relative to taxation reached by the parties during the planning board review process of Kendal (the Agreement); and

3) the eligibility of Kendal for exemption either pursuant to RSA 72:23-k or RSA 72:23 V.

#### **BOARD'S FINDINGS AND RULINGS**

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I) Board's Jurisdiction

The board denies the Town's motion for reconsideration of the board's May 11, 1994 denial of the Town's motion to dismiss Kendal's claims to challenge the assessed value of portions of Kendal. The board determines it has jurisdiction to determine the eligibility of Kendal for either an RSA 72:23-k exemption or an RSA 72:23 V exemption and any assessed value related to any partial taxability for the following reasons.

1) RSA 72:23-k allows an alternate calculation of the payment in lieu of taxes to be based upon the municipal portion of the local tax rate applied against the assessed value of the entire project. Thus, any appeal from RSA 72:23-k inherently opens the door to the question of the proper assessment of the property.

2) The evidence of the Agreement struck by the parties as a precondition to planning board approval raises the question of whether that agreement is proper and binding and has any basis in the statutes. (see analysis in the

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following section.) Because the Agreement forms a questionable basis for

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taxation, the board also asserts jurisdiction pursuant to RSA 71-B:16 II.<sup>1</sup>

Therefore, the board's scope of jurisdiction and review in this appeal is quite broad (see Appeal of Wood Flour, Inc., 121 N.H. (1981)) and will include both the questions of tax exempt eligibility under RSA 72:23-k or 72:23 V and, if necessary, a review of the proper assessed value of any taxable portion.

II. Parties Preconstruction Agreement Relative to Payment in Lieu of Taxes.

The parties submitted lengthy memoranda as to the background of a 1989 Agreement between the parties to exempt the community center and health care center and for a payment in lieu of tax on the residential units based upon their assessed value times the Town's total tax rate.

In short, the board finds the Agreement was struck for two reasons:

1) the selectmen and Kendal officials were unable to come to an agreement as to the taxable status of the proposed facilities; and

2) the Hanover planning board had concerns that the proposed facility could be regarded as premature and a scattered subdivision if the property was fully exempt from taxation.

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<sup>1</sup>RSA 71-B:16 "Order for Reassessment," states: "The board may order a reassessment of taxes previously assessed or a new assessment to be used in the current year or in a subsequent year of any taxable property in the state: . . . II. When it comes to the attention of the board from any source, except as provided in paragraph I, that a particular parcel of real estate or item of personal property has not been assessed, or that it has been fraudulently, improperly, unequally, or illegally assessed. . . . (Emphasis added.)

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The Agreement was not formalized in one document. Rather, it was memorialized in several communications between selectmen, town manager, and Kendal officials and was incorporated as one of several subdivision conditions at the time of the planning board's approval of Kendal's subdivision plans. It was a dispute in the interpretation of this Agreement that triggered the filing of the appeal before the board and the proliferation of arguments as to the Agreement's import.

The basis for Town's authority to tax is contained in the New Hampshire Constitution and is developed into practice in various statutes. Pt. 2, Article 5 of the New Hampshire Constitution empowers the general court "to impose and levy proportional and reasonable assessments, rates, and taxes, upon all inhabitants of, residents within, the said state; and upon all estates within the same. . . ." The authority and manner in which to levy taxes is solely the jurisdiction of the New Hampshire Legislature. Therefore, political subdivisions of the state derive their authority to levy taxes in the manner prescribed by the legislature and in no other way. Opinion of the Justices (Weirs Beach) 134 N.H., 711, 715 (1991); Dugas v. Town of Conway, 125 N.H. 175, 181 (1984); see Keene v. Roxbury, 97 N.H. 82, 84 (1951).

Therefore, the board must look to the basis in the statutes to determine whether the Agreement was proper or without basis and therefore *ultra vires*.

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See Marrone v. Town of Hampton, 123 N.H. 729, 735 (1983) ("Where a municipal governing body enters into a contract which is beyond the scope of the municipality's powers, such an attempt to contract is termed *ultra vires*, and the contract is wholly void."; see also PMC Realty Trust v. Town of Derry, 125

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126, 131 (1984).) The board can find only two bases in the statutes for a payment in lieu of tax that would conceivably be applicable to Kendal: RSA 72:23-k and RSA 674:21 V.

