

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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MIRIAM OSBORN MEMORIAL HOME ASSOCIATION,

Petitioner,

Index No: 17175/97
18077/98
16567/99
16113/00
16626/01
18115/02
16987/03

-against-

THE ASSESSOR OF THE CITY OF RYE, THE
BOARD OF ASSESSMENT REVIEW OF THE CITY
OF RYE, AND THE CITY OF RYE,

Respondents,

DECISION & ORDER

-and-

THE RYE CITY SCHOOL DISTRICT,

Intervenor-Respondent.

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DICKERSON, J.

POST TRIAL DECISION : THE MIRIAM OSBORN MEMORIAL HOME ASSOCIATION

PART I : TAX EXEMPTION

The trial of this Real Property Tax Law [" R.P.T.L.]
Article 7 proceeding challenging the real property tax assessments

for the years 1997-2003 imposed upon the Petitioner, The Miriam Osborn Memorial Home Association [" The Osborn "] by the Respondents, The City of Rye [" the City "] and its Assessor [" the Assessor "] and Board of Assessment Review [" BAR "], lasted seventy-four (74) days during which numerous witnesses testified on the exemption¹ and valuation² issues and numerous Decisions were rendered³.

Seeking Restoration Of 100% Tax Exemption

First, the Osborn seeks the restoration of a 100% real property tax exemption pursuant to R.P.T.L. § 420(a)(1)(a)[" RPTL § 420-a "] [" Real property owned by a corporation or association organized or conducted exclusively for religious, *charitable, hospital, educational or moral or mental improvement of men, women or children purposes, or for two or more such purposes, and used exclusively for carrying out thereupon one or more of such purposes either by the owning corporation or association or by another such corporation or association as hereinafter provided shall be exempt from taxation as provided in this section " [emphasis added] which it enjoyed from 1908 to 1996 when it was revoked by the Assessor and partially restored by the BAR.*

Charitable Use & Hospital Use Exemptions

Specifically, the Osborn seeks the full restoration of a RPTL § 420-a " charitable use exemption " [See Matter of Miriam Osborn Memorial Home Association v. Assessor of the City of Rye, 275 A.D. 2d 714, 713 N.Y.S. 2d 186 (2d Dept. 2000)] and a RPTL § 420-a " hospital use exemption " [See Miriam Osborn Memorial Home Association v. The Assessor of the City of Rye, 6 Misc. 3d 1035, 800 N.Y.S. 2d 350 (2005)].

An Issue Of First Impression

The Osborn is a modern Continuing Care Retirement Community [" CCRC "] and the application of the charitable use exemption and/or the hospital use exemption pursuant to RPTL § 420-a to a CCRC is an issue of first impression in New York State. However, the nature of CCRCs⁴ and other types of senior housing⁵ has been examined by the Courts of many States not only within the context of whether and to what extent they should be exempt from the payment of real property taxes because of a charitable use and/or hospital use, but also whether they should be exempt from the payment of excise taxes on entrance and monthly service fees⁶ and the payment of sales and use taxes⁷. The Courts have also resolved other disputes⁸ including challenges to the assessments imposed

upon CCRCs⁹. In addition, the Internal Revenue Service has issued Revenue Rulings 72-124¹⁰, 72-209¹¹, 79-18¹², Private Letter Rulings PLR 200250038¹³ and PLR 200437036¹⁴ and a General Counsel Memorandum¹⁵, all of which discuss the charitable nature of senior housing including CCRCs.

The Burden Of Proof

Having revoked the Osborn's long standing real property tax exemptions the Respondents had the burden of proof to explain why the Osborn was no longer entitled to a charitable use exemption [Miriam Osborn Memorial Home Association v. The Assessor of the City of Rye, No: 17175/97, Slip Op. February 3, 2005 at pp. 4-5 (" it would be efficient and fair to require the Respondents to go first and present their case on why the Osborn's real property is ' no longer entitled to [a tax] exemption ', in whole or in part ")] or a hospital use exemption [Miriam Osborn Memorial Home Association v. The Assessor of the City of Rye, 6 Misc. 3d 1035, 800 N.Y.S. 2d 350 (2005) (" since the City of Rye withdrew (the Osborn's) existing ' hospital ' exemption the burden is on the Respondents to prove that the Osborn is no longer entitled to the ' hospital ' use exemption under RPTL § 420-a ")].

The Scope Of Respondents' Burden Of Proof

The Osborn seeks to limit the data upon which the Respondents may rely in carrying their burden of proof to " only those facts that the Assessor actually considered when she made her determination...Factors or information that the Assessor did not know or consider at the time of her determination were not part of her decision-making process and may not be cited at trial to justify her action "¹⁶. The Osborn relies upon Otrada, Inc. v. Assessor of Ramapo, 9 Misc. 3d 1116 (Rockland Sup. 2005), mod'd 11 Misc. 3d 1058 (Rockland Sup. 2006)(" It is evident to this Court that Defendants did not provide sufficient evidence at trial to meet their burden of proving why the exemption on the subject property was reduced from 100% to 67%... The Court is not expected to make any assumptions as to why the Assessor chose to reduce Otrada's tax exemption.") and *dicta*¹⁷ in Salvation & Praise Deliverance Center, Inc. v. Assessor of The Town of Poughkeepsie, 6 Misc. 3d 1021 (Dutchess Sup. 2005).

The Brave New World Of CCRCs

To the extent the Osborn seeks to limit this Court's review and consideration of all of the evidence introduced at trial on the tax exemption and valuation issues its position is rejected as counterproductive. It is after all The Osborn that makes much of the brave new world of CCRCs [and its accreditation by the

Continuing Care Accreditation Commission [CCAC]¹⁸ and, notwithstanding a legion of out of state cases finding CCRCs¹⁹ and similar senior care facilities²⁰ not tax exempt, urges this Court to ignore New York law on charitable use exemptions as it relates to adult homes²¹ and nursing homes²² which focuses upon the percentage of indigent seniors cared for²³ and take a fresh look and consider its evidence and its analytical framework²⁴ using thirty year old Internal Revenue Service Rulings²⁵ and more recent Private Letter Rulings²⁶.

The Paragon Of Charity Care

Indeed, it is The Osborn that asks this Court to look beyond its original charitable purpose of caring for " indigent " aged women [and not " hold(ing) [The Osborn] to its levels of support in years past "²⁷] and expand the definition of charitable use beyond " a Depression-era soup kitchen or orphanage...or alms giving "²⁸ to include the modern concept of a CCRC [of which " The Osborn (asserts that it) exceeds all others on every conceivable measure of charitable activities (and) emerges as the unassailable paragon of charity care²⁹ "] which " is a setting in which [healthy and wealthy³⁰] elderly residents can transition along a continuum of care from independent living to assisted living or skill nursing care, allowing a resident to spend the rest

of his or her life residing on one campus without the trauma and dislocation associated with transferring to another health care facility or residential location "31.

Good Faith Investigation

A careful review of the trial testimony³² of the Assessor, Ms. McCarthy, reveals that she acted in good faith based upon available information and a comprehensive investigation in revoking The Osborn's 100% real property tax exemption, i.e., that the use of The Osborn had dramatically changed from being a nursing home caring for indigent residents to a continuing care retirement community catering to the needs of wealthy and healthy seniors. Further, a careful review of the evidence presented by Respondents during the trial demonstrates that such proof is relevant to the reasons why the Assessor revoked The Osborn's 100% real property tax exemption.

Valuation

Second, and on the premise that the Osborn's 100% exemption from real property taxation would not be restored, in whole and or in part, the Osborn pursued its challenge to the assessments

imposed upon its property for the tax years 1997 through 2003, seeking a reduction in assessed value and appropriate refunds of taxes paid [Miriam Osborn Memorial Home Association v. The Assessor of the City of Rye, No: 17175/97, Slip Op. February 3, 2005 at pp. 4-5 (" Were...the Osborn's 100% tax exempt status restored then there would be no further need for evidence on the issue of market value for assessment purposes. However, if such (is not found) then the trial will continue with the Petitioner presenting its case on the tax exemption issue after which the Petitioner shall present its case on the valuation issue followed by the Respondents' case ")]. This Court's Decision on valuation appears in a separate Opinion.

No Longer The Nursing Home It Once Was

Stated, simply, and after careful consideration of the trial record and exhibits and the excellent post trial Memorandum of Law of the Osborn³³ and the Respondents³⁴ on the issue of tax exemption including their respective Proposed Findings of Fact³⁵, this Court finds that while it is true that " The Osborn is no longer the nursing home it once was "³⁶ it is still a " residential health care facility ", a portion of which [i.e., The Pavilion] is licensed by the New York State Department of Health and, therefore, is

entitled to a hospital use exemption [San Simeon By The Sound, Inc. v. Russell, 250 A.D. 2d 689, 671 N.Y.S. 2d 699 (2d Dept. 1998); Cobble Hill Nursing Home, Inc. v. Axelrod, 196 A.D. 2d 564, 601 N.Y.S. 2d 334 (2d Dept. 1993), lv. to appeal denied 83 N.Y. 2d 756 (1994); Miriam Osborn Memorial Home Association v. Assessor of the City of Rye, 6 Misc. 3d 1035, 800 N.Y.S. 2d 350 (West. Sup. 2006)(fn 10. " Pursuant to New York State Public Health Law § 2801(1) a nursing home is included within the definition of the term ` hospital `. See e.g., San Simeon, supra; Cobble Hill, supra] albeit a partial use exemption [Matter of Genesee Hospital v. Wagner, 47 A.D. 2d 37, 364 N.Y.S. 2d 934 (4th Dept. 1975), aff'd 39 N.Y. 2d 863, 352 N.E. 2d 133, 386 N.Y.S. 2d 216 (1976); Matter of Butterfield Memorial Hospital Association v. Town of Philipstown, 48 A.D. 2d 289, 368 N.Y.S. 2d 852 (2d Dept. 1975)] reflective of the reduced importance of the residential health care facility in the overall operation of the Osborn as measured by square footage³⁷ [Matter of Genesee Hospital, supra, at 47 A.D. 2d 47; Matter of Butterfield Memorial Hospital Association, supra, at 48 A.D. 2d 291].

Providing Care For The Indigent Elderly

Second, the Court finds that The Osborn is no longer entitled to a charitable use exemption notwithstanding the Petitioner's

absurd declaration that " There has been no change in the use of the Osborn's property "38. Although The Osborn is organized for charitable purposes [American-Russian Aid Ass'n v. City of Glen Cove, 41 Misc. 2d 622, 246 N.Y.S. 2d 123 (Nassau Sup. 1964), aff'd 23 A.D. 2d 988, 260 N.Y.S. 2d 589 (2d Dept. 1965); Adult Home at Erie Station, Inc., v. City of Middletown, 8 Misc. 3d 1010 (Orange Sup. 2005)] it is, clearly, not exclusively used for tax exempt purposes [Mohonk Trust v. Board of Assessors of the Town of Gardiner, 47 N.Y. 2d 476, 418 N.Y.S. 2d 762 (1979); Matter of Symphony Space, Inc. v. Tishelman, 60 N.Y. 2d 33, 418 N.Y.S. 2d 763 (1979); Ass'n of the Bar of the City of New York v. Lewisohn, 34 N.Y. 2d 143, 356 N.Y.S. 2d 555 (1974); Belle Harbor Home of the Sages, Inc. V. Tishelman, 100 Misc. 2d 911, 420 N.Y.S. 2d 343 (Queens Sup. 1981), aff'd 81 A.D. 2d 886, 441 N.Y.S. 2d 413 (2d Dept. 1981) Adult Home at Erie Station, Inc., v. City of Middletown, 8 Misc. 3d 1010 (Orange Sup. 2005); 10 ORPS Opinions of Counsel No. 100; 6 ORPS Opinions of Counsel No. 33], given the remarkably few indigent elderly The Osborn actually cares for³⁹.

Ceiling & Floor Analysis

We have found it useful in determining the true value of real property in tax certiorari⁴⁰ and eminent domain⁴¹ proceedings to establish a valuation floor and/or ceiling below which and/or above

which this Court may not go, based upon certain well accepted principals. This approach is equally useful in this tax exemption analysis.

Tax Exemption Revocation & Partial Restoration

In 1996 the Assessor revoked the Osborn's 100% tax exemption and raised the assessed value of the subject property from \$2,045,100 to \$2,584,000.⁴² However, the Osborn protested and after a Public Hearing⁴³ the BAR⁴⁴ confirmed the increase in assessed value but exempted \$538,050 from taxation amounting to an exemption of 20.8%. In 1998 the Assessor revoked the Osborn's partial tax exemption and raised the assessed value from \$2,584,000 to \$2,794,000⁴⁵. Again, the Osborn protested and after a Public Hearing⁴⁶ the BAR⁴⁷ confirmed the increase in assessed value but exempted \$581,700 from taxation amounting again to an exemption of 20.8%. In 2002 the Assessor increased the assessed value⁴⁸ of the subject property from \$2,794,000 to \$3,224,000 while continuing the BAR restored exempt portion of \$581,700, thereby reducing the percentage of the partial exemption from 20.8% to 18.04⁴⁹.

The Tax Exemption Floor

Therefore, the tax exemption floor for each of the disputed tax years below which this Court may not go is as follows:

Year	Tax Exemption
1997	20.8%
1998	20.8%
1999	20.8%
2000	20.8%
2001	20.8%
2002	18.04%
2003	18.04%

The BAR's Partial Exemptions Are Of No Legal Significance

Although these percentages will serve as the floor below which this Court will not go in its tax exemption analysis, they will not be added to the partial exemptions granted to the Osborn herein since they were given by the BAR without explanation or reasoning and as such have no legal significance⁵⁰ notwithstanding the Osborn's⁵¹ and the Respondents'⁵² positions to the contrary.

R.P.T.L. Article 7 Petitions Filed

The Osborn filed R.P.T.L. Article 7 Petitions for each of the tax years 1997 through 2003 challenging the revocation of its 100%

tax exemption and the amount of the assessed value of the subject property.

The Founding Of The Osborn

Miriam A. Osborn was born in 1840 and was married to Charles Osborn who died in 1885 at the age of 46 years⁵³. According to The Osborn's historical documents, Mrs. Osborn:

. . . saw the tragedy of the destitute single woman and the widow in the 1880s when there were no pensions or organized support whatever except for the few voluntary homes for the aging. Mrs. Osborn knew the great fear gentlewomen had of untimely death or illness leaving them without support unless relatives or friends were able to provide a home⁵⁴.

Mrs. Osborn died in 1891.

The Last Will And Testament

The Osborn's genesis can be found in Mrs. Osborn's Last Will and Testament [the " Will "] which was executed on June 2, 1888.

In Article Eighth of her Will, Mrs. Osborn stated:

I direct my Trustees to procure the incorporation by or under the authority of the

Legislature of the State of New York, of an Association, under the corporate title of "The Miriam A. Osborn Memorial Home Association," or some similar name, with similar powers, privileges and franchises to those contained in the Charter of the said Association for the Relief of Respectable, Aged, Indigent Females, in the City of New York and with such other and additional powers as may be required by the terms of the devise⁵⁵.

In furtherance of her direction to create The Miriam A. Osborn Memorial Home Association [" Memorial Home "], Mrs. Osborn bequeathed property and funds for the creation of a physical home on the property that she conveyed⁵⁶.

Providing Care For Indigent Women

Mrs. Osborn intended that the Memorial Home provide care for indigent women. This intent can be found by reference to other portions of Mrs. Osborn's Will as well as the Last Will and Testament of her friend and lawyer, John W. Sterling.

In Article Ninth of her Will, Mrs. Osborn directed that in the event that the Memorial Home was not incorporated, her residuary estate, both real and personal, was to be conveyed to the " Association for the Relief of Respectable, Aged, Indigent, Females in the City of New York " [" Association "]⁵⁷. However, this bequest was conditioned on the Association erecting " a separate building, suitable and convenient for the occupation of

respectable, aged, *indigent* females, under the care and charge of said Association . . . [emphasis added]"⁵⁸. Article Ninth further provided that such building was to be known as " The Miriam A. Osborn Memorial Home for Aged Women "⁵⁹. Finally, Article Ninth provided that in the event that the Association was unable to fulfill the Will's conditions, " the said property shall be conveyed, transferred and paid over to the Peabody Home for Aged and *Indigent* Women . . . for the general uses and purposes of the said Institution [emphasis added]"⁶⁰.

In Article Fourteenth of her Will, Mrs. Osborn appointed her friend, John W. Sterling, and the Central Trust Company of New York as Trustees under the Will⁶¹. Thereafter, in his Last Will & Testament, Mr. Sterling bequeathed additional land and funds to the " Miriam Osborn Memorial Home Association " for the creation of " an additional Building, which will be suitable for the uses of the said Association " as a " Memorial " to certain designated Scottish women⁶². Mr. Sterling then went on to state that it was his " wish ":

" That in selecting aged, *indigent* gentlewomen as inmates of the said Memorial Building, some preference may be shown by the Trustees of the said Association to such as may have been born in Scotland or may have had Scottish ancestors "⁶³.

Plan "A" & Plan "B" Residents

Prior to 1990, The Osborn was admitting both Plan "B" Residents, who were residents fully supported by The Osborn, and fee-paying residents known as "A" Residents⁶⁴. "A" Residents signed "A" contracts which contained language " to the effect that the Resident would not have to leave because of inability to pay "⁶⁵. Thus, once an "A" Resident was admitted to The Osborn, The Osborn was contractually required to support that Resident for life even if the "A" Resident was unable to pay for her care⁶⁶.

The Pathway 2000 Plan

In 1988, Mark Zwerger [" Zwerger "], who had just been hired by The Osborn to serve as its Chief Operating Executive, concluded that The Osborn was not financially viable in its then present condition⁶⁷. In order to solve this problem, Zwerger devised " a basic plan to develop [The Osborn into] a continuing care retirement community and preserve the original facilities of The Osborn "⁶⁸. The name that Zwerger gave to this plan was " Pathway 2000 " [the " Pathway 2000 Plan "]⁶⁹. As acknowledged by Zwerger, The Osborn's Pathway 2000 Plan was a plan designed to convert The Osborn into a continuing care retirement community [" CCRC "] that would provide an array of services to senior citizens who could afford to pay for them⁷⁰.

What Is A CCRC?

A CCRC is " generally characterized as a campus setting in which residents come in essentially on the independent living level and transition through the continuum of care . . . and spend the rest of their life there "⁷¹. CCRCs⁷² are distinguished from other types of senior housing⁷³ by the presence of three levels of care: independent living, assisted living and skilled nursing⁷⁴.

The Three Levels Of Care

The independent living level of care is comprised of senior citizens who are generally in good health, who are independent in the activities of daily living and who do not require assisted living or skilled nursing services⁷⁵. Residents in the assisted living level of care are mobile with or without aids, need minimum assistance with activities of daily living, and do not require 24 hours of nursing care⁷⁶. Residents in the skilled nursing level of care need 24 hour nursing care⁷⁷.

