

In the West Virginia Supreme Court of Appeals

**Appalachian Emergency Medical
Services, Inc., a West Virginia nonprofit
corporation,**

Petitioner,

v.

**Civil Action No Below.: 02-C-0239
Circuit Court of Cabell County
Honorable John L. Cummings**

**Rebecca Melton Craig,
W. Va. State Tax Commissioner,**

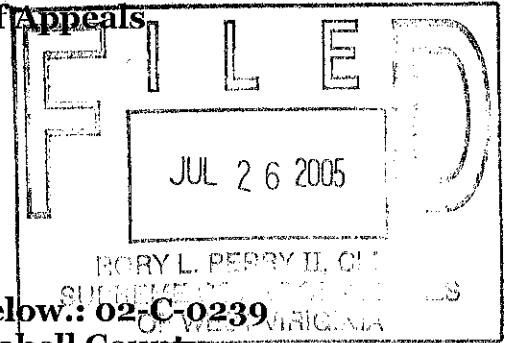
Respondent.

**Reply Brief on Behalf of Appellant,
Appalachian Emergency Medical Services, Inc.**

Introduction

Appellant Appalachian Emergency Medical Services, Inc., ("AEMS"), hereby files the following reply to the Brief of Respondent State Tax Commissioner, in the above-styled appeal of Judge Cummings' Order Affirming State Tax Commissioner dated October 19, 2004.

The issue presented is whether the Judge erred in affirming property tax ruling 02-09 which denied AEMS' application for tax exempt status on property (hereinafter ("Property")) owned in Huntington, West Virginia, where the substantial, reliable and probative evidence of record shows that AEMS is a non-profit organization with a charitable purpose; the Property is being leased to a related supervising entity which also is a non-profit organization with a charitable purpose; the Property is not being leased at a market rate for profit; and the use of the Property is not inconsistent with the charitable purpose exemption to *ad valorem* taxation as set forth in W.Va. Code § 11-3-9 and W.Va. Rule 10 C.S.R. 3.



The primary contention regarding this matter is whether the Property is being held out or leased for profit.¹ Nothing indicated in the Tax Commissioner's Response Brief changes the fact that AEMS is not profiting from the lease. Accordingly, Judge Cummings' Order must be reversed.

1. The Property is not being held out or leased for profit.

The Tax Commissioner argues that the Property should be taxed because the mortgage payment of the Property, which AEMS passes along to TSN under the lease agreement, remained at the same amount per month despite a reduction in interest rates. Specifically, the Tax Commissioner claims that AEMS has collected more rent than what is due under the mortgage. However this is not true. TSN pays a lease payment that equals the required mortgage payment of AEMS under the loan agreement. AEMS is not receiving any money above and beyond the mortgage payment.

The Tax Commissioner notes that the interest rate has dropped. However, the interest rate could also rise. The Tax Commissioner's argument that AEMS is making a profit when the interest rate drops is not applicable to this case.

In addition, the Tax Commissioner cites *Mariner's Museum v. City of Newport News*² for the proposition that current Virginia law does not support the Property being exempt, but this is not accurate. In *Mariner's Museum*, the Court held that the receipt of a substantial net revenue or profit from a lease renders a charitable organization's property

¹See Order Affirming State Tax Commissioner at Page 2.

² *Mariner's Museum v. City of Newport News*, 495 S.E.2d 251 (Va 1998).

taxable³. *Mariner's Museum* stands for the proposition that incidental revenue is not enough to preclude the *ad valorem* property tax exemption.

In the present case, AEMS is not receiving any "substantial" net revenue or profit. At most, any revenue that may be received by AEMS is only incidental. Thus, current Virginia law is supportive. Accordingly, the Property must be exempted from *ad valorem* property tax.

Additionally, the Tax Commissioner attempts to distinguish Alaska law from the present case by stating that the *Nome* case was remanded. However, AEMS cited the case for the applicable law, and not what specifically occurred in the case.

The Supreme Court of Alaska held that property leased or rented is exempt if:

- 1) the property is leased or rented for an exempt activity;
- 2) the lease or rental payments are not the product of an owner's dominant profit motive; and
- 3) the lease or rental payments are incidental to and reasonably necessary for the exempt use of the property and do not exceed the operational requirements of the exempt activity.⁴

In the present case, the lease between TSN and AEMS meets the Alaskan test. The lease payment is set at the amount of the mortgage payment. Therefore, the lease payment is incidental and necessary for the use of the property. If TSN does not pay the lease payment, the mortgage payment will not be made because AEMS has no other assets. Further, the Tax Commissioner argues that the test is not applicable because the Property

³ *Mariner's Museum v. City of Newport News*, 495 S.E.2d 251, 253 (Va 1998).

⁴ *City of Nome v. Catholic Bishop of Northern Alaska*, 707 P.2d 870 (Alaska 1985).

is not rented at “charitable rates.” While the lease payment may not be set at a nominal amount, it is at a charitable rate. AEMS does not receive any amount over the mortgage payment, the entire lease payment is applied to the mortgage.

The Tax Commissioner relies on Pennsylvania law concerning charitable property exemption from property taxation. However, Pennsylvania law is distinguishable from the law of West Virginia as Pennsylvania’s statute specifically addresses real property owned by one charity and used and occupied by another charity.⁵ Under Pennsylvania law both charitable organizations must occupy the property to qualify for the exemption. This is not required under the West Virginia law.