RSA 72:23-k provides that charitable nonprofit community housing and community health care facilities for elderly and disabled persons shall annually enter into a payment in lieu of taxes with the host municipality based on amount not to exceed the lowest of either 10% of the shelter rent or a sum equivalent to applying the town portion of the tax rate against the assessed value of the project. The key to this statute are provisions that this agreement must be determined on an annual basis and cannot be determined only once and bind future tax years and assessing officials.

RSA 674:21 V provides for a one-time assessment of an impact fee upon a proposed development to be used to fully or partially fund some needed capital infrastructure to allow the development to occur. The key to the provisions of this statute is that it is a one-time fee and that it must be spent only for the capital improvements that are made in anticipation of the needs of the

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development.

The board rules the Agreement here is not in concert with either of these two statutes. Therefore, the board finds that the Agreement is *ultra vires* and is not binding on the parties or upon this board in its determination of the proper taxation of Kendal.

**III. Eligibility for Exemption Pursuant Either to RSA 72:23-k or RSA 72:23 V**

The board's discussion in this section will focus on three general areas:

1. the applicable statutes;

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2. common meaning of the word "charitable"; and

3. the charitable aspects of Kendal as argued by the Taxpayer and its qualification for exemption.

**1.) The Applicable Statutes.**

RSA 72:6 states, "all real estate, whether improved or unimproved, shall be taxed except as otherwise provided."

The Taxpayers argued that they qualified for an exemption under RSA 72:23-k or in the alternative under RSA 72:23 V.

**72:23-k Charitable, Nonprofit Housing Projects.**

I. The real estate and personal property of charitable, nonprofit community housing and community health care facilities for elderly

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and disabled persons, if none of the income or profits is used for any purpose other than community housing or community health care, shall be exempt from taxation. This exemption shall apply to housing and health care facilities situated within New Hampshire which are sponsored or owned by nonprofit, charitable corporations or organizations, located within or outside of the state, and to projects organized, operated, or assisted under state law or pursuant to rules and regulations of the United States Department of Health and Human Services, or any successor agency. For the purposes of this section an elderly person is one who is 62 years or more of age. The age of the head of the family determines the eligibility of the family unit in the project. For the purposes of this section, the term "charitable" shall have the meaning set forth in RSA 72:23-1 [Amended 1991, 111:3, eff. April 1, 1992.]

II. On or before November 1 of each year the owner of the housing project shall enter into an agreement with the municipality in which the property is situated to pay the municipality, on December 1 of each year, a sum in lieu of taxes to defray the costs of municipal, non-utility, services. Failing mutual agreement, the sum paid on December 1 of each year shall be an amount not to exceed the lower of 10 percent of the shelter rent received by the owner from all sources during the preceding calendar year, not including security deposits received from residents of the housing project, for shelter and care of residents within the project, or a sum equivalent to that derived from application of the current municipal, non-school, portion of the local tax rate against the net local assessed value of the project. For cause shown and at any

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time, keeping in mind the nature and purpose of the project, the municipality or the board of tax and land appeals may refund or abate all or a portion of the payment in lieu of taxes in any year. The owner shall on or before June 1 of each year file with the municipality in which the property is located, upon a form prescribed and provided by the board of tax and land appeals, a statement of its financial condition for the preceding fiscal year and such other information as the board of tax and land appeals requires. [Amended 1991, 306:7, eff. April 1, 1992.]

**72:23 Real Estate and Personal Property Tax Exemption.**

The following real estate and personal property shall, unless otherwise provided by statute, be exempt from taxation: ...

- V. The real estate and personal property owned by charitable organizations and societies organized or incorporated in this state or having a principal 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.

Because both statutes refer to a charitable type of organization, RSA

72:23-1 (1992 Supp.) must be considered.

**72:23-1 Definition of "Charitable."** The term "charitable" as used to describe a corporation, society or other organization within the scope of this chapter, including RSA 72:23 and 72:23-k, shall mean a corporation, society or organization established and administered for the purpose of performing, and obligated, by its charter or otherwise, to perform some service of public good or welfare for the benefit of the general public, or a substantial and indefinite segment of the general public, with no pecuniary profit or benefit to its officers or members, or any restrictions which confine its benefits or services to such officers or members, or those of any related organization. The fact that an organization's activities are not conducted for profit shall not in itself be sufficient to render the organization "charitable" for purposes of this chapter, nor shall the organization's treatment under the United States Internal Revenue Code of 1986, as amended. This section is not intended to abrogate the meaning of "charitable" under the common law of New Hampshire.