Market Research

In December 1989, The Osborn engaged a consulting firm, Van Scoyoc Associates Inc. [" Van Scoyoc "], to perform consumer research to help determine " the need and potential demand for a full service retirement community and provide insight to consumer

preferences "78. Van Scoyoc sent questionnaires to " older adult households in the total service area "79, created profiles of the total survey respondents and the respondent market80 and used the responses as the basis of its recommendations regarding the financial and physical attributes of a new Osborn81.

Senior Citizens : Income, Assets & Payment Plans

In gathering information, Van Scoyoc focused on the income and assets of the senior citizens surveyed. Among other things, Van Scoyoc wanted to know the preferences of these senior citizens regarding the desirability of amenities such as a putting green, a club/bar, fireplaces, and garage parking82.

The Plan "B" Freeze

In 1989, at the time of Van Scoyoc's retention, The Osborn was supporting as " charity beneficiaries ", approximately, 63 Plan "B" residents [which did not include, approximately, 19 Assignment residents83] nearly half of its total residents84. On March 13, 1990, The Osborn's Board of Trustees unanimously passed a resolution not to admit any new fully-supported Plan "B" residents " until financial analysis was completed "85. The Plan "B" freeze did not end until 200086.

The Van Scoyoc Report

In June 1990, Van Scoyoc issued its lengthy Market Analysis Study [the " Van Scoyoc Report "]⁸⁷, which provided advice to The Osborn as to how to attract " a broad enough segment of the financially qualified market for residency "⁸⁸. The Van Scoyoc Report pointed out that " The successful development of an Osborn housing community will depend on a well-planned public relations and marketing campaign "⁸⁹. The Van Scoyoc Report went on to state that:

In order to accommodate the needs of the market segment likely to seek residency, it is recommended that an Osborn housing community provide a convenient, secure and service-oriented program in a quality setting which is compatible with the target market's present standard of living.

In Search Of The Affluent Elderly

In its Report, Van Scoyoc reported to The Osborn's Board of Trustees:

After careful study of all the factors presented in the market analysis, Van Scoyoc Associates believes there is adequate market opportunity to pursue an Osborn housing community⁹⁰.

The Van Scoyoc Report went on to state that:

In order to accommodate the needs of the market segment likely to seek residency, it is recommended that an Osborn housing community provide a convenient, secure and service-oriented program in a quality setting which is compatible with the target market's present standard of living⁹¹.

Upon receipt of the Van Scoyoc Report, Zwerger reported to The Osborn's Board of Trustees that Van Scoyoc had concluded that "[a] market for a CCRC was identified but perceived to represent a small segment of the affluent elderly population "⁹².

Selecting Projected Fees

In connection with its surveys and analysis, Van Scoyoc used the following projected fees' options provided by the Osborn⁹³: entry fees between \$175,000 and \$218,750 with monthly fees between \$1,450 and \$2,050 or a monthly fee only of between \$2,850 and \$3,810⁹⁴.

The Entry Fee/Monthly Fee Option

Based upon the projected entry fee/monthly fee option , Van Scoyoc concluded that " Fewer households are financially eligible

under the entry fee/monthly fee program (2,688 and 711) "⁹⁵. The local service area consisted of Rye, Harrison, Rye Brook, Port Chester, Larchmont, Mamaroneck and parts of Scarsdale and White Plains⁹⁶.

The Monthly Fee Only Option

Van Scoyoc used projected monthly fees of between \$2,850 and \$3,810 with respect to a " monthly fee only " option "⁹⁷. Based upon these projected monthly fees, also provided by The Osborn⁹⁸, Van Scoyoc concluded that between " 4,126 and 1,103 households (householder 65+ and 75+) in the local service area are estimated to afford the monthly fee only plan "⁹⁹. Based on its analysis, Van Scoyoc concluded:

While the overall 75+ market looks reasonable, the relatively small number of qualified one-person 75+ households indicates further planning should assess options for moderating rate requirements to broaden affordability among this key market segment¹⁰⁰.

Adjusting Entrance & Monthly Fees

While acknowledging that " there is a relationship between fees and the number of people who can afford to pay them "¹⁰¹ the Osborn chose to raise the proposed entrance fees¹⁰² rather than

" moderating " them as recommended by Van Scoyoc in order to
" broaden affordability,".

Importance Of Health Care & Nursing Services

The Van Scoyoc Report stated that " As access to health and nursing services at the Osborn was the most important feature to the respondent market, further attention to this aspect will also be required in program planning. In other similar facilities, the inclusion of nursing coverage in the fees for residency often provides a competitive advantage and enhances program marketability "¹⁰³

Creating A Residential Image

The Van Scoyoc Report made the " following recommendations " to The Osborn in order " to create a residential image and separate identity for the new accommodations:"

- Design a master plan which creates a campus image; buffer landscaping will help to minimize the nursing home dominance on the site.
- Develop a separate access road as a "gateway" to the new housing community.
- Incorporate outdoor activities such as walking trails, gardening areas, etc.

- Develop the new community center to serve as a focus for the housing components.
- Develop a separate name for the new community to distinguish it from present Osborn facilities and, in turn, more effectively market the units¹⁰⁴.

Van Scoyoc also recommended that a "financial feasibility study that identifies the costs for developing, financing and operating the proposed community should be completed "¹⁰⁵.

Public Relations & Marketing Campaign

The Van Scoyoc Report cautioned, however, that

Once a go decision is reached, it will be crucial to have a well planned public relations and marketing campaign to capture the full market potential. Further, the sponsor will also need to address numerous internal and external issues, including corporate structuring for new facilities, regulatory considerations, real estate tax issues, and site planning¹⁰⁶.

Financial Feasibility Study Needed

In accordance with the Van Scoyoc Report, The Osborn retained KPMG Peat Marwick [" KPMG "] to provide to The Osborn's Board of Trustees with a more detailed financial analysis of the proposed Pathway 2000 Project¹⁰⁷. On November 13, 1990, KPMG presented its

preliminary financial analysis [" KPMG Report "] to The Osborn's Board of Trustees¹⁰⁸.

Disappearing Plan "B" Residents

Among other things, the KPMG Report contained a table covering a ten year period beginning in 1990, which projected that the number of fully-supported "B" residents would drop from 60 in 1990 to 22 in 1999¹⁰⁹. The reduction in the number of Plan "B" residents significantly reduced the actuarial liability of the Osborn¹¹⁰.

Diluting The No Eviction Policy

In 1990-1991 The Osborn changed its "A" Resident contract " to remove the promise of a resident never having to leave because of inability to pay "¹¹¹. In that same time period the Osborn also " froze "B" admissions...we raised our prices 29%... and we reaffirmed our commitment not to take Medicaid residents "¹¹².

Mission Statement: To Serve The Financially Independent

The Osborn's Board of Trustees also adopted a Mission Statement for The Osborn which provided as follows:

To meet the needs of men and women age 65 years and older by providing a congenial living environment, quality housing, and a continuum of appropriate care in settings ranging from independent living to nursing facility. In so doing, it is our intent to serve the financially independent as well as those who need financial support consistent with the spirit of Miriam Osborn's will and the prudent use of the resources of the Miriam Osborn Memorial Home Association¹¹³.

The Pathway 2000 Project : Let The Metamorphosis Begin

In 1991 the Osborn's Board of Trustees approved¹¹⁴ the Pathway 2000 Plan [renamed Pathway 2000 Project] recognizing that it would be " re-inventing The Osborn into a modern, efficient, and marketable Continuing Care Retirement Community "¹¹⁵. As of that time when the Pathway 2000 Project was approved, The Osborn was providing some charity care to 82 of its 144 residents or over 50% of its Residents¹¹⁶. In the winter of 1993, The Osborn published a special issue of a quarterly newsletter called "Outlook."¹¹⁷ The issue contained a number of articles on the Pathway 2000 Project.

As stated in the lead article:

After four years of research and planning, The Osborn has set forth a proposal for a revitalized housing and health care program for older people which promises to become a standard for quality continuing care retirement communities nationwide¹¹⁸.

The Good Life

In another article entitled " The Good Life At The New Osborn," The Osborn informed its readers that " Residents of the new, expanded Osborn now under development will enjoy a wide variety of amenities, activities and recreational facilities " ¹¹⁹.

Fees To Pay For The Cost Of Construction

In the same issue, Zwerger and John Bowen [" Bowen "], The Osborn's Chairman of the Board, authored a joint column which discussed the Pathway 2000 Project and which addressed the subject of the Entrance Fees and Monthly Fees that would be charged by The Osborn ¹²⁰.

We want to point out that we cannot quote firm prices for our entry fees and monthly fees at this time. Those fees must accurately reflect the cost of the project, which we will not know until we are closer to construction.

The Pathway 2000 Project, which was completed in two phases [Phase I and Phase II], involved " the construction of 26 new buildings and the renovation of 4 other buildings " ¹²¹.

The Osborn's Board of Trustees financed the cost of construction through the issuance of tax exempt bonds¹²² which were to be " paid down...in part (with) the entrance fees that were charged "¹²³. As such the " more [the Osborn] spent [on construction] , the more it was going to cost [its] residents "¹²⁴. The total cost of the Pathway 2000 Project, which converted The Osborn into its present facility, was \$135,000,000¹²⁵.

Direct Mail Marketing Strategy

It is clear that given the anticipated construction costs of implementing the Pathway 2000 Project a marketing strategy needed to be developed to attract senior citizens who were and are " age and income qualified "¹²⁶. The Osborn's Marketing Department developed a direct mail marketing strategy which was designed to position " The Osborn and Sterling Home Care as the most sought after, premier continuing care and home care providers in the market "¹²⁷. As Zwerger acknowledged, The Osborn's marketing campaign was directed " to the aged income qualified population for specific units " and it was specifically addressed to " individuals who can afford those accommodations "¹²⁸. Between 1997 and year end 2003, The Osborn's marketing expenditures totaled approximately \$3.1 million¹²⁹.

Independent Living Units

In connection with its marketing efforts, The Osborn engaged the services of Glynn Devins Advertising & Marketing [" Glynn Devins "] to " design the advertising (and develop) the list "¹³⁰ of senior citizens who might be interested in living at The Osborn. The direct mailings were based upon specific zip codes with " Criteria includ(ing) one name per household, \$75,000 minimum household income, age 70+ and age 75+ "¹³¹. The direct mailings sent by The Osborn in connection with its marketing campaign contained letters and brochures that described The Osborn and the services that it provided¹³². In one of the letters The Osborn informed recipients that:

There is an exciting, new opportunity to enjoy gracious, comfortable, worry-free retirement living in Westchester County, in a place you've known and respected for years. Construction will soon begin on two new Sterling park apartment buildings on The Osborn campus in Rye.

The expansion of Sterling Park, our independent living community, continues the tradition of excellence for which The Osborn is widely known, and completes a ten-year development program of new construction and renovation on our expansive campus. The new Sterling Park project will include 94 private, spacious apartments, as well as underground parking, a dining room, meeting room, library, screening room and game room, all in

Westchester County's most desirable continuing care retirement community.

Residents of the new Sterling Park will enjoy an incomparable package of amenities and services, as well as priority access to The Osborn Pavilion Health Care Center¹³³.

The letters also contained copies of a marketing brochure describing life at The Osborn¹³⁴.

Westchester's Preferred Retirement Lifestyle

In one brochure The Osborn referred to itself as " Westchester's Preferred Retirement Lifestyle "¹³⁵, which was the " impression " that The Osborn wanted to give¹³⁶. The marketing brochures also contained pictures of The Osborn's newly built " garden homes (which) combined gracious style and comfortable living: ideal residences for the perfect lifestyle "¹³⁷ and emphasized the point that " Sterling Park is for those who are ready for retirement lifestyle without concessions," and " Sterling Park is the preferred retirement choice in Westchester County "¹³⁸.

The New Osborn

Upon completion of the Pathway 2000 Project, The Osborn consisted of (1) 84 skilled nursing beds located in the Pavilion, The Osborn's skilled nursing facility, (2) 188 Entrance Fee independent living units located in the garden homes and in the 2000, 3000, and 4000 apartment buildings [" Entrance Fee Units "] and (3) 105 other units located in the Osborn, Strathcona and Sterling buildings which were apartments used as either assisted living or independent rental units¹³⁹.

Entrance Fee Units: Who Can Afford Them?

The Osborn does not permit anyone who cannot afford The Osborn's entrance fees to occupy any of the 188 Entrance Fee Units¹⁴⁰. Entrance Fee Units comprise a substantial majority of the independent living units at The Osborn and of the total independent living and assisted living units on The Osborn campus¹⁴¹. Entrance Fee Units also comprise a substantial majority of the square footage of the total space occupied by all of the independent and assisted living units, and of the newly built-out The Osborn campus¹⁴².

Accessibility, Home Ownership & Medicaid

Entrance Fee Units may be more accessible¹⁴³ to those residents who owned homes¹⁴⁴ [depending upon income, age and mortgages¹⁴⁵] and resided in The Osborn's primary service area including the City of Rye, the southern portion of the City of White Plains, the Town of Mamaroneck, The Town of Harrison, the Village of Port Chester, the Village of Rye Brook, the eastern portion of the Village of Scarsdale and the Village of Larchmont¹⁴⁶.

Although The Osborn accepts Medicare it does not accept Medicaid¹⁴⁷ which excludes a substantial percentage of elderly from access to The Osborn's Pavillion¹⁴⁸ and shifts the burden of caring for Medicaid patients to other skilled nursing facilities located in Westchester County¹⁴⁹.

The Range Of Entrance Fees [1997-2003]

In 1997, when Phase I was completed, entrance fees for Entrance Fee Units ranged from \$229,000 to \$505,000¹⁵⁰. By 2003, the entrance fees for Entrance Fee Units had increased to a range of \$301,400 to \$825,000¹⁵¹.

The Range Of Monthly Fees: Entrance Fee Units [1997-2003]

In 1997, when Phase I was completed, monthly fees for Entrance Fee Units ranged from \$1,850 or \$22,200 per annum to \$2,500 or \$30,000 per annum¹⁵². By 2003, the monthly fees for Entrance Fee Units had increased to a range of \$2,603 to \$3,741 or a range of \$31,236 to \$44,892 per annum¹⁵³

The Range Of Monthly Fees: Non-Entrance Fee Units [1997-2003]

In 1997, the monthly fees for non-Entrance Fee Units ranged from \$2,400 to \$4,300 or from \$28,800 to \$51,600 per annum¹⁵⁴. By 2003, the monthly fees for non-Entrance Fee Units had increased to a range of \$4,436 to \$5,352 or \$53,232 to \$64,224 per annum¹⁵⁵.

The Range Of Fees For Assisted Living Units [1997-2003]

In 1997, the monthly fees for assisted living apartments ranged from \$3,600 to \$4,950 or from \$43,200 to \$59,400 per annum¹⁵⁶. By 2003, the monthly fees for assisted living apartments had increased to a range of \$4,959 to \$6,624 or \$59,508 to \$79,488 per annum¹⁵⁷.

The Range Of Fees For Assisted Living Basic Home Care Service

In addition to the monthly fees that they have to pay to The Osborn for the assisted living units, The Osborn's assisted living residents also have to pay Sterling Home Care, Inc., additional monthly fees of " between \$1,400 and \$1,500 " for " Basic assisted living services "¹⁵⁸.

The Age Of New Osborn Residents

Between 1996 and year end 2003, The Osborn admitted 439 applicants [the " Pathway 2000 Residents "] for residence in the newly constructed accommodations at The Osborn¹⁵⁹. The average and the median age of the 439 Pathway 2000 Residents upon admission to The Osborn was 83¹⁶⁰. Of the 439 Pathway 2000 Residents, 272 or 62% of them were between the ages of 80 and 89 as of the date of their admission to The Osborn¹⁶¹. An additional 47 Pathway 2000 Residents or 11% of them were over the age of 90 as of the date of their admission¹⁶². Only 6 Pathway 2000 Residents or 1% of them were 69 or younger as of the date of their admission¹⁶³.

Financial Testing

Since 1996, The Osborn has performed a " qualification review " for every applicant to The Osborn's independent living units, to its assisted living units and for long-term stays at the Pavilion, the Osborn's skilled nursing facility¹⁶⁴ [" It's our policy to determine whether a prospective applicant can afford to have the resources to pay for their stay at The Osborn "¹⁶⁵]. The Osborn has acknowledged that " one of the things that the computer model does is to determine whether the income and assets of particular applicants are sufficient to meet the future costs that would be incurred by that applicant if that applicant was accepted at The Osborn "¹⁶⁶. If the applicant has sufficient assets and income to meet the projected expenses for the requested level of care, the applicant is deemed to be " financially qualified "¹⁶⁷. If an applicant is not financially qualified, the Osborn may try to find other available units for which the applicant may be eligible¹⁶⁸ or place the applicant on the scholarship waiting list¹⁶⁹.

The Residency Agreement

If accepted, applicants are required to sign an Osborn Residency Agreement [e.g., Sterling Park at The Osborn Residency

Agreement]¹⁷⁰. Osborn Residency Agreements contain a specific provision whereby the " Resident represents and warrants to The Osborn that the resident is capable of independent living, has no medical condition which would endanger himself/herself...and has assets and income which are sufficient under foreseeable circumstances...to meet the ordinary and customary living expenses "¹⁷¹. The Osborn's Residency Agreements permit The Osborn to " terminate this Agreement "¹⁷² if the Resident fails " to pay any amount owed to The Osborn "¹⁷³. This is also true under the Sterling Home Care, Inc. Assisted Living Services Agreement¹⁷⁴.

The Area's Elderly Population

Based upon the 2000 United States Census Data, 804,500 people resided in the area within 10 miles of The Osborn¹⁷⁵ of which 25,202 were between 75 and 79 years old, 17,390 were between 80 and 84 years old and 16,941 were 85 and over¹⁷⁶.

The Net Worth Of The Area's Elderly

According to the 2000 Census Data, the median annual income for senior citizens between 75 and 79 years old was \$33,889 and 60.75% of these senior citizens had an annual income below \$45,000¹⁷⁷. According to the 2000 Census Data, the median annual

income for senior citizens between 80 and 84 years old was \$28,818 and 65.81% of these senior citizens had an annual income of below \$45,000¹⁷⁸. According to the 2000 Census Data, the median annual income for senior citizens 85 and older was \$23,860 and 71.25% of these senior citizens had an annual income below \$45,000¹⁷⁹.

The Net Worth Of New Osborn Residents

In contrast, of the 439 Pathway 2000 Residents, 325 or 74% of them had an individual or joint net worth of between \$1,000,000 and \$30,000,000¹⁸⁰. An additional 14 Pathway 2000 Residents or 3% of them had guarantors with a net worth in excess of \$1,000,000¹⁸¹. An additional 70 Pathway 2000 Residents or 16% of them had an individual or joint net worth of between \$500,000 and \$999,000¹⁸².