The Tax Commissioner argues that the Property should be taxable due to AEMS competing with other landlords, but AEMS never competed in the real estate market. TSN was looking for property in the Huntington area to house a single site, on-line, real-time management system to monitor the EMS transmission system (“System”) for West Virginia. The System had to be located on property that has line-of-sight visibility to three communications towers in Rotary Park.⁶ While TSN did initially consider other rental properties to house the System, those rental properties that meet the required line-of-sight visibility were deemed not affordable due to exorbitant lease rates.⁷

Other commercial rental properties in the area were excluded from consideration by TSN well before the decision for AEMS to purchase the Property.⁸ Thus, there is no competition between AEMS and other local landlords.

⁵ 72 P.S. § 5020-204(a)(9).

⁶ See Hearing Tr. at 13

⁷ See Hearing Tr. at 14

⁸ See Hearing Tr. at 13-15

While the Tax Commissioner argues that the arrangement between AEMS and TSN creates an extra burden on the government, this conclusion is speculative. The term of the lease between AEMS and TSN is for 15 years and although tentative lease renewal negotiations are contemplated under the lease, TSN is not obligated past the original lease term. Assuming anything after the end of the mortgage is speculative and without fact. Currently, the lease payment is equal to the amount of the mortgage payment. Thus the government is not experiencing an extra burden.

Further, TSN is the entity supporting the EMS systems across the state. TSN supports the seven region EMS organization, including AEMS, by providing personnel certifications; training for EMS personnel; and assisting in the licensure, re-certification training and re-licensure of personnel.⁹ The TSN lease with AEMS is consistent with the contract that TSN has with the AEMS board of directors for a supportive relationship between the two organizations.¹⁰ TSN does not have this lease agreement with an unrelated organization, but with an interlocking agency.¹¹ There is no extra burden placed on the government.

2. The Property is used exclusively for charitable purposes.

The Property is being used exclusively for charitable purposes for which AEMS and TSN qualify under Section 501(c)(3). The specific charitable purposes outlined in both organizations' Articles of Incorporation are being carried out every day at the Property. If TSN had purchased the Property itself, its use of the Property would remain exactly the same – in support of TSN's, and AEMS' charitable purposes.

⁹ Hearing Tr. at 7

¹⁰ See Hearing Tr. at 29

¹¹ See Hearing Tr. at 30

AEMS and TSN are intertwined charitable organizations with a common mission and purpose of planning, developing, and implementing a better coordinated and more efficient EMS system, with TSN overseeing all of the regions and AEMS focusing on the local region which includes Cabell County. AEMS representatives sit on the TSN Board of Directors. The charitable organizations are essentially one entity when it comes to providing support to the EMS systems. Thus, AEMS' petition for exemption from *ad valorem* taxation should have been granted.

The Property is being used to support EMS systems throughout West Virginia. The Property is being used for EMS meetings and training. A conference room and classroom in the building are being utilized for this purpose. The Property is also used to house the TSN Huntington field office.

The state regulations which correspond to W.Va. Code § 11-3-9(a)(12) provide the following definition of charity:

2.10 The term "charity" means a gift to be applied consistently with the existing laws, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint.... It is immaterial whether the purpose is called charitable in the gift itself if it is so described as to show that it is charitable. Any gift not consistent with existing laws which is promotive of science or tends to the education, enlightenment, benefit or amelioration of the condition of mankind or the diffusion of useful knowledge, or is for the public convenience is a charity.

110 W.Va. C.S.R. 3 § 2.10. Clearly, the use of the Property is for educational purposes, including the diffusion of useful knowledge to EMS organizations throughout the state and for supporting EMS organizations. Thus relieving the bodies of those served by the EMS organizations from disease, suffering or constraint, falls under the above quoted definition of charity.

The AEMS Property is used to provide support services to county level based EMS throughout the State of West Virginia. These EMS organizations serve the general population within the areas covered by those organizations. The use of the Property is undoubtedly "for the benefit of an indefinite number of persons." See 110 W.Va. C.S.R. 3 § 2.10. Accordingly, the Property is being used exclusively for charitable purposes.

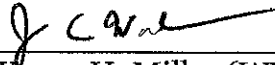
Conclusion

WHEREFORE, for all the foregoing reasons, AEMS respectfully requests that the Court reverse the Judge's Order Affirming State Tax Commissioner dated October 19, 2004, and find that the Property is exempt from *ad valorem* property taxation, and for such other and further relief as this Court deems just with the circumstances.

Dated this ___ day of July, 2005.

**APPALACHIAN EMERGENCY MEDICAL
SERVICES, INC.,**

By Counsel:



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CERTIFICATE OF SERVICE

I, Jason C. Workman, counsel for Appalachian Emergency Medical Services, Inc., do hereby certify that I have served the foregoing "Reply Brief on Behalf of the Appellant Appalachian Emergency Medical Services, Inc.," upon counsel of record, by mailing a true and exact copy thereof, via United States mail, postage prepaid, to the following:

Stephen B. Stockton
Senior Assistant Attorney General
Tax and Revenue Division
Building 1, Room 435
State Capitol Complex
Charleston, West Virginia 25305

Dated this day 26 day of July, 2005.



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