In short, for the use of the property to be deemed charitable under either statute, the organization must be organized for a charitable purpose and

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an obligation to provide the general public, or some indefinite segment of it, a service of public good or benefit without any special monetary or other benefit

to its members (See Nature Conservancy v. Town of Nelson, 107 N.H. 316 (1966) and Society of Cincinnati v. Exeter, 92 N.H. 348, (1943)).

**2.) The Elements of Charity**

While RSA 72:23-1 provides the general statutory definition of charitable, it also includes a caution that this general definition is not meant to abrogate the common meaning of charitable. Thus, a review of several of the common definitions of charitable is helpful and understanding of various elements of charity.

Webster's Ninth Collegiate Dictionary (1989) defines "charity" as: "generosity and helpfulness, especially toward the needy and suffering . . . a gift for public benevolent purposes . . ." Further, Webster's Third New International Dictionary (1976) defines "charity" as: "an eleemosynary gift; a gift (as by grant or devise) of real or personal property to the use of the public or any portion of it as distinct from specific individuals for any beneficial or salutary purpose." Black's Law Dictionary, 5th Ed. (1979)

defines "charity" as:

a gift for, or institution engaged in, public benevolent purposes . . . a 'charity,' in absence of legislative definition, is the attempt in good faith, spiritually, physically, intellectually, socially and economically to advance and benefit mankind in general, or those in need of advancement and benefits in particular, without regard to their ability to supply that need from other sources and without hope or expectation . . . of gains or profit by donor or by instrumentality of charity.

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Further, RSA 72:23-1 states that charitable organization's activities must provide "some service of public good or welfare." Black's Law Dictionary, 5th Ed. (1979) defines "public welfare" as: "the prosperity, well being, or convenience of the public at large, or of the whole community . . . it embraces the primary social interest of safety, order, morals, economic interest and nonmaterial and political interests."

While RSA 72:23-1 states that the United States Internal Revenue Code of 1986 (Code) is not controlling of New Hampshire tax statutes, it is interesting to note the types of organizations the Code finds as charitable. In summary, they are any organization that is religious, charitable, performing scientific testing for public safety, literary, educational, promoting national or international sports, or preventing cruelty to children or animals. Further, the Code includes the general concept that to be charitable, the organization should lessen the burden of government.

In summary, a charitable organization must provide a service that socially benefits mankind in general, or specifically, a broad segment of those in need. The definition of charitable is a broad one, including services that intellectually, socially, economically or spiritually enhance the welfare of mankind. See Nature Conservancy v. Town of Nelson, 107 N.H. 316 (1966);

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Appalachian Mountain Club v. Meredith, 103 N.H. 5 (1960). While not controlling of the definition of charitable, such features of gifting and lessening the burden of government are common in charitable organizations.<sup>2</sup>

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**3.) Kendal's Claims of Charity**

Kendal argued it qualified as a charitable organization pursuant to RSA 72:23-1 for four general reasons:

1) the articles of incorporation and the mission statement set out Kendal's intention to provide assistance to people who are unable to pay the full entry fee or the monthly fee;

2) because Kendal is a non-membership corporation, its benefits are not limited to its members (because there are none) and, therefore, it serves a substantial and indefinite segment of the general public;

3) Kendal uses a blended pricing arrangement so that larger apartments subsidize the cost in both the entrance and monthly fees of smaller units, thus

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<sup>2</sup>Inherent in the concept of exemptions is the transfer of exempted property tax to the shoulders of those not exempted. There appears to be a fine line that is drawn between the lack of requirement that a charity must lessen a governmental expense (see Young Women's Christian Association v. Portsmouth, 89 N.H. 40, 44 (1937)) and the prohibition that a specific segment of society or industry may not be benefitted at the expense of public funds. See Opinion of the Justices, 88 N.H. 484 (1937).

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attracting a lower income resident; and

4) a residents' assistance reserve fund has been established, funded by a combination of a one-time energy conservation rebate and charitable donations; this fund is to subsidize residents and applicants who cannot fully pay the fees.