The Waiting List For Independent Living Units

The Osborn maintains waiting lists for its independent living and assisted living units at a fee of \$5,000¹⁸³. Of the 344 individuals on The Osborn's waiting list for independent living units, 252 or 73% of them had an individual or joint net worth of between \$2,000,000 and \$25,000,000¹⁸⁴. Of these 344 individuals, an additional 59 or 17% of them had an individual or joint net worth

of between \$1,000,000 and \$1,999,999¹⁸⁵. An additional 4 of them or 1% of them had guarantors who had a net worth in excess of \$1,000,000¹⁸⁶.

The Waiting List For Assisted Living Units

Of the 31 individuals on The Osborn's waiting list for assisted living units, 15 or 49% of them had an individual or joint net worth of between \$2,000,000 and \$15,100,000¹⁸⁷. Of these 31 individuals, an additional 12 or 39% of them had an individual or joint net worth of between \$1,000,000 and \$1,999,999¹⁸⁸. An additional 2 of them or 6% of them had guarantors who had a net worth in excess of \$1,000,000¹⁸⁹.

Only The Healthy Need Apply

In order to be admitted to The Osborn's independent level of care, an applicant also had to be healthy¹⁹⁰. As stated in The Osborn's Policies and Procedures, an " Applicant's acceptance for residency at Sterling Park At The Osborn must meet established health criteria which indicates that they are able to function and live independently. Medical and nursing care are not provided to Residents of Sterling Park "¹⁹¹.

The Level Of Care Assessments

Accordingly, every applicant for an independent living unit was interviewed by one of The Osborn's Retirement Counselors in order to determine " level of care, needs and ability to function at The Osborn "¹⁹² during which a " Level of Care Assessment " form was completed¹⁹³. An applicant had to have a score of " 6-12 points no points higher than 2 " for independent living, a score of " 13-24 points no points higher than 4 " for assisted living and " 25-35 points " for skill nursing "¹⁹⁴.

Annual Assessment Review

An assessment is also done " on a yearly basis and then if there is an incident or hospitalization "¹⁹⁵ in order to document " the needs of the Independent residents and their conditions "¹⁹⁶. The Osborn created a document entitled " Sterling Park Incidents and Transitions "¹⁹⁷ which included an " Average Assessment " for each of the individuals who resided in independent level of care units for the years 2002 and 2003¹⁹⁸.

Staying Healthy

For 2002, the average age of the 275 Residents in the independent level housing units was " 84.86 " and their Average Assessment was " 8.03237," well within the range [6-12] required for independent living¹⁹⁹. For 2003, the average age of the 264 Residents in the independent level of care units was " 85.51 " and their Average Assessment was " 8.16," also well within the range required for independent living²⁰⁰.

The Continuing Disappearance Of The Needy

In 1993, The Osborn was supporting 57 Plan "B" residents which represented 45.60% of the total residents²⁰¹. With the opening of the new Osborn the number of charitable beneficiaries continued to decline²⁰². As of 1996, The Osborn's total resident population had increased to 215, most of whom were fee-paying "A" Residents²⁰³. In contrast to the increase in The Osborn's fee-paying "A" Resident population, the number of Plan "B" Residents had decreased to 29 in 1996²⁰⁴. As of year end 1997, The Osborn was supporting only 26 Plan "B" Residents²⁰⁵. Thus, as of year end 1997, only 11% of the total Osborn resident population was comprised of Plan "B" Residents²⁰⁶.

Plan "B" Resident Days In 1997-2003

The total " Resident Days " used by Plan "B" Residents as a percentage of " Total Osborn Actual Resident Days " for 1997 was 13.07%, for 1998, 10.90%, for 1999, 9.11%, for 2000, 7.42%, for 2001, 6.77%, for 2002, 6.81% and for 2003, 6.57%²⁰⁷.

Charity Task Force Report : 2002

The Charity Task Force Report, prepared by a committee created by the Osborn's Board of Trustees, noted that " Sadly, such charity in the absence of a fiscally sound operating enterprise was leading The Osborn to certain financial ruin ".²⁰⁸
The Charity Task Force Report went on to state:

The Board of Trustees, recognizing this inevitability, set about on a path to restore The Osborn to operating solvency in the hopes of perpetuating a very worthwhile charitable endeavor. To do so meant temporarily curtailing the acceptance of new charity beneficiaries (henceforth to be referred to as scholarship residents or beneficiaries) and re-inventing The Osborn into a modern, efficient, and marketable Continuing Care Retirement Community²⁰⁹.

Redirecting Surplus Funds Into Development

The Charity Task Force Report contained the following recommendations: First, " the trustees should have the option to use the general operating and cash surpluses for whatever purpose they see fit. This should include support for charity but also capital replacements or unforeseen expenses "²¹⁰.

5% Charity Cap

Second, " The total funds budgeted for charity expenditures annually shall not exceed 5% of the estimated principal balance of the endowment fund as of the beginning of any given year...The formula also has an annual 5% cash flow cap meaning that in any given year The Osborn cannot spend more than 5% of its beginning cash balance on charity subsidies "²¹¹.

Sterling Home Care: Moving Charity Care Off Campus

Another recommendation made by the Charity Task Force was to create a separate corporate entity, Sterling Home Care, Inc., " to provide home health care...to both people on the campus and in the community "²¹² using a " sliding fee schedule (for)

eligible Sterling Home Care or adult day care clients who meet certain income eligibility based on Federal poverty level ²¹³.

2001: The Osborn In Excellent Financial Health

The need for a 5% charity care cap [first implemented in 2002²¹⁴] and moving some charity care off campus [thus lowering the costs] is curious, indeed, since The Osborn, evidently, through the implementation of the Pathway 2000 Project in 1991 was able to miraculously bootstrap itself from " certain financial ruin ²¹⁵ to excellent financial health in 2001. According to The Osborn's 2001 federal tax return, by 2001, the fair market value of The Osborn's assets had risen to \$169,417,363²¹⁶. The Osborn's budget for 2002 noted that 2001 was quite successful because " Projected 2001 operations were better than budget, revenues were higher and expenses were lower " and because the " new apartment building filled up faster than expected . . ." ²¹⁷.

2002: First Full Year Of Stable Operations

2002 represented The Osborn's first full year of stabilized operations " following our expansion ²¹⁸. By the end of 2002, The Osborn was almost 100% occupied and had a substantial waiting list of financially qualified applicants who were seeking admission to

The Osborn²¹⁹. In its 2002 budget, The Osborn budgeted total revenues of \$27,043,528²²⁰. Despite its revenue base, The Osborn projected "charity care" for 2002 of \$1.85 million for 26 residents."²²¹

Making More But Spending Less On Charity Care

By year-end 2002, The Osborn had received a total of \$27,957,973 in revenues, more than \$900,000 above budget²²². In its budget for 2003, The Osborn "projected charity cost (of) approximately \$2.3 million for 31 residents " which would be an increase from 27 residents in 2002²²³. The Osborn did not admit a single new fully-supported Plan "B" Resident in 2003²²⁴. By year end 2003, the number of Plan "B" Residents was 23, not 31 as had been budgeted, and was actually 3 fewer people than in 2002²²⁵.

2003: The Osborn's Financial Health Continues To Improve

The Osborn's financial health to improve in 2003. According to The Osborn's 2003 year-end report, The Osborn once again received more revenues than had been budgeted -- \$29,630,591 vs. \$29,226,148 -- for an additional surplus of \$364,003²²⁶. By year end 2003, the value of The Osborn's Endowment Fund had increased

by \$5,570,645 as compared to year end 2002²²⁷. Moreover, by year end 2003, The Osborn had a net operating surplus of \$1,464,322²²⁸.

No New Plan "B" Residents Please

During 2003 The Osborn did not admit any new Plan "B" Residents from outside of The Osborn campus²²⁹. By year end 2003, 5.06% of The Osborn's residents were Plan "B" residents²³⁰. No new Plan "B" Residents were admitted during 2003 because to do so would cause The Osborn to be out of compliance with its "Charity Cap"²³¹.

The Osborn's Metamorphosis Is Now Complete

In short, the transformation of The Osborn is now complete. From an institution that was created to serve the needs of indigent aged women, to one that now, primarily, serves the needs of wealthy and healthy senior citizens. At best, the provision of charity is carefully controlled and will only be provided under limited and strictly monitored circumstances to very few indigent elderly, indeed.

DISCUSSION

The Osborn seeks the restoration of a 100% real property tax exemption for the years 1997 through 2003 pursuant to RPTL § 420-a(1)(a) which provides " Real property owned by a corporation or association organized or conducted exclusively for religious, *charitable, hospital,* educational or moral or mental improvement of men, women or children purposes, *or for two or more such purposes,* and used exclusively for carrying out thereupon one or more of such purposes either by the owning corporation or association or by another such corporation or association as hereinafter provided shall be exempt from taxation as provided in this section ". The Osborn enjoyed a 100% tax exemption from 1908 to 1996 when it was revoked by the Assessor and partially restored by the BAR. For the years in dispute The Osborn's partial tax exemptions were 20.8% [1997-2001] and 18.04% [2002-2003].

Charitable Use & Hospital Use Exemptions

Specifically, the Osborn seeks the full restoration of a RPTL § 420-a " charitable use exemption " [See Matter of Miriam Osborn Memorial Home Association v. Assessor of the City of Rye,

275 A.D. 2d 714, 713 N.Y.S. 2d 186 (2d Dept. 2000)(" Under the circumstances of this case, including the documentary evidence demonstrating that admission to Sterling Park is restricted to relatively healthy, elderly individuals who can afford to pay entrance fees ranging from \$229,000 to \$526,000 and monthly ` maintenance fees ` ranging from \$1,850 to \$2,500, material issues of fact exist as to whether the petitioner's primary use of the property is for charitable purposes ")] and a RRTL § 420-a " hospital use exemption " [See Miriam Osborn Memorial Home Association v. The Assessor of the City of Rye, 6 Misc. 3d 1035, 800 N.Y.S. 2d 350 (2005)(" There is no doubt that Assessor McCarthy considered whether the Osborn, which clearly operated as a nursing home during the tax years in question, should be granted an exemption under the RPTL § 420 as a ` hospital `...(The Assessor) took away a ` hospital ` exemption under RPTL § 420-a that she believed the Osborn had been given and was not entitled to ")].

Hospital Use Exemption

Although The Osborn has transformed itself from a nursing home caring for indigent aged elderly into an extraordinary, state-of-the-art CCRC serving the needs of health and wealthy

senior citizens, its Pavilion is still a skilled nursing facility licensed by the New York State Department of Health. As a licensed " residential health care facility " The Osborn is entitled to a hospital use exemption [San Simeon By The Sound, Inc. v. Russell, 250 A.D. 2d 689, 671 N.Y.S. 2d 699 (2d Dept. 1998); Cobble Hill Nursing Home, Inc. v. Axelrod, 196 A.D. 2d 564, 601 N.Y.S. 2d 334 (2d Dept. 1993), lv. to appeal denied 83 N.Y. 2d 756 (1994); Miriam Osborn Memorial Home Association v. Assessor of the City of Rye, 6 Misc. 3d 1035, 800 N.Y.S. 2d 350 (West. Sup. 2006) (fn 10. " Pursuant to New York State Public Health Law § 2801(1) a nursing home is included within the definition of the term ' hospital '. See e.g., San Simeon, supra; Cobble Hill, supra].

Partial Exemption Only

The importance of The Pavilion as a residential health care facility in the overall operation of the Osborn has been reduced and unlike San Simeon, supra, is no longer the very essence of the nursing home²³² it once was. Instead The Pavilion is merely an adjunct to a much larger assisted and independent living complex of apartments, garden homes and amenities²³³.

Attracting The Wealthy

The Osborn's efforts to make itself attractive to wealthy seniors and avoid " certain financial ruin "²³⁴ by building a modern CCRC are similar to the efforts of hospitals to make themselves more attractive to doctors and interns [See e.g., Matter of Genesee Hospital v. Wagner, 47 A.D. 2d 37, 364 N.Y.S. 2d 934 (4th Dept. 1975) (" In recent years the Genesee Hospital has seen a decline in the number of interns it has been able to attract... confronted with this trend Genesee Hospital determined that if it was to improve as a high-quality medical and teaching hospital it would have to do something to attract well-known physicians onto its staff as well as attract and retain the better interns...The construction of a Doctors Office Building was thought to be a step in that direction...The plan which was developed to accomplish these purposes provided that any physician on the staff of Genesee Hospital could rent space in the hospital's professional office building for a leasehold period...The doctors were not restricted in the amount of time they were permitted to spend seeing private patients nor the amount of money they could earn through their private practices...The central issue presented...is whether the subject professional office building attached to the Genesee Hospital is entitled to the same tax-exempt status as the hospital itself...We hold...that where physicians lease suites from the hospital...and

carry on their own private practice there, such suites are not entitled to tax exemption "), aff'd 39 N.Y. 2d 863, 352 N.E. 2d 133, 386 N.Y.S. 2d 216 (1976); Matter of Butterfield Memorial Hospital Association v. Town of Philipstown, 48 A.D. 2d 289, 368 N.Y.S. 2d 852 (2d Dept. 1975)(the hospital's " motivation in erecting the Medical Arts Building was to attract and hold doctors to service the small community. That purpose was achieved...The building, insofar as its tax-exempt status is concerned is a hybrid. Portions of it are used for hospital...purposes...it also contains suites used as offices by doctors in which they conduct their private practices of medicine from which they derive pecuniary benefit...(and) to that extent...is not entitled to an exemption from taxation ")].

How To Measure A Partial Hospital Use Exemption

The Osborn requests that a partial hospital use exemption be based upon revenues²³⁵ while the Respondents suggest that such an exemption be based upon square footage or " Actual Paid Days "²³⁶ or " Total Osborn Available Days "²³⁷. After careful consideration of each of these proposed measures of the significance of The Pavilion in the overall operations of The Osborn, the Court will rely upon square footage as the most objective measure²³⁸ [See

e.g., Matter of Genesee Hospital, supra, at 47 A.D. 2d 47 (" private office space...is not exempt...exact nature of the plans for the ambulatory care unit and *the extent of the space which it would occupy* " [emphasis added]); Matter of Butterfield Memorial Hospital Association, supra, at 48 A.D. 2d 291 (" " the making of proper findings as *to the extent of the area of the Medical Arts Building subject to taxation* " [emphasis added]).

Charitable Use Exemption

The first requirement for a RPTL § 420-a charitable use exemption is that the owner of the subject property be organized exclusively for charitable purposes. A test for a charitable use or organization is set forth in American-Russian Aid Ass'n v. City of Glen Cove, 41 Misc. 2d 622, 626, 246 N.Y.S. 2d 123 (Nassau Sup. 1964)(quoting Matter of MacDowell's Will, 217 N.Y. 454, the Court stated that " ` If the purpose to be attained is personal, private or selfish, it is not a charitable trust. When the purpose accomplished is that of public usefulness unsustained by personal, private or selfish considerations, its charitable character ensures its validity ` ") aff'd 23 A.D.2d 988, 260 N.Y.S.2d 589 (2d Dept 1965) .

It is clear that The Osborn was originally organized for the charitable purpose of caring for indigent aged women and did so for many years. The New Osborn is still " a not-for-profit... organization dedicated to addressing the unique needs of the elderly-for housing, health care and financial security-with a licensed nursing home onsite "²³⁹ and qualifies for tax exempt status under Internal Revenue Code § 501(c)(3). This Court finds that The Osborn has met the first RPTL § 420-a requirement for an exemption from taxation in that it was organized exclusively for charitable purposes. [See Matter of Sayville Manor, Inc. v Assessor of the Town of Islip, N.O.R. Suffolk County Clerk, Index No. 17780/97, Werner, J.].

The Exclusive Use Requirement

The second requirement for exemption from taxation pursuant to RPTL §420-(a) is that the subject property be used exclusively in furtherance of the specified exempt purposes for which the corporation was organized [See e.g., Mohonk Trust v. Board of Assessors of Town of Gardiner, 47 N.Y.2d 476, 483, 418 N.Y.S.2d 763 (1979) (" To determine whether a particular piece of land is exempt under the statute it is necessary to determine first

whether the owner of the land is " organized or conducted " exclusively, or primarily, for an exempt purpose ")]. The term " exclusive " has been held to connote " principal " or " primary " [See e.g., Matter of Symphony Space, Inc. v. Tishelman, 60 N.Y.2d 33, 38, 356 N.Y.S.2d 555 (1983); Association of the Bar of the City of New York v. Lewisohn, 34 N.Y.2d 143, 356 N.Y.S.2d 555 (1974)].

Persons In Need

In order for The Osborn to be entitled to a RPTL § 420(a) charitable use exemption, the property must be shown to limit its use to " persons in need " [Belle Harbor Home of the Sages, Inc. v. Tishelman, 100 Misc. 2d 911, 420 N.Y.S. 2d 343 (Queens Sup. 1981), aff'd 81 A.D. 2d 886, 441 N.Y.S. 2d 413 (2d Dept. 1981); 10 ORPS Opinions of Counsel No. 100)].

New York's Standard: How Many Indigent Elderly Are Cared For?

The Osborn's relies upon a few out-of-state cases [See Presbyterian Homes, Inc. v. Kent County Board of Assessment, 1998 WL 283374 (Del. Super. 1998); Wittenberg Lutheran Village Endowment Corp. v. Lake County Property Tax Assessment Board of

Appeals, 782 N.E. 2d 483 (Ind. Tax Ct. 2003), transfer denied 792 N.E. 2d 49 (Ind. 2003); Appeal of the City of Loconia, 146 N.H. 725, 781 A. 2d 1012 (2001); Fifield Manor v. County of Los Angeles, 188 Cal. App. 2d 1, 10 Cal. Rptr. 242 (1961)²⁴⁰], several Internal Revenue Service Rulings²⁴¹ and its portrayal of itself as a unique facility delivering a continuum of care to elderly senior citizens²⁴² providing a " cost-effective alternative to placement in a nursing home "²⁴³, to justify the restoration of a 100% RPTL § 420-a charitable use exemption.

The law in New York, of course, is otherwise. Within the context of residential health care facilities, nursing homes and adult homes New York courts have consistently interpreted the exclusive charitable use requirement [which includes limiting the property's use to " persons in need "] to require occupancy by large percentages of persons receiving only S.S.I [or in the case of the Osborn an appropriate equivalent would be " charity care " or " scholarship care " provided to Plan "B" residents].

Belle Harbor: 90% S.S.I.

In Belle Harbor, supra, the Petitioner, organized under the Not-For-Profit Corporation Law to operate a charitable corporation, was licensed by the New York State Department of Social Services to operate a residential care facility. Petitioner

provided numerous services to the aged who were unable to live on their own. Approximately 90% of residents in Belle Harbor received Supplemental Security Income [S.S.I.].