The board finds Kendal's arguments all fail to meet the RSA 72:23-1 definition of charitable. The principal reason for this failure is because Kendal's determination of an individual's financial ability is so broad and discretionary, there no longer remains an enforceable obligation that Kendal provide a public benefit of service to a "substantial and indefinite segment of the general public." Further, even if Kendal was found to have an obligation

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to provide a public service, the testimony indicates the public service that Kendal has supplied, or would be capable of supplying based on its present financial structuring and budgeting, is so slight and relatively insignificant that the Property would not qualify for exemption under either RSA 72:23 V or RSA 72:23-k.

**4.) Obligation**

There must exist an enforceable obligation on the part of an organization to provide a charitable service to the general public for its property to qualify for an exemption. This obligation cannot be optional or discretionary;

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if it were, the requirement of providing a service of public good or welfare to be eligible for an exemption from ones constitutionally mandated share of the tax burden would be a hollow obligation. See Young Women's Christian Association v. Portsmouth, 89 N.H. 40, 42 (1937). As stated initially in Nature Conservancy v. Nelson, 107 N.H. 776, 777 (1966) and cited in Appeal of City of Franklin, 137 N.H. 622, 625 (1993):

the public service which plaintiff is to render must be obligatory so as to enable the Attorney General or other public officer to enforce this right against it if the service is not performed. It follows that if the public benefit is limited to that which the plaintiff sees fit to provide at its option or in its uncontrolled discretion the requirements of RSA 72:23 V are not satisfied.

Further,

"the purpose of the `obligation` requirement is to prevent purely private organizations, albeit with charitable purposes, from benefitting by a tax exemption without, in turn, providing some service of public good." Id. at 626.

In short, the obligation is to ensure there exists some *quid pro quo* of public service in exchange for the exemption.

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The board finds Kendal's pledge to provide charitable health care services is so conditioned in its articles of incorporation, its mission statement, its administrative policies and its agreements with the residents that there remains no substantive enforceable obligation of charity. This is perhaps best exemplified by comparing of the wording contained in both the articles of incorporation and the statement of mission with the actual practice and agreements signed with residents at Kendal.

Paragraph three of Kendal's articles of incorporation reads:

3. The corporation is incorporated under the Pennsylvania Nonprofit Corporation Law of 1972 (as amended) exclusively for charitable purposes within the meaning of Section 501(c) (3) of the Internal Revenue Code of 1986, or the corresponding provisions of any future United States Internal Revenue Law (hereinafter referred to as the "Code"), particularly to build, own operate and maintain residential, medical and protective care facilities specifically designed, planned and equipped to meet the physical, emotional, recreational, social and religious needs of elderly persons; to provide lifetime medical and nursing care for such persons; and to furnish, to the limits of its ability to do so, financial security of persons who have been admitted to such facilities by maintaining, at less than the regular charges, any resident who becomes unable to pay such charges and by operating such facilities at the lowest feasible cost. (Emphasis added.)

Kendal's statement of mission states one of its four obligations is "to admit and maintain in our community, as our resources permit, people who are

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unable to pay the full entry or monthly fees. . . ." (Emphasis added.)

The reservations on granting assistance is further detailed in a memo (Municipality Exhibit-K), outlining the criteria to be considered in evaluating the financial capabilities of applicants, and in the Residence and Care Agreement (Taxpayer Exhibit-7) signed by applicants upon their admission to Kendal. The criteria for evaluating the financial capability of applicants are quite subjective and include such things as the age and health of the applicant, the

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liquidity and amount of the applicant's assets and income, the lifestyle of the applicant (whether they live quite circumspectly or whether they enjoy more expensive activities) and any other outside sources of income that are available. The review of all these various factors are at the sole discretion of Kendal and, as stated in its evaluation memo, is very subjective in nature.

To highlight the inconsistency of the request for charitable exemption with this highly discretionary review of an applicant's financial capabilities, the reference to outside income is notable. Municipality Exhibit-K references outside income as "financial aid one may get from a church, friends, former businesses, etc. and may warrant consideration. It is not unreasonable to expect that there be some kind of formal recognition from the fund-giver if these funds are critical to ones ability to financially afford living" [at

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Kendal]. The board finds that the discretion of Kendal to formally account for income sources from such organizations as churches is inconsistent with their argument that Kendal is a charitable institution.

Further, the board finds the criteria for evaluating the financial capability of applicants is so discretionary and results in there being such a high threshold in the entrance fees that in reality the services at Kendal are available to only a small segment of the general public who are able to afford them; the services are not available to a substantial and indefinite segment as required by RSA 72:23-1. While the mission statement indicates a desire to admit people who are unable to pay the full entry fee, the more binding articles of incorporation make no reference to assistance provided to anyone other than those who have already been admitted as residents.

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Under Section 16.4 of the Residence and Care Agreement (Section 16.4 attached in Addendum A), Kendal has retained sole discretion in determining whether to subsidize the monthly fees. Such a determination is contingent upon a certification that the resident has not made any gift or transfer of property that would be intended to circumvent the resident's ability to pay the monthly fees and requires that each resident take necessary steps to obtain any public assistance that may be available for them. Further, if a resident has received a subsidy, the resident must obtain the approval from Kendal before any real

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estate can be transferred, and Kendal has the authority to recover the subsidy from a resident's estate regardless of whether the resident was at Kendal at the time of death or not.

The board finds that Kendal's discretion to recover a subsidy is so broad and at the sole discretion of Kendal that there is no true gifting of public charity.

In short, the board finds Kendal is an excellently planned and executed continuing care retirement community with charitable intent, but lacks the enforceable obligation of providing service of public good.

#### **Alternate Findings**

Even if the board were to find there was an enforceable obligation of charity at Kendal, the Property would not qualify for a charitable exemption for three additional reasons. The board finds the blended pricing structure of the entrance and monthly fees, the residents' assistance fund and the use of the Property by other not-for-profit organizations do not result in charitable uses of the Property that are more than slight and insignificant. See Nature

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Conservancy of N.H. v. Nelson, 107 N.H. 316, 320 (1966); Franciscan Fathers v. Pittsfield, 97 N.H. E 96, 401 (1952).

The board finds the blended pricing schedule is more akin to good

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marketing strategy rather than charitable subsidy. An analysis of both monthly fees and the entrance fees on a per-square-foot basis of each of the units indicates that the studios are primarily the only unit type that are significantly subsidized by the other unit's fees. Of the 248 units at Kendal, only nine are the studio type. Based on a square-foot analysis, the monthly fees and the entrance fees for one bedroom units are not significantly subsidized by larger units. This subsidy of the nine units, if it were to be considered charity, is not a significant use of the Property for charitable purposes.

The board finds the residents' assistance reserve fund has been only minimally used to provide assistance to the residents (in 1992, only \$6,600 was used as a subsidy compared to total operating expenses of \$7,918,721). Further, Kendal has no systematic policy of allocating income for the residence assistance fund and has depended solely on a one-time energy conservation grant from a utility company and private charitable donations. This lack of any structured financial planning to provide assistance for its residents casts a doubt on any significant need for such funds. This is exemplified by less than .06% percent of the residents' cost were subsidized in 1992, and all but two applicants on the waiting list of approximately 470 had adequate funds for entrance and monthly fees.

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Further, the Kendal argues it allows other not-for-profit organizations to use the Property. The board finds the use of the Property by other not-for-profit organizations to be so slight as to be insignificant and of little merit.

### **Conclusion**

For all the reasons found above, the Property is not eligible for exemption under either RSA 72:23-k or RSA 72:23 V and should be assessed proportionally to all other property in Town. The board has determined the Property has been improperly assessed for the 1992 tax year and, consequently, pursuant to its RSA 71-B:16 II authority, the board orders the Town to completely reassess Kendal's entire property and to issue a new tax bill for the 1992 tax year. The Town shall perform its assessment and issue a new tax bill within 120 days from the date of this decision. Any appeal of the new assessment relative to its proportionality shall be pursuant to the RSA 76:16, RSA 76:16-a, and RSA 76:17 timelines from the notice of tax.

Because this appeal was filed pursuant to RSA 72:34-a and not RSA 76:17-c (1992 supp), this decision applies only to the 1992 tax year and not to tax years 1993 (Kendal has filed appeals for 1993 - Docket Nos. 13848-93-EX and 14416-93-PT) and 1994.

### **Parties Request for Findings of Fact and Rulings of Law**

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Before responding to the parties' requests, the board would note Kendal submitted a total of 67 requests and the Town 66. Board's Rule TAX 201.36 limits the number of total requests to 25 per party unless leave has been requested and granted. Because the board realizes this case involves extensive facts and legal arguments, the board will answer all of the requests. However, the board would

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note that those requests answered "neither granted nor denied" are because either the request involved multiple conclusions, was ambiguous or was adequately addressed in the board's decision. See Public Service Company of N.H. v. Town of Bow, \_\_ N.H. \_\_ (November 2, 1994).