The Court in Belle Harbor, *supra*, at 100 Misc. 2d 913-914 held that " the property was primarily used in furtherance of charitable purposes. Ninety percent of the residents have government benefits as their only source of income. The provision of care and services to the indigent elderly on a nonprofit basis is a charitable activity, even though some of the elderly pay for the services with government benefits...because 90% of petitioner's residents receive only government support, the care given to residents capable of paying should be regarded only as ' incidental activity ' not altering petitioner's essentially charitable nature. "

It is clear from an analysis of Belle Harbor, *supra*, that the standard for the charitable exemption requires a finding that a large percentage of Petitioner's residents receive only government [S.S.I.] support, compared with the small percentage of Petitioner's residents who are able to pay for their services with private income.

Jeantet Residence: 97% S.S.I.

In Marino P. Jeantet Residence For Seniors, Inc. v. Comm. of Finance of the City of New York, 105 Misc. 2d 1080, 430 N.Y.S.2d 545, aff'd 86 A.D.2d 671, 449 N.Y.S. 2d 933 (2d Dept 1982), a not-for-profit home for adults had been denied a real property tax exemption by the City of New York. In that case, the Court, noting that the facility involved was indistinguishable from the one in Belle Harbor, *supra*, examined only two categories of tenants, those who received only governmental support and those having private resources. In Jeantet, *supra*, there were 170 permanent residents residing at the premises, and " 4 of whom are privately paid residents ". (Jeantet at 105 Misc.2d 1082). Approximately 97 percent of the residents in Jeantet received S.S.I. assistance.

Sayville Manor: 95% S.S.I.

In Matter of Sayville Manor, Inc. v. Assessor of the Town of Islip, *supra*, at p.4, the same analysis was followed by the trial court when determining whether the property was being primarily used for the charitable purpose for which it was organized. The court took into consideration that " it is undisputed that the Sayville Manor operates without regard to income. Respondent does

not deny that 95 percent of those in residence pay with SSI funds."

Bronxwood Home: 75% S.S.I.

In Matter of Bronxwood Home for the Aged, Inc. v. Tishelman, 184 N.Y.L.J. (No. 30), p.7 (Bronx Sup., August 12, 1980), the court held that "...petitioner's property appears to be used primarily in furtherance of its charitable purposes...Petitioner notes that 75 percent of its residents are so indigent as to qualify for S.S.I. benefits and that the remainder are unlikely to afford private proprietary facilities because they would soon deplete their assets and could then become eligible for S.S.I. benefits. " The court in Bronxwood Home relied on the factual similarity it shared with Belle Harbor, *supra*, particularly the fact that 90 percent of Belle Harbor's residents received S.S.I. benefits.

Adult Home At Erie Station: 51%, 49%, 54% S.S.I.

In Adult Home at Erie Station, Inc., v. City of Middletown, No. 4845/01 (Orange Sup. Ct., August 12, 2003, J. Rosato), a case involving the application of an Adult Home for a 100% tax exemption the Court held that " it is readily apparent that each of the cases cited by petitioner, wherein exemptions were granted, involved a much higher level of indigency than the 58.6% level of indigency, i.e., level of SSI Bed Days, found in the instant case "). In a subsequent post trial decision [Adult Home at Erie Station, Inc., v. City of Middletown, 8 Misc. 3d 1010 (Orange Sup. 2005] the Court held that " 61 out of 124 residents [49.19%] were private pay...for the year 2000, 60 out of 117 residents [51.28%] were private pay...for the year 2001 and 55 out of 118 residents [46.16%] were private pay...for the year 2002... New York courts have interpreted the exclusive charitable use requirement [which includes limiting the property's use to ` persons in need `] to require occupancy by large percentage of persons receiving only S.S.I...request for a full exemption... denied ").

10 ORPS Opinions Of Counsel No: 100

Counsel stated in 10 ORPS Opinions of Counsel No. 100 that

" it appears and remains our opinion that, for a housing project to be exempted pursuant to section 420-a, a large percentage of the clients (tenants) must be in need of and receive a real and substantial charitable benefit ". This ORPS opinion cites Belle Harbor, supra and Marino P. Jeantet, supra for the proposition that " the provision of care and services to the indigent elderly on a nonprofit basis is a charitable activity, even though some of the elderly pay for the services with government benefits and a small percentage are able to pay for the services with private income " .

The Osborn Does Not Deserve A Charitable Use Exemption

The Osborn may have once deserved a charitable use exemption. For example, in 1989 The Osborn was supporting as " charity beneficiaries ", approximately, 63 Plan "B" residents [which did not include, approximately, 19 Assignment residents²⁴⁴] nearly half of its total residents²⁴⁵. However, during the years in dispute the percentage of Plan "B" residents dropped from 11% in 1997 to 6% in 2003²⁴⁶ while the health and wealth of The Osborn's other residents increased dramatically. None of these percentages are sufficient enough to warrant a finding " that a large percentage of the clients must be in need of and receive a real

and substantial charitable benefit ". The Osborn, simply, does not deserve a charitable use exemption.

Authority From Out-Of-State Courts : CCRCs

The Courts of other States have examined CCRCs similar to The Osborn and found them equally undeserving of a charitable use exemption [See e.g., Sunny Ridge Manor, Inc. v. Canyon County, 675 P. 2d 813 (Idaho Sup. 1984)(" In any case, the type of person who needs nursing home care could not pass the entrance qualifications ...is not a charitable corporation "); The Good Samaritan Home of Quincy v. Illinois Department of Revenue, 130 Ill. App. 3d 1036, 86 Ill. Dec. 190 (1985)(" There is no provision mandating that any charity be dispensed to individuals who do not pay or to any destitute member of society in general...primary use of the property...is not for charitable purposes "); Friendship Haven, Inc. v. Webster County Board of Review, 542 N.W. 2d 837 (Iowa 1996)(" We must also consider the claim that the cottages are so integrated with the remainder of the facility that in its ` seamless care scheme ` there is a subsidization of housing and care for the cottage residents...the cottages are not exempt on that basis "); Western Massachusetts Lifecare Corp. v. Board of Assessors of Springfield, 434 Mass.

96, 747 N.E. 2d 97, 105-106 (2001)(" While Reeds Landing has a policy of not displacing a resident solely because the resident later becomes unable to pay the fees, the financial screening criteria are such that, to date, no resident has been unable to meet the monthly fees "); Lasell Village, Inc. v. Board of Assessors of Newtown, 67 Mass. App. Ct. 414, 854 N.E. 2d 119 (2006)(" To the extent elderly persons and society at large are, as Lasell contends, benefitted by its self-described innovative model of continuing care services, the promotion of concepts of active retirement... we conclude that these societal benefits in this context are insufficient to bring Lasell within the class of charities traditionally recognized "); Michigan Baptist Homes and Development Co. v. City of Ann Arbor, 242 N.W. 2d 749 (Mich. Sup. 1976)(" Hillside Terrace does not serve the elderly generally, but rather provides an attractive retirement environment for those among the elderly who have the health to enjoy it and who can afford to pay for it "); Chapel View, Inc. v. Hennepin County, 1988 WL 70657 (Minn. Tax. 1988)(" The \$17,000 paid for the warrant is refunded in all circumstances after the unit is vacated...We conclude that persons with less than moderate wealth have virtually been eliminated from the residence by the requirement of purchasing an admission

warrant "); OEA Senior Citizens, Inc. v. County of Douglas, 185 N.W. 2d 464 (Neb. Sup. 1971)(" We now see no reason why an institution merely because it caters to the needs of the aged and infirm, should be exempt from taxation if someone other than that institution is furnishing the cost of the care and maintenance provided by the institution "); Appeal of Marple Newtown School District, 500 Pa. 160, 455 A. 2d 98 (1983)(" the record is clear that financial security is a prerequisite to the admission of all residents (and that the Village is) a private housing facility which...offers its residents no services beyond those which the residents demonstrate an ability to afford " no charitable use exemption; no hospital use exemption); Christian Home For The Aged, Inc. v. Tennessee Assessment Appeals Commission, 790 S.W. 2d 288 (Tenn. App. 1990)(" Although it is true that a charitable institution does not lose its charitable character and exemption from taxation because financially able patients are required to pay...in this case financially disabled members of the public are effectively excluded from the benefits provided by (CCRC)...exemption of the...property, except for the chapel and nursing facility (denied)"); First Baptist/ Amarillo Foundation v. Potter County Appraisal District, 813 S.W. 2d 192 (Tex. App. 1991)(not tax exempt because

" The primary reason was that the indigency activity of First Baptist in terms of providing charitable housing and medical care was so minute in relation to the total operation that First Baptist would not be purely public charity "); Maplewood Community, Inc. v. Craig, 216 W. Va. 273, 607 S.E. 2d 379 (2004)(" that residents of Maplewood receive priority in being admitted to The Heritage, a nursing home facility...located adjacent to Maplewood ")].

Authority From Out-Of-State Courts: Other Facilities

The Courts of other States have examined other types of senior care facilities similar to The Osborn and also found them equally undeserving of a charitable use exemption [See e.g., Miller County v. Opportunities, Inc., 971 S.W. 2d 781 (Ark. Sup. 1998)(" but we have no showing that any charitable activity is occurring there or that the fees paid by the residents are being devoted to a charitable purpose "); United Presbyterian Association v. Board of County Commissioners, 448 P. 2d 967 (Colo. Sup. 1969)(" and we find that quid pro quo permeates the entire operation...where material reciprocity between alleged recipients and their alleged donor exists-then charity does not "

); United Church of Christ v. Town of West Hartford, 206 Conn. 711, 539 A. 2d 573 (1988)(entrance fees of \$73,000 and monthly fees of \$350 which " support the conclusion that the project is self-supporting "); Mayflower Homes, Inc. v. Wapello County Board of Review, 472 N.W. 2d 632 (Iowa App. 1991)(" It appears to be maintained to provide low-cost elderly housing to those who can generally afford such accommodations...Mayflower...free to provide low-cost housing to the elderly, but it is not free to offer such low-cost housing at the taxpayers' expense when the residents can afford such housing "); Madonna Towers v. Commissioner of Taxation, 167 N.W. 2d 712 (Minn. Sup. 1969)(" It is difficult for us to agree that an elderly person is the beneficiary of a charity under circumstances where he contributes a substantial sum of money to the capital structure of an establishment and in return therefore acquires the right of use and occupancy for life...This arrangement...is more akin to a long-term lease...than to a charitable arrangement "); Hattiesburg Area Senior Services, Inc. v. Lamar County, 633 So. 2d 440 (Miss. Sup. 1994)(" continuum care " facility but without skilled nursing [" on-premises medical staff is not provided "] " their funds are not derived mainly...from private or public charity,,,they mainly rely upon rental receipts to meet of their expenses...the ' charity ' is not dispensed to all who need and apply for it-it is dispensed to those who apply and meet

the financial criteria "); Corcoran v. Carnahan, 669 S.W. 2d 548 (Mo. Sup. 1984) (" (Residents) living ` comfortably would be a more apt expression (and) excludes low-income elderly people from its services...The essence of the charitable natures of homes for the aged is that they accommodate the ability to pay of the less financially fortunate elderly...The Commission correctly concluded that the home's services were effectively denied to a large percentage of the elderly on the basis of finances. Money- and a substantial sum of it-is the qualifying factor for admittance into the home "); Presbyterian Homes of the Synod of New Jersey v. Division of Tax Appeals, 55 N.J. 275, 261 A. 2d 143 (1970) ("Quid pro quo permeates the entire operation "; charitable purpose does not " embrace the care of financially independent elderly persons who alone can qualify for admission to Meadow Lakes "); Riverview Place, Inc. v. Cass County, 448 N.W. 2d 635 (N.D. Sup. 1989) (" When making an application for residency...an individual is required to complete a form detailing...current financial condition and assets...the record does not reflect any evidence ...to indicate that their residents have a demonstrated need for care or charity "); Friendship Manor v. State Tax Commission, 420 P. 2d 77 (Ore. Sup. 1966) (" We will assume, without deciding, that caring from the aging, rich or poor, is a charitable purpose...there is no ground for tax exemption...Its residents are largely persons who can

financially fend for themselves, either collectively or individually, and the government would not be required to provide housing for them "); Hilltop Village, Inc. v. Kerrville Independent School District, 426 S.W. 2d 943 (Tex. Sup. 1968) ("...But it is apparent that Hilltop Village is not accepting residents without regard to their financial circumstances nor is it bound to assume charitable obligations or to engage in dispensing relief to those in need "); Friendship Manor Corp. v. Tax Commission, 26 Utah 2d 227, 487 P. 2d 1272 (1971) (" Where the senior citizen is paying for all of the services he receives and the rental of the apartments is not determined by need, but is determined by what is required to retire the principal and interest on the mortgage, together with all upkeep and operation expenses, no charitable purpose is involved. The state does not have the obligation to provide living accommodations to persons well able and willing to pay for their needs ")].

Mrs. Osborn's Intentions

In determining whether to grant a charitable exemption, the Court may examine a testator's intention to determine whether the organization is in compliance with them. In Valeria Home, Inc. V. Cook, 22 N.Y. 2d 388 (1968), the Court of Appeals affirmed lower court decisions denying a charitable tax exemption where

the petitioner operated a home in a manner different from its benefactor's intentions. In Cook, supra, at 22 N.Y. 2d 390, the benefactor intended the home to house people who could not " afford independent homes or to pay the charges extracted at health resorts or sanitarium ". As noted by the Court of Appeals, the original " convalescent " purpose of the home became " quite incidental " and it " primarily " became a " recreation establishment ". In upholding the removal of the tax exemption, the Court of Appeals considered the benefactor's Will and held " This language clearly indicates that the testator intended that the home provide a place where people recovering and convalescing from periods of ill health would be welcomed. The operations of the home indicates that, if anything, the slightest indication of ill health is sufficient to disqualify a prospective applicant ". Clearly, The Osborn no longer adheres to the intentions of Mrs. Osborn's Will to care for indigent aged women.

Conclusion

Based upon the foregoing the Court denies The Osborn's request for the restoration of a RPTL § 420-a charitable use exemption and grants The Osborn's request for the restoration of a RPTL § 420-a partial hospital use exemption based upon the Pavilion's square footage vis-a-vis the total square footage of

The Osborn for each year in dispute. To the extent the partial hospital use exemption is less than the floor below which this Court may not go then the floor percentage governs.

The foregoing constitutes the Decision and Order of this Court regarding the tax exemption issues raised herein.

Dated: December 30, 2006
White Plains, N.Y.

HON. THOMAS A. DICKERSON
JUSTICE SUPREME COURT

TO: Peter Bergmann, Esq.
Brian T. McGovern, Esq.
Mathew S. Fenster, Esq.
Cadwalader, Wickersham, & Taft
Attorneys for Petitioner
One World Financial Center
New York, N.Y. 10281

John E. Watkins, Esq.
Liane V. Watkins, Esq.
Watkins & Watkins, LLP

Attorneys for Petitioner
175 Main Street
White Plains, N.Y. 10601

Robert A. Weiner, Esq.
Lisa Linsky, Esq.
McDermott Will & Emery LLP
Attorneys for Respondents
340 Madison Avenue
New York, N.Y. 10173-1922

Daniel G. Vincelette, Esq.
Daniel G. Vincelette, P.C.
Attorney for Respondents
12 Everett Road Extension
Albany, N.Y. 12205

ENDNOTES

1. **Intervenor-Respondent's Case:** Presented by Intervenor-Respondent Rye City School District (the "School District") from February 14, 2005 through April 15, 2005; September 15 and 30, 2005; October 24, 2005; December 2, 2005; and January 5, 2006. The School District called the following ten witnesses:

<u>Witness</u>	<u>Dates</u>	<u>Transcript Range</u>
Cheryl Santucci (McDermott, Will & Emery LLP employee)	2/14/05; 2/17/05; 9/15/05; 9/30/05; 10/24/05; 12/2/05; 1/5/06	48-166; 699-821; 8643-8720; 9649- 9717; 9737-9875; 10437-10461; 10851- 10876
Edye McCarthy (Former Rye City Assessor)	2/15-2/16/05	184-281; 396-522
Michael Klemens (Former member of Rye City Planning Commission)	2/15/05	281-391

Nathan Soffio (Chief Financial Officer of The Osborn)	2/18/05; 2/28/05; 3/1/05-3/2/05	860-973; 947-1193; 1217-1325; 1357-1413
John Bowen (Chairman of the Board of Trustees of The Osborn)	3/2/05-3/4/05	1439-1522; 1612- 1704; 1735-1779
Jonathan Spitz (Resident of Rye)	3/3/05	1524-1538
Michael Visci (Resident of Rye)	3/3/05	1539-1554
Jeffrey Blumengold (Member of Weiser LLP)	3/7/05-3/10/05; 4/13/05-4/14/05	1898-2079; 2182- 2260; 2262-2368; 2373-2552; 3320- 3484; 3500-3632
William Hecht (Member of Weiser LLP)	3/11/05; 4/8/05; 4/11/05-4/12/05	2566-2737; 2770- 2851; 2882-3071; 3110-3303
Eugene Principato (President of The Marketing Difference)	4/14/05-4/15/05	3648-3755; 3776-3964

In addition, the School District introduced portions of the deposition testimony of The Osborn's former Marketing Director, Ruth Bush (2/14/05 Tr. 120-167; 2/16/05 Tr. 483-498); Mark Zwerger (2/16/05 Tr. 596-626; 2/17/05 Tr. 641-668); and Nathan Soffio (5/2/06 Tr. 12148-12156).

The School District introduced Exhibits 1-269 (non-consecutive) into evidence during its case on the exemption issue.

Argument on The Osborn's Nonsuit Application: April 21, 2005
(Tr. 3966-4025)

The Osborn's Case: Presented from May 10, 2005 through September 15, 2005 and September 30, 2005. The Osborn called the following seven witnesses:

<u>Witness</u>	<u>Dates</u>	<u>Transcript Range</u>
Mark Zwerger (Chief Executive Officer of The Osborn)	5/10/05-5/13/05; 5/16/05-5/17/05	4067-4252; 4273- 4435; 4440-4620; 4622-4818; 4820- 5042; 5046-5117
Dr. William Martimucci (Medical Director of The Osborn)	5/17/05-5/19/05; 6/21/05; 6/23/05	5133-5230; 5233- 5403; 5405-5638; 5869-6020; 6034- 6166
Kathy Lonergan (Clinical Operations Manager of The Osborn)	6/20/05	5640-5860
Lori Dillon (Paralegal with Cadwalader, Wickersham & Taft LLP)	6/27/05; 8/9/05; 8/12/05; 8/29/05	6211-6263; 7570- 7597; 7607-7645; 7791-7836
Janet Malang (Sterling Park Manager at The Osborn)	6/27/05-6/30/05; 7/1/05; 7/7/05; 9/30/05	6264-6337; 6354- 6503; 6516-6587; 6598-6753; 6777- 6915; 6930-7029; 9579-9648
Patrick Donnellan (Certified Public Accountant)	7/7/05-7/8/05; 8/8/05-8/9/05	7029-7095; 7112- 7243; 7270-7438; 7448-7569
Gail Kohn (Principal of Linking Partners, LLC)	8/12/05; 8/29/05- 8/31/05; 9/13/05- 9/14/05	7656-7771; 7775- 7791; 7837-7918; 7922-8073; 8091- 8283; 8293-8425; 8446-8550

The Osborn introduced Exhibits A-ZZZZ (non-consecutive) into evidence during its case on the exemption issue.