**Taxpayer's Requests for Findings of Fact and Rulings of Law**

1. Granted.
2. Granted.
3. Granted.
4. Granted.
5. Granted.
6. Granted.
7. Granted.
8. Neither Granted nor Denied.
9. Granted.
10. Granted.
11. Neither Granted nor Denied.
12. Granted.
13. Granted.
14. Granted.
15. Granted.

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16. Granted.
17. Neither Granted nor Denied.
18. Granted.
19. Neither Granted nor Denied.
20. Neither Granted nor Denied.
21. Denied.
22. Neither Granted nor Denied.
23. Denied.
24. Neither Granted nor Denied.
25. Neither Granted nor Denied.
26. Granted.
27. Granted.
28. Granted.
29. Denied, "The board's decision deals with the 1992 tax year only."
30. Neither Granted nor Denied.
31. Denied, "The board's decision deals with the 1992 tax year only."
32. Granted.
33. Granted.
34. Granted.
35. Granted.
36. Granted.
37. Neither Granted nor Denied.
38. Granted.

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39. Granted.
40. Granted.
41. Denied.
42. Denied.
43. Denied.
44. Denied.
45. Neither Granted nor Denied, The phrase "the wealthy" is too relative.
46. Neither Granted nor Denied.
47. Neither Granted nor Denied.
48. Granted.
49. Denied.
50. Granted.
51. Granted.
52. Neither Granted nor Denied.
53. Granted.
54. Denied.

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55. Denied.
56. Denied.
57. Denied.
58. Denied.
59. Denied.
60. Denied.
61. Denied.
62. Neither Granted nor Denied.
63. Neither Granted nor Denied.
64. Denied.
65. Denied.
66. Neither Granted nor Denied.
67. Granted.

**Municipality's Request for Findings of Fact and Rulings of Law**

Findings of Fact

1. Granted.
2. Granted.
3. Granted.
4. Granted.
5. Granted.
6. Granted.
7. Granted.
8. Granted.
9. Granted.
10. Granted.
11. Granted.
12. Granted.
13. Granted.
14. Granted.

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15. Granted.
16. Granted.
17. Neither Granted nor Denied.
18. Granted.
19. Granted.
20. Granted.
21. Granted.
22. Granted.

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23. Granted.
24. Granted.
25. Granted.
26. Granted.
27. Granted.
28. Granted.
29. Granted.
30. Granted.
31. Granted.
32. Granted.
33. Granted.
34. Granted.
35. Granted.
36. Granted.
37. Granted.
38. Granted.
39. Granted.
40. Granted.
41. Neither Granted nor Denied.
42. Granted.
43. Granted.
44. Granted.
45. Granted.
46. Granted.
47. Granted.
48. Granted.
49. Granted.
50. Granted.

Rulings of Law

- A. Granted.
- B. Granted.
- C. Granted.
- D. Granted.
- E. Granted.
- F. Neither Granted nor Denied.
- G. Neither Granted nor Denied.
- H. Granted.
- I. Neither Granted nor Denied.

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- J. Granted.
- K. Neither Granted nor Denied.
- L. Granted.
- M. Granted.
- N. Granted.
- O. Granted.
- P. Granted.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Paul B. Franklin, Member

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Ignatius MacLellan, Esq., Member

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Michele E. LeBrun, Member

CERTIFICATION

I hereby certify a copy of the foregoing decision has been mailed this date, postage prepaid, to Deborah J. Cooper, Esq., counsel for Kendal at Hanover, Taxpayer; and Adele M. Fulton, Esq., counsel for the Chairman, Board of Selectmen of Hanover.

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Valerie B. Lanigan, Clerk

Date: December 13, 1994

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## **ADDENDUM**

**A**

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**Kendal at Hanover**

**v.**

**Town of Hanover**

**Docket No.: 12827-92EX**

**ORDER**

This order relates to the "Taxpayer's" rehearing motion, which is denied. The decision addressed, at length, the Taxpayer's arguments in the motion. We will here, however, briefly address some of the issues raised in the motion.