2. The Osborn's Case: Presented from September 19, 2005 through September 29, 2005 as follows:

<u>Witness</u>	<u>Dates</u>	<u>Transcript Range</u>
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Bob Sterling 9/19/05; 9/26/05- 8742-8906; 8929-
 (Principal of 9/29/05 9078; 9101-9239;
 Sterling Appraisals, 9274-9371; 9393-9534
 Inc.)

In addition to Mr. Sterling's appraisal (Ex. BBBB-1, BBBB-2), The Osborn introduced Exhibits AAAAA-CCCCC-1 (non-consecutive) into evidence during its case on valuation.

Intervenor-Respondent's Case: Presented by the School District from October 24, 2005 through May 1, 2006 as follows:

<u>Witness</u>	<u>Dates</u>	<u>Transcript Range</u>
Noreen Whitty (Rye City Assessor)	12/2/05	10483-10505
Gerald Rasmussen (Real Estate Appraiser with Cushman & Wakefield)	10/24/05- 10/25/05; 11/7/05; 12/2/05; 12/8/05; 1/6/06; 1/11/06; 2/2/06; 2/6/06-2/8/06; 4/3/06; 4/11/06- 4/12/06; 5/1/06	9917-9934; 9940- 10107; 10113-10227; 10505-10608; 10617- 10814; 10943-11085; 11088-11188; 11195- 11292; 11295-11394; 11418-11536; 11558- 11682; 11705-11830; 11835-11983; 11987- 12083; 12087-12132

In addition to Mr. Rasmussen's appraisal (Exs. 270, 271) (as redacted in Court on November 28, 2005), the School District introduced Exhibits 273-289 (non-consecutive) into evidence during Respondent's case on valuation.

Court Exhibits 1 through 17 were marked during the trial.

3. See Miriam Osborn Memorial Home Association v. The Assessor of the City of Rye, 11 Misc. 3d 1065 (West. Sup. 2006) (admissibility of hotel appraisals); Miriam Osborn Memorial Home Association v. The Assessor of the City of Rye, 11 Misc. 3d 1059 (West. Sup. 2006) (admissibility of documents downloaded from the New York State Department of Health and the U.S. government medicare websites); Miriam Osborn Memorial Home Association v. The Assessor of the City of Rye, (Misc. 3d 1019, 800 N.Y.S. 2d 909 (2005) (admissibility of an ORPS Salesweb data compilation); Miriam Osborn Memorial Home Association v. The Assessor of the City of Rye, 8 Misc. 3d 1008 (West. Sup. 2005) (motion to quash trial subpoena for accountant's work papers); Miriam Osborn Memorial Home Association v. The Assessor

of the City of Rye, 7 Misc. 3d 1004 (West. Sup. 2005) (admissibility of testimony of a Law Professor); Miriam Osborn Memorial Home Association v. The Assessor of the City of Rye, No: 17175/97, Slip Op. April 7, 2005 (admissibility of ancient documents); Miriam Osborn Memorial Home Association v. The Assessor of the City of Rye, 6 Misc. 3d 1035, 800 N.Y.S. 2d 350 (2005) (burden of proof regarding restoration of hospital exemption under RPTL § 420-a); Miriam Osborn Memorial Home Association v. The Assessor of the City of Rye, No. 17175/97, Slip Op. February 3, 2005 (burden of proof regarding restoration of charitable use exemption under RPTL 420-a); Miriam Osborn Memorial Home Association v. The Assessor of the City of Rye, 6 Misc. 3d 1011 (West. Sup. 2005) (motion to preclude evidence of resident health); Miriam Osborn Memorial Home Association v. The Assessor of the City of Rye, 4 Misc. 3d 1009 (West. Sup. 2004) (scope of appraisal audit pursuant to 22 NYCRR § 202.59[©]).

4.P. Memo. at pp. 29-30; R. Memo. at pp. 53-62;

Delaware: Presbyterian Homes, Inc. v. Kent County Board of Assessment, 1998 WL 283374 (Del. Super. 1998) (" PHI operates a nursing home and retirement complex (the Village) (which) originally consisted of a nursing center with 100 beds...an adjoining 17 acre parcel was developed into an independent living area with 108 units consisting of 36 cottages and 72 apartments together with a community center...The entire operation is integrated into a campus...The nursing care facility affords medical services to people residing in the independent living units...Although the entrance fees to the Independent Living facility are high, they do not strip the facility of its charitable purpose. **As the record demonstrates the fees are not enough to allow the facility to recover its large outlay and it is in the subsidy that PHH must provide that one may find an indication of its charitable purpose; tax exempt** [emphasis added]).

Idaho: Sunny Ridge Manor, Inc. v. Canyon County, 675 P. 2d 813 (Idaho Sup. 1984) (" The center includes residential units...recreational facilities...a library, a convenience store, a barber and beauty shop and a thirty-bed intermediate health care facility...The first residents purchased a ' lifetime residency contract ' for a one-time payment of \$18,000 (a ' founder's fee (later increased to \$25,000)...monthly charge of \$385.00...To qualify for residency a person must be fifty-five or older, ambulatory, able to take care of himself...We find it laudable that Sunny Ridge provides the care it does...there is

nothing in the record to indicate that this benefit of reduced costs is directed toward those [that] particularly need it. The savings may well benefit primarily persons who could afford to pay higher costs. ***In any case, the type of person who needs nursing home care could not pass the entrance qualifications...is not a charitable corporation*** " [emphasis added]; **not tax exempt**).

Indiana: Wittenberg Lutheran Village Endowment Corp. v. Lake County Property Tax Assessment Board of Appeals, 782 N.E. 2d 483 (Ind. Tax Ct. 2003), transfer denied 792 N.E. 2d 49 (Ind. 2003)(" Wittenberg Lutheran Village (is) an integrated retirement community (and) includes a nursing home, an assisted living facility...and eighteen buildings, each containing four residential units... known as the ' Villas '...The Villas cater to independent, active seniors...because seniors require different types of care at different stages of their later years, the Village offers a ' continuum of care to meet those varying needs...the needs of senior citizens are not exclusively financial, nor are they merely health-related. Indeed, seniors also need a sense of community and involvement. Seniors need a sense of security and safety. Seniors need social interaction. Seniors need supportive services that enable them to live more independently for a longer period of time. Seniors need to function at active levels. ***The Villas meet all these needs and are thus owned, occupied and used for a charitable purpose*** " ; [emphasis added]; **tax exempt**).

Illinois: The Good Samaritan Home of Quincy v. Illinois Department of Revenue, 130 Ill. App. 3d 1036, 86 Ill. Dec. 190 (1985)(" The Home operates a nursing home...licensed by the Illinois Department of Public Health...also operates a cottage program...The Home finances the construction of the cottages by charging a prospective resident the full construction cost of the cottage on a pre-paid rent basis...The monthly rent (varies from \$260 to \$340)...We conclude that the fact that most applicants are required to pay a substantial amount of ' prepaid rent ' clearly represents an obstacle to the receipt of the benefits offered by the Home...***There is no provision mandating that any charity be dispensed to individuals who do not pay or to any destitute member of society in general...primary use of the property...is not for charitable purposes*** " [emphasis added]; **not tax exempt**).

Iowa: Friendship Haven, Inc. v. Webster County Board of

Review, 542 N.W. 2d 837 (Iowa 1996)(partial tax exemption granted to CCRC including skilled nursing facility with the exception of cottages occupied by independent living residents; " Friendship Haven is a continuing care retirement community...and until recently, the entire facility has been exempt from property taxes...Friendship Haven is comprised of several buildings...The Tompkins Memorial Health Center offers a full range of professional services...All care is by a professional nursing staff under the direction of a resident physician... The concept of the cottage is to further the ability of the occupants to live independently...as time goes on, these individuals can move from the independent atmosphere of the cottages to one of the direct care facilities...entrance fee(s)...range from \$35,000 to \$55,000 per unit...a monthly fee is charged, which ranges from \$340 to \$390...the occupants of the cottages are not the recipients of charity...**We must also consider the claim that the cottages are so integrated with the remainder of the facility that in its ' seamless care scheme ' there is a subsidization of housing and care for the cottage residents...the cottages are not exempt on that basis "** [emphasis added]).

Massachusetts: Western Massachusetts Lifecare Corp. v. Board of Assessors of Springfield, 434 Mass. 96, 747 N.E. 2d 97, 105-106 (2001)(" Western constructed a continuing care retirement community (which) provides housing and services to elderly residents in 117 ' independent living units ' (ILUs), fifty-four ' assisted living units ' (ALUs) and a forty-bed skilled nursing facility (SNF). Common facilities include formal and informal dining rooms, recreation rooms, lounges, library, beauty and barber shop, convenience store, coffee shop and gift shop... Residents of the ILU and those in the ALU with the LifeCare Benefit are entitled to transfer to the SNF if such a transfer becomes necessary...The initial entrance fees for ILUs range from \$100,200 (for the smallest one-bedroom apartment) to \$230,500 (for a two-bedroom unit with den and balcony). These fees are partially refundable when a resident vacates...with the refund amount declining by one per cent of each month of residence...The monthly service fees range from \$1,325...to \$2,050...plus additional \$475 a month for any second occupant...Applicants must demonstrate that they have sufficient assets with which to pay the entrance fee and that, from remaining assets, they will have sufficient stable income to meet the ongoing monthly service fees...**While Reeds Landing has a policy of not displacing a resident solely because the resident later becomes unable to pay the fees, the financial screening criteria are such that, to**

date, no resident has been unable to meet the monthly fees " [emphasis added]; **not tax exempt**); Lasell Village, Inc. v. Board of Assessors of Newtown, 67 Mass. App. Ct. 414, 854 N.E. 2d 119 (2006)(" The Village is located on a thirteen-acre parcel of land that Lasell leases from the college. It is a fourteen-building complex containing a total of 162 independent living units (ILUs) as well as a forty-four bed nursing facility called Lasell House. Each ILU is fully functional as a private residence...Lasell's residential service model contemplated that persons entering its retirement community would be lifetime residents, it provided residents with a variety of benefits, and a continuum of care arrangements up to and including long-term care in Lasell House...an applicant was required to be...at least sixty-five years of age and in sufficiently good health to be able to perform without assistance the activities of daily living...entrance fees ranged from \$197,000 to \$790,000 and basic monthly service fees totaled between \$1,733 to \$4,751. Prospective residents were required to demonstrate ownership assets valued at twice the amount of entrance fee associated with the selection of any particular ILU and receipt of stable income in an amount equal to twice the amount of the monthly fees...**To the extent elderly persons and society at large are, as Lasell contends, benefitted by its self-described innovative model of continuing care services, the promotion of concepts of active retirement...we conclude that these societal benefits in this context are insufficient to bring Lasell within the class of charities traditionally recognized "** [emphasis added]; **not tax exempt**).

Michigan: Michigan Baptist Homes and Development Co. v. City of Ann Arbor, 242 N.W. 2d 749 (Mich. Sup. 1976)(" The residence (Hillside Terrace) facility consists of 55...apartments...equipped with air-conditioning, wall-to-wall carpeting...other features (include) library, chapel, solariums...There is also a 23-bed health center which has been licensed as a nursing home... (new residents pay) a life-lease fee (ranging from \$8,000 to \$20,000)...each resident pays a monthly service charge...**Hillside Terrace does not serve the elderly generally, but rather provides an attractive retirement environment for those among the elderly who have the health to enjoy it and who can afford to pay for it "** [emphasis added]; **not tax exempt**).

Minnesota: Chapel View, Inc. v. Hennepin County, 1988 WL 70657 (Minn. Tax. 1988)(" The facility consists of a nursing home known as the Chapel View Care Center...and the apartments, a

physically connected residence for elderly citizens...Petitioner developed a plan for a housing facility which would provide the supervision and medical assistance required by many elderly persons, while at the same time maintaining their independence and privacy...Persons entering into the apartments are required to own an admission warrant...**The \$17,000 paid for the warrant is refunded in all circumstances after the unit is vacated...We conclude that persons with less than moderate wealth have virtually been eliminated from the residence by the requirement of purchasing an admission warrant** " [emphasis added]; not tax exempt).

Nebraska: OEA Senior Citizens, Inc. v. County of Douglas, 185 N.W. 2d 464 (Neb. Sup. 1971)(senior residence and " health center (the Center)...There are no surgical facilities...While Center is maintained for the welfare of residents, all services rendered therein...are billed to those receiving such services...Can Manor be classed as a charitable institution?...**We now see no reason why an institution merely because it caters to the needs of the aged and infirm, should be exempt from taxation if someone other than that institution is furnishing the cost of the care and maintenance provided by the institution** " [emphasis added]; not tax exempt).

New Hampshire: Appeal of the City of Loconia, 146 N.H. 725, 781 A. 2d 1012 (2001)(" The Home operates a large elderly housing complex...including independent living, assisted living and nursing care facilities...the independent living units ' [are] one of the main ' money engines' generating funds necessary to carry out [the] Home's legislative purpose. Just as fund raising is the lifeblood of most charitable organizations, cost shifting at [the] Home provides a significant source of funds for providing charitable assistance to older residents requiring intensive assisted or nursing care services...**the Home's independent living units, assisted living units and nursing care facility, ' work in concert to fulfill [its] charitable mission** " [emphasis added]); tax exempt).

Pennsylvania: Appeal of Marple Newtown School District, 500 Pa. 160, 455 A. 2d 98 (1983)(" retirement village " consisting of " Country Homes ", apartments and " Medical Center which contains 25 beds...open primarily to residents "; entry fees from \$22,000 to 59,000 and monthly fees from \$460 to \$1241; residents must be in good health, " demonstrate an ability to afford the substantial entrance fee and monthly charges (and) must sign a ' Residence and Care Agreement (which gives the Village) the

right to require a resident to vacate...if the resident fails to pay...the Village has only once provided a subsidy to a resident...*the record is clear that financial security is a prerequisite to the admission of all residents (and that the Village is) a private housing facility which...offers its residents no services beyond those which the residents demonstrate an ability to afford "* [emphasis added]; no charitable use exemption; no hospital use exemption; not tax exempt).

Tennessee: Christian Home For The Aged, Inc. v. Tennessee Assessment Appeals Commission, 790 S.W. 2d 288 (Tenn. App. 1990)(" The Village provides three types of living arrangements depending upon the mental and physical conditions of the resident ...independent living reside in either the towers, townhouses or cottages. Persons requiring some assistance...live in efficiency apartments. And those persons who need nursing care reside in the...101 bed state-licensed nursing home...Residents of the towers...make a one time nonrefundable donation to the Village of \$62,500 to \$67,500 which guarantees lifetime healthcare (and) a monthly maintenance fee (of \$60 to \$80)...They also pay a pro-rata share of the real property taxes. Residents of the efficiency apartments...pay rent of \$485 to \$780 per month...*Although it is true that a charitable institution does not lose its charitable character and exemption from taxation because financially able patients are required to pay...in this case financially disabled members of the public are effectively excluded from the benefits provided by (CCRC)...exemption of the...property, except for the chapel and nursing facility (denied)"*).

Texas: First Baptist/Amarillo Foundation v. Potter County Appraisal District, 813 S.W. 2d 192 (Tex. App. 1991)(" Park Place Towers (is) an independent living and nursing center for the elderly...entrance fee was based on square footage occupied ...and ranged from \$46,800...to \$180,000...monthly service fee ranged from \$520 to \$1,170 per month; *not tax exempt because " The primary reason was that the indigency activity of First Baptist in terms of providing charitable housing and medical care was so minute in relation to the total operation that First Baptist would not be purely public charity "* [emphasis added]).

West Virginia: Maplewood Community, Inc. v. Craig, 216 W.

Va. 273, 607 S.E. 2d 379 (2004)(" Maplewood...a not-for-profit West Virginia corporation that is exempt from federal income tax, operates a senior community comprised of two types of living facilities...eighty-four independent living apartments (and another building) comprised of forty-four assisted living units...*that residents of Maplewood receive priority in being admitted to The Heritage, a nursing home facility...located adjacent to Maplewood* " [emphasis added]; not tax exempt).

5. For other tax exemption cases not involving CCRCs but a variety of residential care facilities for the elderly see:

Arkansas: Miller County v. Opportunities, Inc., 971 S.W. 2d 781 (Ark. Sup. 1998)(" apartment complex occupied by persons aged 55 and older...All Meadowbrook Place residents pay a monthly fee...\$650.00...evidence that Opportunities, Inc. has lost money on its operation of Meadowbrook Place, *but we have no showing that any charitable activity is occurring there or that the fees paid by the residents are being devoted to a charitable purpose* " [emphasis added]; not tax exempt).

California: Fifield Manor v. County of Los Angeles, 188 Cal. App. 2d 1, 10 Cal. Rptr. 242 (1961)(" home for the aged...The test is not found in the question of what financial ability does the recipient possess, but what are his needs, alleviation of which constitutes a worthy social value. We apprehend that the financial test becomes pertinent only when the occupants of an old age home pay more than the cost to the home of what it furnishes them...a home for the aged which caters to wealthy persons and furnishes them those services and care needed by the old and infirm, rich or poor, does not cease to be a charitable institution so long as its charges do not yield more than actual cost of operation "; charitable use; tax exempt. Note: The Appellate Court found that the factual findings of lower Court that " Fifield Homes are operated ` as a luxurious apartment hotel for the aged ` and that ` the services furnished and the charges exacted...for admission to its apartment hotel are not within the reach of persons of limited means, or of persons in modest circumstances ` are not supported by the evidence "; both of these factual findings apply to The Osborn;).

Colorado: United Presbyterian Association v. Board of County Commissioners, 448 P. 2d 967 (Colo. Sup. 1969)(" Highland West (operates) a home for physically independent elderly persons who pay for their tenancy...Equally commendable is the sponsor's desire to provide a congenial environment for elderly persons...

We have carefully examined the record...and we find that *quid pro quo permeates the entire operation...where material reciprocity between alleged recipients and their alleged donor exists-then charity does not* " [emphasis added]; not tax exempt).

Connecticut: United Church of Christ v. Town of West Hartford, 206 Conn. 711, 539 A. 2d 573 (1988)(*elderly housing project consisting of residential units with entrance fees of \$73,000 and monthly fees of \$350 which* " support the conclusion that the project is self-supporting " [emphasis added]; not tax exempt).