In paragraph 2, the motion addressed the board's discussion about the Taxpayer's charitable intent. The Taxpayer should not over estimate the board's conclusion that the Taxpayer has a charitable intent. We agree the Taxpayer has, as one of its goals, some charitable intent. However, the Taxpayer's primary goal and intent is not charitable. Rather, the Taxpayer's

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primary intent, as demonstrated by its actions, is to provide, on a nonprofit basis, congregate-care housing to the elderly. Presently, the Taxpayer serves individuals with significant means. Therefore, we concluded the Taxpayer was not sufficiently charitable in the use of the property even though the Taxpayer provides a service needed by the elderly.

In paragraph 2 c of the motion, the Taxpayer argued it was required to provide certain services. The board agrees the Taxpayer is required to provide certain services, but this begs certain questions: services of what type?, to

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whom? and for what compensation? The services and accommodations the Taxpayer provides are first-class, and the residents enjoy a living standard far superior to that which is normally associated with a charity. The Taxpayer must provide these services to the people who live in the facility and who have paid the substantial entrance fees and who pay the monthly fee. Providing such services, however, is like providing services to members of a private club. The Taxpayer is not required, however, to provide charitable services to an indefinite group of the public, and thus, the property does not qualify for the exemption.

In paragraph 2 e of the motion, the Taxpayer argued it had an obligation the attorney general could enforce. The Taxpayer did not, however, explain under what statute the attorney general could do so. Perhaps, the attorney

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general can enforce the Taxpayer's obligation to the paid-in clients, but the attorney general does not have enforcement powers against the Taxpayer as a charitable trust. See RSA 7:20. RSA 7:21 III states:  
"Charitable trust" means any fiduciary relationship with respect to property arising as a result of a manifestation of an intention to create it and subjecting a person by whom the property is to be held to equitable duties to deal with the property for charitable or community purposes.

The Taxpayer does not meet this definition in terms of having a charitable purpose, which is the only purpose that would qualify for the charitable exemption under RSA 72:23 V. Thus, the attorney general does not have the power to force the Taxpayer to use the appealed property for charitable purposes.

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Based on the record here, the statutes and caselaw, especially Appeal of City of Franklin, 137 N.H. 622, 625-26 (1993), and as stated in the decision, the Taxpayer does not qualify for the charitable exemption for several reasons, including the following:

- 1) it does not provide and is not obligated to provide charitable

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services to an indefinite group of the public;

2) it has too much unbridled discretion concerning the use of the property; and

3) it does not sufficiently use and occupy the property for charitable purposes.

Finding no error in the board's decision, we deny the motion.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

\_\_\_\_\_  
Paul B. Franklin, Member

\_\_\_\_\_  
Ignatius MacLellan, Esq., Member

\_\_\_\_\_  
Michele E. LeBrun, Member

**Certification**

I hereby certify that a copy of the foregoing order has been mailed this date, postage prepaid, to Deborah J. Cooper, Esq., counsel for Kendal at Hanover; Adele M. Fulton, Esq., counsel for the Town of Hanover; and Chairman, Selectmen of Hanover.

Dated: January 27, 1995

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Valerie B. Lanigan, Clerk

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**Certification**

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I hereby recertify that a copy of the foregoing order has been mailed this date, postage prepaid, to Deborah J. Cooper, Esq., counsel for Kendal at Hanover; Adele M. Fulton, Esq., counsel for the Town of Hanover; and Chairman, Selectmen of Hanover.

Dated:

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Valerie B. Lanigan, Clerk

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**Kendal at Hanover**

**v.**

**Town of Hanover**

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**ORDER**

This order responds to the stipulation (filed January 9, 1996). The board concludes it lacks jurisdiction to approve the stipulation. The board has issued its decision and its order on the rehearing motion. Absent supreme court remand, the board's jurisdiction ended when the board entered its order on the rehearing motion. The supreme court appeal was withdrawn without remand to the board.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Paul B. Franklin, Chairman

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Ignatius MacLellan, Esq., Member

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Michele E. LeBrun, Member

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**CERTIFICATION**

I hereby certify that the foregoing order has been sent, postage prepaid to Deborah J. Cooper, Esq. counsel for Taxpayer; Adele M. Fulton, counsel for Town of Hanover and courtesy copy to Chairman, Board of Selectmen, Hanover.

Date: June 6, 1996

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Valerie B. Lanigan, Clerk