Iowa: Mayflower Homes, Inc. v. Wapello County Board of Review, 472 N.W. 2d 632 (Iowa App. 1991)(" The purpose of the facility is to provide homes for aging people...Myers consistently loses money...Myers does not provide any health care but provides a type of intermediate care between living at home and a nursing home. Residents...are charged a one time occupancy fee (\$18,000 to \$50,000) and monthly maintenance fees (\$200 to \$300)...It appears to be maintained to provide low-cost elderly housing to those who can generally afford such accommodations...Mayflower...free to provide low-cost housing to the elderly, but it is not free to offer such low-cost housing at the taxpayers' expense when the residents can afford such housing " [emphasis added]; not tax exempt).

Minnesota: Madonna Towers v. Commissioner of Taxation, 167 N.W. 2d 712 (Minn. Sup. 1969)(proposed retirement apartment complex (intended to serve) " elderly persons who are financially able to make a substantial initial investment (life residence fee ranges from \$9,900 to \$19,900) with monthly payments (\$175 to \$275) thereafter in return for which an attractive, social and therapeutic environment is provided...It is difficult for us to agree that an elderly person is the beneficiary of a charity under circumstances where he contributes a substantial sum of money to the capital structure of an establishment and in return therefore acquires the right of use and occupancy for life...This arrangement...is more akin to a long-term lease...than to a charitable arrangement " [emphasis added]; not tax exempt).

Mississippi: Hattiesburg Area Senior Services, Inc. v. Lamar County, 633 So. 2d 440 (Miss. Sup. 1994)(" continuum care " facility but without skilled nursing [" on-premises medical staff is not provided "] " their funds are not derived

mainly...from private or public charity,,,they mainly rely upon rental receipts to meet of their expenses...the ' charity ' is not dispensed to all who need and apply for it-it is dispensed to those who apply and meet the financial criteria " [emphasis added] ; not tax exempt).

Missouri: Corcoran v. Carnahan, 669 S.W. 2d 548 (Mo. Sup. 1984) (" retirement home...contains residential and non-acute medical care facilities with various service and recreational facilities... (Residents) must be 62 years of age or older, in reasonably good health and able to care for themselves...monthly fee of between \$358 and \$530...(Entrance fees) of between \$20,000 and \$40,000...(Residents) living ' comfortably would be a more apt expression (and) excludes low-income elderly people from its services...The essence of the charitable natures of homes for the aged is that they accommodate the ability to pay of the less financially fortunate elderly...The Commission correctly concluded that the home's services were effectively denied to a large percentage of the elderly on the basis of finances. Money- and a substantial sum of it-is the qualifying factor for admittance into the home " [emphasis added] ; not tax exempt).

New Jersey: Presbyterian Homes of the Synod of New Jersey v. Division of Tax Appeals, 55 N.J. 275, 261 A. 2d 143 (1970) (" Meadow Lakes Village consists of 23 apartment buildings with a total of 221 units most of which are garden apartments with various recreational facilities including bowling greens; residents pay founder's fees ranging from \$12,000 to \$43,000 and monthly fees from \$205 to \$365; of the health care center's 65 available beds only 17 occupied by residents..." *Quid pro quo permeates the entire operation* "; charitable purpose does not " embrace the care of financially independent elderly persons who alone can qualify for admission to Meadow Lakes " [emphasis added] ; no charitable exemption; no hospital exemption).

North Dakota: Riverview Place, Inc. v. Cass County, 448 N.W. 2d 635 (N.D. Sup. 1989) (" Riverview Place is a modern, minimum-care residential facility for the elderly (without a skilled nursing facility)...formerly used as a convent... Occupancy fees...range from between \$850 ro \$1,205 per month... *When making an application for residency...an individual is required to complete a form detailing...current financial condition and assets...the record does not reflect any evidence ...to indicate that their residents have a demonstrated need for care or charity* " [emphasis added] ; not tax exempt).

Oregon: Friendship Manor v. State Tax Commission, 420 P. 2d 77 (Ore. Sup. 1966) (" (the Manor is) a retirement home...The principal money raising device was the founder's fee paid by those who wished to have a room in the Manor. Initially, the fee was \$5,000 for a single person (and) may be partially refunded if a resident leaves...the Manor (also) provides board and health care...The Manor does in a few instances pay all or part of the founder's fee and monthly care charges for persons unable to pay...most of the residents pay their own way...We will assume, without deciding, that caring from the aging, rich or poor, is a charitable purpose...there is no ground for tax exemption...Its residents are largely persons who can financially fend for themselves, either collectively or individually, and the government would not be required to provide housing for them " [emphasis added]; not tax exempt).

Texas: Hilltop Village, Inc. v. Kerrville Independent School District, 426 S.W. 2d 943 (Tex. Sup. 1968) (" Hilltop Village is a single one-story building development complex...providing a home for the aged...the activity of providing facilities to meet the special residential requirements of the aged may qualify an institution for tax exemption as one of purely public charity under circumstances where...aid is dispensed to those in sickness or distress ` without regard to poverty or riches of the recipient `...But it is apparent that Hilltop Village is not accepting residents without regard to their financial circumstances nor is it bound to assume charitable obligations or to engage in dispensing relief to those in need " [emphasis added]; not tax exempt).

Utah: Friendship Manor Corp. v. Tax Commission, 26 Utah 2d 227, 487 P. 2d 1272 (1971) (housing project for elderly persons with no skilled nursing facility; " The Manor includes a dining room, library...beauty shop, lounge and recreation areas...In renting apartments plaintiffs make an extra charge for balconies ...tenants must be ambulatory...The Friendship Manor does not accept tenants if they are not financially responsible to pay the expenses and maintain the standard of living which is required... While the care of the aged may well be a state function age alone does not make one a subject of charity. Where the senior citizen is paying for all of the services he receives and the rental of the apartments is not determined by need, but is determined by what is required to retire the principal and interest on the mortgage, together with all upkeep and operation expenses, no charitable purpose is involved. The state does not have the obligation to provide living accommodations to persons well able

and willing to pay for their needs " [emphasis added]; not tax exempt) .

6. See e.g.,

Hawaii: Matter of the Tax Appeal of Central Union Church Arcadia Retirement Residence, 63 Haw. 199, 624 P. 2d 1346 (1981)(" retirement residence that provides housing, meals, limited nursing care and other essential services to enable its elderly residents to live independently (operates with a " deficit of approximately \$1,000,000 (per annum) ")...only those elderly persons who are able to pay established charges and also are ambulatory and reasonably healthy are considered for admission...residents execute ` lifetime care agreements `...and pay...entrance fees (which) represent payments for lifetime leases of apartments...Residents are also assessed monthly service fees...The elderly have been recognized as a disadvantaged and distressed group with needs calling for special attention. Poverty is ` only one form of distress to which the elderly as a class are particularly susceptible `...We are also influenced in this regard by a realization that the tax in this case would, in all probability, be shifted forward to Arcadia's aged residents...the primary, if not exclusive, purpose of the relevant transactions is to further Arcadia's objective of providing housing and other services for elderly persons and not to produce ` income `"; **entrance and monthly service fees not subject to excise taxes) .**

7. See e.g.,

North Carolina: Southminster, Inc. v. Justus, 119 N.C. App. 669, 459 S.E. 2d 793 (1995)(" Plaintiffs (operate) continuing care facilities...providing health care and assistance in living to the elderly and infirm...The entrance fees at The Pines range from \$35,800 for a small efficiency apartment to \$115,500 for a large cottage while the monthly service fees for such accommodations range from \$976 to \$1,524...The average annual income of the residents...was \$43,000 while their average net worth was approximately \$444,000...The natural and ordinary meaning of ` charitable ` is sufficiently broad to include aid and assistance provided for the elderly or infirm without regard to individual poverty. ` **The concept of charity is not confined to the relief of the needy and destitute...Plaintiffs are clearly engaged in an humane and philanthropic endeavor to aid and assist the rapidly growing class of elderly citizens of this State, and**

their activities certainly benefit the larger community which only recently has come to realize the problems associated with an aging population...plaintiff are...charitable organization "
[emphasis added]; **exempt for sales and use taxes**).

8. See e.g.,

Connecticut: Falls Church Group, Ltd. v. Tyler, Cooper and Alcorn, LLP, 89 Conn. App. 459, 874 A. 2d 266 (2005)(vexatious litigation action against law firm for bringing action on behalf of residents of bankrupt CCRC dismissed; " Retirement Centers of America (RCA) entered into a consulting agreement...with East Hill Woods, Inc. (EH) to provide consulting and marketing services...in connection with the development of a continuing care retirement community...(RCA) had among its marketing objectives the encouragement of prospective residents to enter into residence agreements (which featured) an entry fee, which ranged from \$117,000 to more than \$300,000, entitled residents to lifetime use of their living unit and unlimited nursing care if they could no longer live independently. When residents left the community, died or sold their units, they or their estates would, subject to certain conditions and exceptions, receive a refund of 94 percent of the entrance fee ").

Illinois: Jackim v. CC-Lake, Inc., 363 Ill. App. 3d 759, 842 N.E. 2d 1113, 299 Ill. Dec. 761 (2005)(" CC-Lake, Inc....holds a permit under the Illinois Life Care Facilities Act...to contract to provide at the Glen a continuum of care known as ' life care ' to individuals who are at least 62 years old...In addition to the independent living units, the Glen will also have a ' care center ' which will offer (1) private suites for memory support, (2) assisted living residences and (3) private, skilled nursing suites "; claims of residents in a class action alleging violation of Security Deposit Interest Act dismissed).

New Jersey: Seabrook Village v. Murphy, 371 N.J. Super. 319, 853 A. 2d 280 (2004)(" **Erickson Retirement Communities... operates a continuing care retirement community (and) offers three types of living arrangements for its residents: (1) Independent Living Units; (2) Assisted Living Units; and (3) Care Center Units** "; residence and care agreement which allowed CCRC to discharge resident by giving only 60 day notice void; " we now hold that a provider or operator of a continuing care facility, seeking to involuntarily remove or discharge a resident, must establish ' just cause ' as that term is defined in N.J.S.A. 52:27D-344d ").

9. See e.g.,

Massachusetts: The Willows at Westborough v. Board of Assessors, 60 Mass. App. Ct. 1121, 804 N.E. 2d 963 (2004) (" the Willows was the assessed owner of...a continuing care retirement community...that provides a wide range of housing and care options to senior citizens (including independent living and assisted living units); **assessments upheld**).

10. I.R.S. Rev. Rul. 72-124, 1872 WL 30720 (1972) (" Advice has been requested whether an organization...is operated for charitable purposes...The organization was formed under the sponsorship of leaders of a church congregation...for the purpose of establishing and operating a home for the aged...It provides...limited nursing care and other services and facilities needed to enable its elderly residents to live safe, useful and independent lives...its operating funds are derived principally from fees charged for residence...entrance fee is charged upon admission with monthly fees charged thereafter...organization ordinarily admits only those who are able to pay its established rates...(The term) charitable...includes the relief of the poor and distressed or of the underprivileged...However, it is not generally recognized that the aged, apart from consideration of financial distress alone, are also as a class highly susceptible to other forms of distress in the sense they have special needs (which) include suitable housing, physical and mental health care...Satisfaction of these special needs...may in the proper context constitute charitable purposes or functions even though direct financial assistance in the sense of relief of poverty may not be involved...(if it meets the elderly's " need for housing, need for health care and the need for financial security.

The need for housing will generally be satisfied if the organization provides residential facilities that are specifically designed to meet (the) needs of the elderly.

The need for health care will generally be satisfied if the organization either directly provides some form of health care or...maintains some continuing relationship with other (health care providers).

The need for financial security...will generally be satisfied if two conditions exist. First, the organization must be committed to an established policy...or maintaining in residence any persons who become unable to pay their regular charges. This may be done by utilizing the organization's own reserves, seeking funds from local and Federal welfare units, soliciting funds from its sponsoring organization, its members, or the general public...As to the second condition respecting the

provision of financial security, the organization must operate so as to provide its services to the aged at the lowest feasible cost (e.g.)...an organization makes some part of its facilities available at rates below its customary charges for such facilities to persons of more limited means that its regular residents " [emphasis added]).

11. I.R.S. Rev. Rul. 72-209, 1992 WL 29772 (1972)(" The organization was formed to provide low cost home health care on a nonprofit basis to the people of the community. The organization's services are available to the general public. It provides professional nursing services and other therapeutic services to patients (elderly people) in the homes...*By providing home nursing and therapeutic care...the organization is serving many of the same health needs of the community that hospitals have traditionally served, and, therefore is promoting health within the meaning of the general law of charity " [emphasis added]).*

12. I.R.S. Rev. Rul. 79-18, 1979 WL 50829 (1979)(" organization ...provides specially designed housing to elderly persons (who pay) fees charged for residence in the facility. *The organization admits as tenants only elderly persons who are able to pay the full stated rental charges (which) are set at a level within the financial reach of a significant segment of the community's elderly persons. However, once persons are admitted...the organization is committed by established policy to maintaining them as residents, to the extent it is able, even if they subsequently become unable to pay its monthly charges. It effectuates this policy by maintaining such individuals out of its own reserves, by seeking whatever support in available under local and Federal welfare programs, by soliciting contributions from the general public [emphasis added] ...The organization provides services to its elderly residents at the lowest feasible cost...Thus, when an organization...provides specially designed housing...that is within the financial reach of a significant segment of the community's elderly, and when the organization commits itself to operating such housing at the lowest feasible cost...and to maintaining in residence those tenants who become unable to pay its monthly fees, such organization is operated to relieve the major forms of distress to which the elderly are susceptible ").*

13. I.R.S. PLR 200150038, 2001 WL 1593205 (2001)(organization operates " a retirement home for elderly (which includes) a 40-

bed medical clinic, which is no longer in use. (organization) proposes that a fee for services plan be implemented to accommodate those persons who would like to be residents... without assigning their assets and income to it...a daily fee (would also be charged)...*Implementation of the proposed fee for services plan will not jeopardize the tax-exempt status of (the organization [emphasis added])* " .

14. I.R.S. PLR 200437036, 2004 WL 2016258 (2004) (" Q has continued to own and operate senior living center consisting of independent living units, assisted living units and a skilled nursing facility...this facility provides for the varying levels of care that elderly residents may need...*A recent market study...shows that Q's independent living facility...is affordable to 62% of the households with residents age 75 or over in its primary market area...housing for the elderly may be a charitable purpose, even if the residents are not in financial distress. Charitable housing for the elderly must accommodate the special physical needs of the elderly, and provide healthcare and financial security...Q has demonstrated that its facility is reasonably available to a significant portion of the elderly in the community [emphasis added]* ") .

15. I.R.S. GCM 37101, 1977 WL 46067 (1977) (" You also asked whether a lavish facility which is limited only to upper income individuals rather than a broad segment of the elderly would be prevented for that reason from qualifying for exemption under Code § 501(c)(3). We do not believe that the lavishness of the facility is the determinative factor. Rather, we think the proper test is whether the facility is reasonably available to the elderly members of the community. That is if the various fees charged are low enough that a significant portion of the elderly community can avail itself of the facility, the the organization will qualify...This test is grounded in the underlying basis for granting charitable exemption: *That the charitable organization is devoted to purposes which are beneficial to the community. If the fees charged are so high that the facility is not reasonably available to the elderly in the community because only an insignificant portion of that group can afford to avail itself of the facility, then we do not believe that the benefit to the community would be sufficient to warrant the organization's exemption...It should be noted that this test is separate from the ' lowest feasible cost ' standard set forth in Rev. Rul. 72-124...If the organization were to erect a costly facility, it might well be operated at ' lowest feasible cost ' yet its expenses would be so high, and its commensurate fees necessarily*

so high, that it would not be reasonably available to the elderly in the community and thus not entitled to exemption " [emphasis added]).

16. P. Memo. Exemption at pp. 7-9, 18-23; P. Reply Memo. Exemption at pp. 3-5; R. Reply Memo. Exemption at pp. 21-32.

17. Salvation & Praise Deliverance Center, Inc. v. Assessor of The Town of Poughkeepsie, 6 Misc. 3d 1021 (Dutchess Sup. 2005) (" At trial the City relied on the alleged financial inadequacies of Salvation & Praise to sustain its burden of proving that the property is subject to taxation...and therefore the petitioner was no longer entitled to the exemption. There is no evidence before this Court that the petitioner's financial condition was ever a factor considered by the City when it denied Salvation & Praise the exemption for the 1995 tax year. Hence, had the RPAPL Article 15 bar claim action not been brought by the City, either because the petitioner paid its taxes or redeemed the property, the City would not, from the facts presented to this Court, have been able to meet its burden of proving that the Petitioner was no longer entitled to an exemption ").

18. P. Memo. Exemption at pp. 48-50 (" The main benefit to the public from the CCAC accreditation process is enabling consumers to identify communities that have met the standards of excellence "); R. Reply Memo. Exemption at pp. 64-65 (" The senior citizens who are the ` consumers ` seeking the right CCRC are not likely to become burdens on society. As Zwerger acknowledged at trial, there are no government assistance programs that will pay for the cost of care for senior citizens who reside in the assisted living and independent levels of care (Zwerger Trial Tr., p. 4745, l. 16 - 4746, l. 14)).

19. See N. 4, supra.

20. See N. 5, supra.

21. See e.g., In Marino P. Jeantet Residence For Seniors, Inc. v. Comm. of Finance of the City of New York, 105 Misc. 2d 1080, 420 N.Y.S. 2d 545, aff'd 86 A.D. 2d 671, 449 N.Y.S. 2d 933 (2d Dept. 1983) (a not-for-profit home for adults); Adult Home at Erie Station, Inc., v. City of Middletown, 8 Misc. 3d 1010 (Orange Sup. 2005) (post trial decision; " New York courts have interpreted the exclusive charitable use requirement [which includes limiting the property's use to ` persons in need `] to require occupancy by large percentage of persons receiving only

S.S.I. ").

22. See e.g., Belle Harbor Home of the Sages, Inc., v. Tishelman, 100 Misc. 2d 911, 420 N.Y.S. 2d 343 (Queens Sup. 1981), aff'd 81 A.D. 2d 886, 441 N.Y.S. 2d 413 (2d Dept. 1981)(residential health care facility).

23. See e.g., Adult Home at Erie Station, Inc., v. City of Middletown, No. 4845/01 (Orange Sup. Ct., August 12, 2003, J. Rosato (" it is readily apparent that each of the cases cited by petitioner, wherein exemptions were granted, involved a much higher level of indigency than the 58.6% level of indigency, i.e., level of SSI Bed Days, found in the instant case "); Adult Home at Erie Station, Inc., v. City of Middletown, 8 Misc. 3d 1010 (Orange Sup. 2005)(post trial decision; " New York courts have interpreted the exclusive charitable use requirement [which includes limiting the property's use to ' persons in need '] to require occupancy by large percentage of persons receiving only S.S.I. ").

24. P. Reply Memo. Exemption at pp. 18-22 (" The School District fails to provide the Court with any meaningful legal framework for analyzing the charitable nature of a (CCRC) such as The Osborn...By contrast, The Osborn has provided a three-prong test along with guidance utilized by the IRS for over thirty years...The School District does cite a line of cases, mostly involving unrelated ' old age ' and adult home, which have no applicability to a CCRC like The Osborn "); P. Memo. Exemption at pp. 25-68; R. Memo. Exemption at pp. 49-61; R. Reply Memo. Exemption at pp. 32-53.

25. See Ns. 10-12, supra.

26. See Ns. 13-14, supra.

27. P. Memo. Exemption at p. 55; R. Reply Memo. Exemption at p. 41.

28. P. Reply Memo. Exemption at pp. 22-23 (" Finally, there is a misguided subtext to the School District's ' public benefit ' argument that ought to be laid bare: the notion that the non-indigent elderly living in the supportive environment fostered by The Osborn cannot be recognized as receiving ' charitable ' care and services...Just as hospitals and private schools may be exempt irrespective of the amounts they charge to patients and

students and the financial means of the communities they serve, so too may a charitable organization be exempt even if its beneficiaries are not largely indigent ").

29.P. Memo. Exemption at p. 25, 48-50, 53-59; R. Reply Memo. Exemption at pp. 41-42 (" comparing The Osborn to other CCRCs is a meaningless comparison...There is simply nothing in the trial record that demonstrates that these unidentified CCRCs would be considered a charity under New York law or their own state law ").

30.P. Reply Memo. Exemption at pp. 46-48 (" scholarship care, while undoubtedly charitable...is but one of the indicia of The Osborn's charitable works. At its core, The Osborn is charitable precisely because it is devoted to the care of the elderly, and provides all of its senior residents with housing, health care and financial security. These are the recognized ' special needs ' (Rev. Rul. 72-124)...Thus, the fact that The Osborn cares for those who can afford to pay its fees in addition to scholarship residents in no way minimizes its charitable nature. So long as those fees are utilized toward meeting the special needs of the elderly, an organization such as The Osborn is furthering a charitable purpose. Accord Rev. Rul. 72-124 ").

31.P. Memo. Exemption at p. 31; Zwerger Trial Tr., pp. 4184, l. 22 - 4185, l. 9; Kohn Trial Tr., pp. 7658, l. 21 - 7659, l. 4.

32. McCarthy Trial Tr., at pp. 184-281, 396-522.

33.The Osborn's Post-Trial Memorandum On Its Exemption From Real Property Taxation dated November 2, 2006 [" P. Memo. Exemption "]; The Osborn's Post-Trial Reply Memorandum in Further Support of its Claim for a Full Exemption from Real Property Taxation dated December 22, 2006 [" P. Reply Memo. Exemption "]; The Osborn's Executive Summary of the Osborn's Positions dated November 2, 2006 [" P. Ex. Summary "].

34. Intervenor-Respondent The Rye City School District's Post-Trial Memorandum Of Law dated November 2, 2006 [" R. Memo. Exemption "]; Intervenor-Respondent The Rye City School District's Post-Trial Exemption Reply Memorandum of Law dated December 22, 2006 [" R. Reply Memo. Exemption "]; Intervenor-Respondent The Rye City School District's Executive Summary undated [" R. Ex. Summary "].

35. The Osborn's Proposed Findings Of Fact Establishing The Osborn's Entitlement To A Full Real Property Tax Exemption dated November 2, 2006 [" P. Findings "]; Intervenor-Respondent The Rye City School District's Corrected Proposed Findings Of Fact dated December 13, 2006 [" R. Findings "]; Petitioner's Corrections to the School District's Proposed Findings of Fact as Addendum to P. Reply Memo. Exemption [" P. Corrections to R. Findings "].

36. R. Memo. Exemption at p. 3.

37. R. Memo. Exemption at pp. 96 [fn 14 (" The Osborn, itself, uses a square footage analysis when apportioning the real estate taxes that it must pay among its Residents (Ex. 57d at OS 19808)], 97 (" According to The Osborn's appraiser, the Pavilion is 56,000 square feet out of a total of 350,123 square feet of developed space that comprise The Osborn's three levels of care (Ex. BBBB-1). In other words, 84% of The Osborn's space is used for the independent living and assisted living levels of care living. Thus, the Pavilion itself only equals 16% of The Osborn's built-out facilities ").

38. R. Memo. Exemption at pp. 10-18; R. Reply Memo. Exemption at pp. 4-21; P. Memo. Exemption at pp. 10-18.

39. See R. Ex. 2.

<u>Year</u>	<u>"B" Residents</u>	<u>Total Residents</u>	<u>Percentage</u>
1995	33	108	31%
1996	29	215	13%
1997	26	230	11%
1998	21	286	7%
1999	24	303	8%
2000	17	301	6%
2001	23	420	5%
2002	26	416	6%
2003	23	411	6%

40. See e.g., VGR Associates LLC v. Assessor of the Town of New Windsor, 2006 WL 2851618 (Orange Sup. 2006); Orange And Rockland Utilities, Inc. v. Assessor of the Town of Haverstraw, 12 Misc. 3d 1194 (Rockland Sup. 2006); Mirant New York, Inc. v. Town of Stony Point Assessor, 13 Misc. 3d 1204 (Rockland Sup. 2006) (" We found it useful in determining the true value of Bowline to begin our analysis by constructing a valuation floor and ceiling based upon several well accepted principals. First,

the Petitioners and Respondents are bound by their admissions of reconciled values in their respective appraisals for each year under review. Second, the Petitioners are bound by their full value figures set forth in their Petitions but only to the extent [as in Bowline but not herein] that they are greater than the admissions of value which appear in their appraisal. "); Orange and Rockland, Inc. v. Assessor of the Town of Haverstraw, 7 Misc. 3d 1017, 801 N.Y.S. 2d 238 (Rockland Sup. 2005).

41. See e.g., Matter of Application of Village of Irvington v. Sokolik, 13 Misc. 3d 1220 (West. Sup. 2006).

42. P. Ex. A (" The above stated property was changed from wholly exempt to taxable. 1995 Total Assessed value \$2,045,100. Tentative 1996 Total Assessed value \$2,584,000 ").

43. R. Ex. 67 (Minutes of Public Hearing before the BAR held on August 26, 1996).

44. P. Ex. D (" Upon careful consideration. The Board upholds and confirms that a partial assessed value should be established on the property. However, the (BAR) does not agree (with the Assessor) that all of the subject property is taxable. As a result, The Board has reduced the taxable portion of the subject property to \$2,046,000 and added an exemption amount of \$538,050 ").

45. P. Ex. O (" You are notified that the City proposes to adjust the appraisal value and resulting assessment...Prior Assessed Value: \$2,584,000. Tentative Assessed Value: \$2,794,000. Your application for a property tax exemption has also been reviewed. Upon careful consideration, I have denied your request because the property is not tax exempt ").

46. R. Ex. 68 (Minutes of Public Hearing before the BAR held on September 9, 1998).

47. P. Ex. P (" Upon careful consideration, The Board upholds and confirms that a partial exemption should be granted to the property. As a result, The Board has reduced the taxable portion of the subject property to \$2,212,300 and added an exemption amount of \$581,700 ").

48. See The Osborn's R.P.T.L. Article 7 Verified Petition dated October 15, 2002 at para. 17.

49. Id., See also Miriam Osborn Memorial Home Association v. The Assessor of the City of Rye, No. 17175/97, Slip Op. February 3, 2005 at p. 2 (" In 2002...the Assessor increased the overall assessed value of the property, thereby reducing the percentage of the partial exemption from 20.8% to approximately 18% ").

50. See P. Memo. Exemption at pp. 71-72. The Osborn's reliance upon an Affidavit of Ms. Edye McCarthy sworn to November 19, 1998 [P. Ex. F] at para. 9 [" Acting upon a grievance complaint filed by the The Osborn, the Board of Assessment Review, after deliberation, found approximately 20 percent of the property tax exempt because the original nursing structure on the site had not yet been refurbished and because of the claimed 33 full subsidy residents "] and Ms. McCarthy's testimony at trial [Trial Tr., pp. 267-276] for its position that " From 1997 through 2003, respondents have never given the Osborn any partial exemption attributable to The Osborn Pavilion...The Osborn's partial exemption from real property taxation, as first approved by the (BAR) in 1996, was granted because the original nursing structure on the site had not yet been refurbished and because of the number of full subsidy residents...Neither ground related to the operation of the Osborn Pavilion " [P. Memo. Exemption at p. 71] is ill founded since Ms. McCarthy was not a member of the BAR, not privy to its deliberations [Trial Tr., p. 275 (" I don't know what the Board of Assessment's reasoning was for their determination ")] and her views as to the BAR's intentions are speculative, at best [R. Reply Memo. Exemption at pp. 59-62 (" McCarthy was not involved in the deliberations that resulted in this 20.8% exemption ")].

15% to 20% Charity Care

If one were to speculate as to the BAR's rationale it may have been that the Osborn conveyed the impression that 15% to 20% of its residents are and/or would be recipients of charity care [See P. Ex. 68 at p. 42, ls. 11-23 (Q. Olson: Also two or three million dollars a year for the care in charitable cases? A. That's correct. Q. Olson: In The Osborn Pavilion? A. Yes. Q. Olson: What would that represent a percentage in total expenses?...A. Fifteen percent, perhaps, 20 ")].

21% Scholarship Care

Implementation of the Pathway 2000 Plan required that the number of beds in the Osborn's skilled nursing facility be reduced from 179 to 84, a reduction which required the filing of

a Certificate of Need (CON) with the New York State Department of Health [P. Memo. Exemption at pp. 11-13; R. Memo. Exemption at pp. 63-72, P. Reply. Memo. Exemption at pp. 11-14] . As part of that process was the review of Osborn's CON by the Hudson Valley Health Systems Agency (HVHSA) which resulted in a Project Summary [R. Exs. 120a, 120 at p. 6] sent to the Osborn. The Project Summary contained language which stated that " The (Osborn) does not participate in the Medicaid program, and does not propose to do so in the future. However, using its endowment, it does provide ` scholarship care ` and proposes to continue doing so in the future, equal to 21% of its projected patient days " .

Although Zwerger denies making the "21%" commitment [which was never fulfilled [R. Ex. 40] although the Osborn " met its \$1 million projection of annual charity care for the entire period at issue in this trial " [P. Reply Memo. Exemption at p. 14; P. Exs. WW, XX]], he never wrote the HVHSA a letter stating that The Osborn had not made a commitment to provide "scholarship" care equal to "21%" of its projected patient days [Zwerger Trial Tr., p. 4845, l's. 4-7]. The Osborn asserts that it was under no obligation to contact HVHSA and correct such an error [P. Reply. Memo. Exemption at p. 12]. The Court disagrees. If the Osborn had made it clear to HVHSA and the Department of Health that the number of Plan "B" residents would dramatically decrease in the future [e.g., from 31% in 1995 to 6% in 2003 [R. Ex. 2]], the outcome of the CON approval process permitting the Osborn to decertify 95 of its 179 skilled nursing beds might have been different.

Compare: Mayflower Homes, Inc. v. Wapello County Board of Review, 472 N.W. 2d 632, 635 (Iowa App. 1991)(" The Board's calculation apparently was based on Myers' claim it had reserved ten percent of its units for charitable cases ").

51. See e.g., P. Reply Memo. Exemption at p. 16 [" Indeed, the School District's novel argument is belied by respondents' own prelitigation acknowledgment that a partial exemption under 50% is allowable...In fact, respondents granted The Osborn a partial exemption of between 18.3% and 20.8% for each of years in question "].

52. R. Reply Memo. Exemption at pp. 59-62 (" Therefore, the Court can infer that in restoring the 20.8% partial exemption, the Rye City BAR did so ` on account of the operations of the Osborn Pavillion ` ").

53. R. Ex. 195, p. 7.

54. R. Ex. 195, p. 7.
55. R. Ex. 65, pp. 9-16.
56. R. Ex. 56, p. 2.
57. R. Ex. 65, p. 11.
58. R. Ex. 65, p. 11.
59. R. Ex. 65, p. 11.
60. R. Ex. 65, p. 11.
61. R. Ex. 65, p. 14.
62. R. Ex. 66, p. 11.
63. R. Ex. 66, p. 11.
64. P. Ex. Y, p. 4; Zwerger Trial Tr., p. 4553, l's. 3-22.
65. Zwerger Trial Tr., p. 4554, l's. 15-24.
66. Zwerger Trial Tr., p. 4557, l's. 7-22.
67. Zwerger Trial Tr., p. 4121, l's. 6-10; p. 4124, l. 18 - p. 4125, l.3.
68. Zwerger Trial Tr., p. 4182, l's. 3-7.
69. Zwerger Trial Tr., p. 4184, l's. 5-7.
70. Zwerger Trial Tr., p. 4134, l. 19 - p. 4135, l. 3.
71. Zwerger Trial Tr., p. 4185, l's. 2-9. See also: Kohn Trial Tr., pp. 7658, l's. 18-25, 7659, l's 1-7, 7660, l's. 10-22
(" Q. What is...a continuing care retirement community?
A. Continuing care retirement community is a residential location which provides a continuum of health services to older persons.
Q. And you referred to continuum of health services, what services refer to continuing care environment? A. Assisted living and skilled care. Q. Are there other forms of retirement communities besides continuing care retirement communities? A. There are active adult communities. There are assisted living communities. Q. You mentioned adult communities. What

distinguishes a CCRC from an adult community? A. There is not in an adult community a continuum of adult services associated with that kind of organization. There may be some minimal assistance provided to individuals, personal assistance, but no health services. Q. And what is the continuum that's missing in an adult community that you will find in a continuing care retirement community? A. Assisted living and skilled nursing case. "); See, generally, P. Memo. Exemption at pp. 25-68.

72. See N. 4, supra.

73. See N. 5, supra.

74. Zwerger Trial Tr., p. 4185, l's. 14-18.

75. R. Ex. 91; Zwerger Trial Tr., p. 4194, l's. 8-12.

76. R. Ex. 92.

77. Zwerger Trial Tr., p. 4213, l's. 2-6; Lonergan Trial Tr., p. 5686, l's. 4-8.

78. R. Ex. 114, p. OS 18336.

79. R. Ex. 114, p. OS 18414.

80. R. Ex. 114, p. OS 18420, 18439.

81. R. Ex. 114, pp. OS 18335-18394.

82. R. Ex. 114, p. OS 18464.

83. Zwerger Trial Tr., p. 4536, ls. 1-25, 4537, ls. 1-23.

84. R. Ex. 89, p. OS 18284.

85. R. Ex. 110, p. OS 18199.

86. Zwerger Trial Tr., p. 4616, ls 11-13.

87. R. Ex. 114.

88. R. Ex. 114, p. OS 18341.

89. R. Ex. 114, p. OS 18340.

- 90.R. Ex. 114, p. OS 18393.
- 91.R. Ex. 114, p. OS 18344.
- 92.Zwerger Trial Tr., p. 4597, l's. 2-13.
- 93.Zwerger Trial Tr. 4595, ls. 12-18.
- 94.R. Ex. 114, p. OS 18387.
- 95.R. Ex. 114, p. OS 18387.
- 96.R. Ex. 114, p. OS 18337.
- 97.R. Ex. 114 at p. OS 18387.
- 98.Zwerger Trial Tr., p. 4595, ls. 12-18.
- 99.R. Ex. 114 at p. OS 18387.
- 100.R. Ex. 114, p. OS 18388.
- 101.Zwerger Trial Tr., p. 4610, ls. 6-24.
- 102.Zwerger Trial Tr., p. 4600, ls 5-10 (" A. Well, the rates that we ultimately ended up with in terms of entry fees were higher. Monthly fees are pretty close. And the monthly fee only rates are pretty close if you trend forward to 1996 ").
- 103.R. Ex. 114, p. OS 18345.
- 104.R. Ex. 114, p. OS 18346.
- 105.R. Ex. 114, p. OS 18347.
- 106.R. Ex. 114, p. OS 18348. See R. Memo. Exemption at p. 19 ("Thus, as early as 1990, The Osborn was aware that its conversion from a home for needy indigent women to an upscale continuing care retirement community would raise ` real estate tax issues ` ").
- 107.Zwerger Trial Tr., p. 4614, l's. 11-19.
- 108.R. Ex. 106.
- 109.R. Ex. 106, p. OS 18484.

110.R. Ex. 89, p. 8; Hecht Trial Tr., pp. 2698, ls. 8-25, 2699, ls. 1-8.

111.Bowen Trial Tr. p. 1499, ls. 11-22.

112.R. Ex. 109, p. OS 18308.

113.R. Ex. 113. See R. Memo. Exemption at p. 20 (" The Osborn's intent to ` serve the financially independent ` is not consistent with the spirit or intentions of Miriam Osborn's Will(Ex. 65)) ".

114.Zwerger Trial Tr., p. 4184, ls. 14-17.

115.R. Ex. 89, p. 5.

116.Zwerger Trial Tr., p. 4537, ls. 16-23.

117.R. Ex. 104.

118.R. Ex. 104, p. 1.

119.R. Ex. 104, p. 1.

120.R. Ex. 104, p. 1.

121.R. Ex. 89, p. 5.

122.Bowen Trial Tr., p. 1468, ls. 6-14.

123.Bowen Trial Tr., p. 1468, ls. 18-20.

124.Zwerger Trial Tr., p. 4602, l. 21 - p. 4603, l. 2.

125.Bowen Trial Tr., p. 1466, l. 17 - p. 1467, l. 18. See R. Memo. Exemption at p. 24 (" The amount of the entrance and monthly fees charged by The Osborn are directly related to the cost of construction of The Osborn and the amount of debt service that was needed to fund the cost of construction. (Zwerger Trial Tr., p. 4602, l's. 3-9; Soffio Trial Tr., p. 891, l. 19 - p. 892, l. 7; p. 896, l. 23 - p. 897, l. 24) ").

126.Bush Trial Tr., p. 139, l. 19, p. 140, l. 5.

127.R. Ex. 143y, p. 30.

128.Zwerger Trial Tr., p. 4607, l. 19 - p. 4608, l. 3.

129. Principato Trial Tr., p. 3783, l's. 11-19.
130. Bush Trial Tr., p. 142 ls. 5-16.
131. R. Ex. 85. See also R. Exs. 86 & 87.
132. R. Exs. 81 and 82.
133. R. Ex. 84.
134. R. Ex. 81.
135. R. Ex. 81, p. OS 17374.
136. Zwerger Trial Tr., p. 4954, l. 18 - p. 4955, l. 3.
137. R. Ex. 81, p. OS 17374.
138. R. Ex. 81, p. OS 17375-77.
139. R. Ex. 166; Zwerger Trial Tr., p. 4221, l. 7 - p. 4222, l. 20; p. 4236, l. 7 - p. 4237, l. 4.
140. Soffio Trial Tr., p. 999, l's. 8-21.
141. R. Ex. 166.
142. R. Ex. 166.
143. R. Reply Memo. Exemption at pp. 70-91, 87 (" As shown by the ' Claritas data ' [Principato Trail Tr., p. 3805, l. 23 - 3806, l. 13; R. Ex. 171] (I) between 76% and 90% of the citizens between the ages of 70 and 74 could not afford to pay the Pavilion's fees depending on how far they lived from the Osborn, (ii) between 84% and 90% of the citizens between the ages of 75 and 79 could not afford to pay the Pavilion's fees depending on how far they lived from the Osborn, (iii) between 86% and 91% of the citizens between the ages of 80 and 84 could not afford to pay the Pavilion's fees depending on how far they lived from The Osborn and (iv) between 87% and 93% of the citizens who were 85 or older could not afford to pay the Pavilion's fees depending on how far they lived from The Osborn ").
144. P. Memo. Exemption at pp. 61-68 (" The School District has maintained that the refundable entrance fees...are the primary barrier to entry to The Osborn [Hecht Trial Tr., p. 3029, ls. 4-

7]... Yet, as Ms. Kohn explained, the elderly tap into the equity they have built up in their homes during their adult lives as a means of paying CCRC fees [Kohn Trial Tr., p. 7856, ls. 5-10]; P. Reply Memo. Exemption at pp. 21-22 (" Between 1997 and 2003, the weighted average of the median home sales price in The Osborn's primary service area increased by 79% from \$409,232 in 1997 to \$734,24 in 2003 [P. Ex. SSSS-1]. This is a greater percentage increase than nearly all of the percentage increases in Osborn fees noted by the School District...Put simply, the value of housing in The Osborn's primary service area increased much more significantly than the cost of living at The Osborn from 1997 through 2003, making The Osborn all the more accessible to the elderly residents within the service area ").

145.R. Reply Memo. Exemption at p. 76 (" The Osborn completely ignores the relevant U.S. Census statistics for Westchester County. For example, as determined by the 2000 Census, of the 148,232 homes in Westchester County, 102,480 had mortgages (R. Ex. 223). In order words, 69.1% of the homes in Westchester County were encumbered (R. Ex. 223). Moreover, as also reflected by the 2000 Census, only 35% of the homes in Westchester County had a value of \$400,000 or more ").

146.Principato Trial Tr., pp. 3673, l. 6 - 3674, l. 7; Kohn Trial Tr., pp. 7857, l. 14 - 7858, l. 6.

147.P. Memo. Exemption at pp. 52-53 (" Indeed, relying on Medicaid funding could compromise a CCRC's financial security, since Medicaid reimbursement would not cover The Osborn's cost of caring for nursing home residents...during the planning stages of Pathway 2000, The Osborn considered the question of whether to participate in the Medicaid program, but determined that it would not cover The Osborn's costs, and would not have a salutary impact on The Osborn's operating deficits [Zwerger Trial Tr., pp. 4240, l. 4 - 4242, l. 6]...through its scholarship care, The Osborn spares the Medicaid program of the burden of paying for individuals who may otherwise qualify for Medicaid...").

148.R. Memo. Exemption at pp. 86-92 (" On December 2003, the New York Association of Homes & Services for the Aging issued a Report entitled ' Preserving Long-Term Care for the Long-Term Future ' [NYAHSR Report] (which stated that) New York State Medicaid ' accounts for 20 percent of all state spending and total Medicaid enrollment has surpassed that of Medicare ' [P. Ex. II, p. 3]. The NYAHSR Report (also states) ' New York's Residents rely more on the Medicaid system than Residents of

other states to pay for (Long Term Care [LTC]) costs... According to the United Hospital Fund, 72 percent of Medicaid's expenditures in New York are for elderly and disabled beneficiaries [P. Ex. II, p. 3]...Individuals who become chronically ill or disabled are often surprised to find out that Medicare and private health insurance do not cover much LTC. With the costs of nursing home care in New York typically exceeding \$75,000-\$100,000 per year and private market assisted living averaging between \$20,000 and \$45,000 per year, LTC represents a catastrophic financial risk for disabled and chronically ill elderly individuals [P. Ex. II, p. 25]) " ; Donnellan Trial Tr., pp. 7296, l. 20 - 7297, l. 2 (" Medicaid program of New York is a program utilized by the middle class to pay for nursing home care and services ").

149.R. Memo. Exemption at pp. 88-89 (" According to information maintained by the New York State Department of Health, between 2000 and 2002, 38 nursing homes or skilled nursing facilities were located in Westchester County [R. Ex. 226]. Of the 38 nursing homes or skilled nursing facilities located in Westchester County, only one, the Pavilion, did not accept Medicaid to pay for long-term care [R. Ex. 228] ").

150.R. Ex. 25.

151.R. Ex. 25. Compare: P. Reply Memo. Exemption at p. 22 (" It is also greater than the 38% increase in the weighted average entrance fee for The Osborn between 1997 and 2003, from \$411,196 to \$568,294 (P. Ex. SSSS-1) ").

152.R. Ex. 26.

153.R. Ex. 26.

154.R. Ex. 33.

155.R. Ex. 33.

156.R. Ex. 33.

157.R. Ex. 33.

158.R. Ex. 69, p. OS 18026; Lonergan Trial, p. 5795, l. 15 - p. 5796, l. 18.

159.R. Ex. 12.

- 160.R. Ex. 151.
- 161.R. Exs. 15 and 16.
- 162.R. Exs. 15 and 16.
- 163.R. Exs. 15 and 16.
- 164.Soffio Trial Tr., p. 880, l. 22 - p. 881, l. 19; p. 1130, ls. 12-16.
- 165.Soffio Trial Tr., p. 880, ls. 24-25, p. 881 ls. 2-3.
- 166.Soffio Trial Tr., p. 601, l's. 2-17.
- 167.Soffio Trial Tr., p. 872, l's. 4-8; Bush Trial Tr., p. 156, ls. 6-20.
- 168.Bush Trial Tr., p. 157, ls. 17-19.
- 169.Bush Trial Tr., p. 161, ls. 3-4.
- 170.R. Exs. 91, p. OS 18136; 61, pp. OS 17614-OS 17630.
- 171.R. Ex. 61, p. OS 17619; Bowen Trial Tr., p. 1759, l. 6 - p. 1760, l. 5.
- 172.R. Ex. 61, p. OS 17622 [" The Osborn may terminate this Agreement if any one of the following events of default occurs and you fail to remedy that same within the time provided below: (I) If you fail to pay any amount owed to The Osborn...provided you shall have thirty (30) days to remedy such Default; or (ii) If you have made misstatements or misrepresentation in your confidential data application on in this Agreement or transferred assets and/or income such that you can no longer meet your obligations under this Agreement and your ordinary and customary living expenses "].
- 173.R. Ex. 61, p. OS 17622; Bowen Trial Tr., p. 1762, l's. 13-16 [" Q. Does the Osborn maintain a contractual right to terminate the residency of an occupant for nonpayment? A. Yes "].
- 174.R. Ex. 69, p. OS 18028 [" Sterling Home Care, Inc. may terminate this Agreement if you fail to pay any amount owed to Sterling Home Care, Inc. hereunder, provided you shall have thirty (30) days to remedy such Default "].

175. R. Ex. 171, p. 17.
176. R. Ex. 171, p. 17.
177. R. Ex. 171, pp. 20-21.
178. R. Ex. 171, p. 2.
179. R. Ex. 171, pp. 21-22.
180. R. Exs. 12, 13, 52 & 54.
181. R. Exs. 12, 13, 52 & 54.
182. R. Exs. 12, 13, 52 & 54.
183. Bush Trial Tr., p. 162, l's. 7-11.
184. R. Exs. 20, 20a, 53a & 53e.
185. R. Exs. 20, 20a, 53a & 53e.
186. R. Exs. 20, 20a, 53a & 53e.
187. R. Exs. 23 and 23a.
188. R. Exs. 23 and 23a.
189. R. Exs. 23 and 23a.
190. R. Ex. 61, p. OS 17619.
191. R. Ex. 90, p. OS 18147.
192. R. Ex. 91, p. 2.
193. Malang Trial Tr., p. 6286, l. 14 - p. 6287, l. 6; P. Ex. PPP.
194. P. Ex. PPP.
195. Malang Trial Tr., p. 6300, ls. 2-22.
196. Malang Trial Tr., p. 6286, l's. 17-22; p. 6291, l's. 15-18; p. 6300, l's. 13-22.
197. P. Ex. UUU.

198. P. Ex. UUU; Malang Trial Tr. p. 6423, l's. 12-25.

199. P. Exs. UUU, PPP.

200. P. Exs. UUU, PPP.

201. R. Ex. 2.

202. R. Ex. 2.

<u>Year</u>	<u>"B" Residents</u>	<u>Total Residents</u>	<u>Percentage</u>
1995	33	108	31%
1996	29	215	13%
1997	26	230	11%
1998	21	286	7%
1999	24	303	8%
2000	17	301	6%
2001	23	420	5%
2002	26	416	6%
2003	23	411	6%

203. R. Ex. 2.

204. R. Ex. 2.

205. R. Ex. 2.

206. R. Ex. 2.

207. R. Ex. 121a.

<u>Year</u>	<u>Actual "B" Resident Days</u>	<u>Osborn Actual Resident Days</u>	<u>%</u>
1997	8,823	67,509	13.07%
1998	8,571	78,629	10.90%
1999	8,960	98,364	9.11%
2000	7,413	99,963	7.42%
2001	7,568	111,760	6.77%
2002	9,195	134,964	6.81%
2003	8,888	135,254	6.57%

If assignment Residents are included as charitable beneficiaries the percentage of use would change from a high of 15.53% for 1997 to a low of 6.84% for 2003 (R. Ex. 125a).

208.R. Ex. 89, p. OS 18279.

209.R.Ex. 89, P. OS 18279; The Charity Task Force Report went on to state:

"The project to undertake this transformation, called "Pathway 2000," was launched in 1991 and completed in 2001. Pathway 2000 cost in excess of \$120 million, resulted in the construction of 26 new buildings and the renovation of 4 other buildings. The Osborn grew from serving 115 residents to serving over 420 residents ".

210.R. Ex. 89, p. OS 18281.

211.R. Ex. 89, p. OS 18281-OS 18282. Notwithstanding this language The Osborn maintains that in reality it did not observe a charity cap [P. Reply Memo. Exemption, Addendum-P. Corrections to R. Findings at p. 9 (" There was and is no actual ` charity cap ` observed at The Osborn. As testified by Mr. Zwerger, The Osborn has not abided by the so-called ` cap ` " (Zwerger 4475:25-4476:7)]; P. Reply Memo. Exemption at p. 50 (Charity Cap..." is not a cap on the level of charity care, but rather a guideline for preserving the endowment to support scholarship residents in the event that the cost of charity care exceeds a certain ratio of the balance of the endowment fund ").

212. Zwerger Trial Tr., p. 4974, ls. 7-23.

213.R. Ex. 89, p. OS 18294-18295.

214. Soffio Trial Tr. at p. 1124, ls. 13-28, 1125, ls. 1-5.

215.R. Ex. 89, p. OS 18279. See R. Ex. 5 which reflects that The Osborn projected 23 Plan "B" residents for 2002 and actually cared for 26 Plan "B" residents in 2002.

216.R. Ex. 60f, p. OS 09966.

217.R. Ex. 57h, p. OS 19911. The " new apartment building " which increased The Osborn's assets by " \$60 million and incurred \$12 million of additional debt " was a newly constructed structure that contained only Entrance Fee Units which are not available for occupancy by Plan "B" Residents[Soffio Trial Tr., p. 999, ls. 8-21] .

- 218.R. Ex. 57h, p. OS 19911.
- 219.R. Ex. 58h, p. OS 19706.
- 220.R. Ex. 57h, p. OS 19914.
- 221.R. Ex. 57h, p. OS 19911.
- 222.R. Ex. 58h, p. OS 19705.
- 223.R. Ex. 57g, p. OS 20352.
- 224.Soffio Trial Tr., p. 1302, l. 17 - p. 1303, l. 14.
- 225.R. Ex. 2.
- 226.R. Ex. 58i, p. OS 20624.
- 227.Soffio Trial Tr., 1263, l's. 14-22; Ex. 58i, p. OS 20596.
- 228.R. Ex. 58i, p. OS 20597.
- 229.R. Ex. 8.
- 230.R. Ex. 2.
- 231.Soffio Trial Tr., p. 1273, l's. 3-7; p. 1302, l. 17 - p. 1303, l. 14.
- 232.R. Memo. Exemption at pp. 77-78 (" The record on appeal in *San Simeon*...it operates a 150 bed-nursing facility located in two substructures (a three story building and a one story building)...It has no programs other than the stated purpose of providing health care to aged and infirm patients ").
233. See N. 239, *infra*.
- 234.R. Ex. 89, p. OS 18279.
- 235.P. Memo. Exemption at pp. 68-73 (" The Osborn submits that as Mr. Donnellan explained revenues as opposed to expenses are the most effective measure of the use of The Osborn's services by its three levels of care within the original three buildings [Donnellan Trial Tr., p. 7310, l. 16 - 7311, l. 13, 7549, p. 9-13]...Revenues fairly depict how much resources are being consumed by any given level of care or site [Donnellan Trial

Tr., p. 7310, ls. 16-22, 7311, ls. 9-13, 7541, ls. 7-17, 7542, ls. 6-20]. Unlike expenses, revenues are straightforward and do not require any subjective judgments or assumptions about how expenses should be allocated among the different levels of care or sites...By contrast, cost-allocation statistics such as patient days of care (census) or square footage fail to recognize the relative level of resource consumption by each level of care or site [Donnellan Trial Tr., p. 7541, l. 3 - 7542, l. 22]...Given The Osborn's provision of scholarship care, revenue alone, however, is not an adequate means for measuring use...it fails to capture the use of services by The Osborn's scholarship residents, for whom no fees are charged or collected...Thus, when measuring the relative use of services by level of care or site, it is necessary to add the amount of forgone revenue associated with scholarship residents...The Osborn Pavilion's use, measured by actual and forgone revenue, ranged from 55.22% in 1997 to 35.53% of The Osborn's use in 2003 [P. Ex. 0000] "); P. Reply Memo. Exemption at pp. 50-56.

236. R. Memo. Exemption at p. 80-81 (" The amount of ` Actual Paid Days ` is calculated by reference to The Osborn's daily census which provides daily information about, among other things, The Osborn's Residents, their payment status and the level of care within which they reside [R. Ex. 55a; Soffio Trial Tr., p. 938, l. 4 - 940, l. 11; Donnellan Trial Tr., p. 7485, l. 7 - 7486, l. 20]. The statistics contained in the daily census are the statistics used to create the month and year and occupancy reports [Soffio Trial Tr., p. 1003, ls. 11-14; p. 1004, ls. 4-16]...As set forth in R. Ex. 111a, such a comparison in usage reveals the following percentages (32% [1997], 35% [1998], 30% [1999], 30% [2000], 27% [2001], 22% [2002], 22% [2003] "); P. Ex. Summary at pp. 5-6 (" The Osborn tracks the usage of its property by reference to ` Potential Resident Days ` and ` Actual Paid Days `. Since, 1997 the occupancy at the Pavillion, The Osborn's skilled nursing facility, has totaled 35% or less of the overall Osborn resident days actually used by Osborn residents. In terms of the number of total available days that could have been used by Osborn residents, the percentage of occupancy at the Pavilion drops to 31% or less ").

237. R. Memo. Exemption at pp. 82-83; R. Ex. 111c [31% [1997], 31% [1998], 30% [1999], 30% [2000], 25% [2001], 22% [2002] and 22% [2003].

238. R. Memo. Exemption at pp. 96 [fn 14 (" The Osborn, itself, uses a square footage analysis when apportioning the real estate

taxes that it must pay among its Residents (Ex. 57d at OS 19808)], 97 (" According to The Osborn's appraiser, the Pavilion is 56,000 square feet out of a total of 350,123 square feet of developed space that comprise The Osborn's three levels of care (Ex. BBBB-1). In other words, 84% of The Osborn's space is used for the independent living and assisted living levels of care living. Thus, the Pavilion itself only equals 16% of The Osborn's built-out facilities "). The parties should calculate the Pavilion's square footage as a percentage of The Osborn for each year in dispute.

239.P. Memo. Exemption at pp. 1-2.

240. (" This case does not help The Osborn because the finding of charitable use and tax exemption were based on the Appellate Court's finding that the factual findings of lower Court that " Fifield Homes are operated ` as a luxurious apartment hotel for the aged ` and that ` the services furnished and the charges exacted...for admission to its apartment hotel are not within the reach of persons of limited means, or of persons in modest circumstances ` are not supported by the evidence "; both of these factual findings apply to The Osborn).

241. See Ns. 10-15, supra. IRS Revenue Rulings do not have the force of law and are not binding on New York courts [Matter of Weltman v. Dempsey-Teqler & Co., 25 A.D. 2d 914 (3d Dept. 1966); Canisius College v. U.S., 799 F. 2d 18, 22 (2d Cir. 1986)]. See also R. Memo. Exemption at pp. 51-53; R. Reply Memo. Exemption at pp. 33-40 (" Revenue Ruling 72-124 states that one of the standards that must be satisfied is that ` the organization must operate so as to provide its services to the aged at the lowest feasible cost `...The Osborn has not provided any proof on this standard...As explained in detail in the Weiser LLP Expert Report (R. Ex. 146a) The Osborn did not operate at the ` lowest feasible cost `...Examples of excessive and/or unnecessary spending include the expenses associated with dining, common area and grounds...The Osborn also employs at a six figure salary, an Executive Chef, Richard Lipari (who) is assisted by two sous Chefs and over a dozen cooks and prep cooks in preparing meals for over 400 residents...Based on our review of invoices, many high-end raw food items were noted, including Caviar, Lobster, Shrimp (16-20 ct peeled and deveined), Scallops (20-30 ct), Osso Buco, Angus Beef Patties, Fillet of Beef, Rack of Lamb, Center Cut Pork Chops and Eye Round...The Osborn's focus on ambience and gracious living are evidenced by its landscaping and decoration expenses...Common areas of The Osborn are decorated

lavishly...In our expert opinion these expenses contribute to the upscale lifestyle that is created on the campus and the very reason that The Osborn continues to incur costs that are in excess of the norm ").

242.P. Memo. Exemption at pp. 25-68.

243.P. Memo. Exemption at pp. 38-40. See e.g., Jamil v. Village of Scarsdale Planning Board, 4 Misc. 3d 642 (West. Sup. 2004), aff'd 24 A.D. 3d 552, 808 N.Y.S. 2d 260 (2d Dept. 2005);

244.Zwenger Trial Tr., p. 4536, ls. 1-25, 4537, ls. 1-23.

245.R. Ex. 89, p. OS 18284.

246. See R. Ex. 2.

<u>Year</u>	<u>"B" Residents</u>	<u>Total Residents</u>	<u>Percentage</u>
1995	33	108	31%
1996	29	215	13%
1997	26	230	11%
1998	21	286	7%
1999	24	303	8%
2000	17	301	6%
2001	23	420	5%
2002	26	416	6%
2003	23	411	6%