IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT

CHAMPAIGN COUNTY, ILLINOIS

THE CARLE FOUNDATION, an Illinois not-for-profit corporation,	)	
Plaintiff	)	
v.	)	No. 2008-L-202
ILLINOIS DEPARTMENT OF REVENUE; CONSTANCE BEARD, in Her Official Capacity as Director of the Illinois Department of Revenue; THE CHAMPAIGN COUNTY BOARD OF REVIEW; ELIZABETH BURGENER-PATTON, ROBERT ZEBE and PAUL SAILOR in Their Official Capacity as Members of the Champaign County Board of Review; PAULA BATES, in Her Official Capacity as Champaign County Supervisor of Assessments; CUNNINGHAM TOWNSHIP; WAYNE WILLIAMS, in his Official Capacity as Cunningham Township Assessor; LAUREL PRUSSING, in Her Official Capacity as Champaign County Treasurer; And the CITY OF URBANA;	)	
Defendants	)	

CLOSING ARGUMENT OF CUNNINGHAM TOWNSHIP, CITY OF URBANA AND CUNNINGHAM TOWNSHIP ASSESSOR

THE EXEMPTION CLAIMS: COUNTS III - XXXIV

Real Property Tax Exemption in Illinois

For there to be any tax exemption in Illinois, it must have been authorized by the Illinois Constitution. The Illinois Constitution

does not provide tax exemption for hospitals. Hospitals are not mentioned in the Illinois Constitution. The Illinois Constitution authorizes the legislature to provide real property tax exemption for charities. A hospital may qualify for tax exemption if it qualifies under the Illinois Constitution as a charity.

In 1968 the Illinois Supreme Court set forth what are called the Korzen factors. The expressed purpose of the Illinois Supreme Court was to enable courts to "resolve questions of purported charitable use." [emphasis added] (Methodist Old Peoples Home v. Korzen (Ill. 1968), 39 Ill.2d 149, 156-157 [Korzen]) This made complete sense as the 1870 Illinois Constitution, Article IX, Section 3, authorized the legislature to exempt property in two categories--property owned by state and local government and property used exclusively for agricultural and horticultural societies, for school, religion, cemetery and charitable purposes. The 1970 Illinois Constitution, Article IX, Section 6, authorizes certain categories of property tax exemption in effectively the same language.

Numerous cases since then have cited the Korzen criteria as being the means by which a court is to determine if a property is eligible for tax exemption. In Eden Retirement Center v. Illinois Department of Revenue (Ill. 2004), 213 Ill.2d 273; 821 N.E.2d 240; 290 Ill.Dec 189, the Illinois Supreme Court cited and restated the Korzen criteria. In Provena Covenant Medical Center v. Department of Revenue (Ill. 2010), 236 Ill.2d 368, 390, the Court again cited the Korzen opinion and restated the Korzen criteria. Plaintiff asserts that because Provena was a plurality opinion, as two justices did not

participate in the case, the opinion should be disregarded. That argument was advanced by the applicant for tax exemption in Midwest Palliative Hospice and Care Center v. Beard and the Illinois Department of Revenue (1st Dist. 2/25/2019), 2019 IL App (1st) 181321. In oral argument, which is published on the state court website, in response to the appellant pointing out that Provena was a plurality opinion, the court asked: "Are you suggesting that the three of us have the authority to just ignore Provena because it's not precedential?" https://multimedia.illinois.gov/court/AppellateCourt/Audio/2019/1st/020619_1-18-1321.mp3 at 17:33 to 17:39. Plaintiff here seems to seek to have the law be determined to be the opposite of what Provena reiterates. Despite plaintiff's incorrect assertion regarding the precedential value of Provena, Korzen is still the standard.

In Oswald v. Hamer (Ill.2d 9/20/2018), 2018 IL 122203, the Illinois Supreme Court held that the Korzen criteria applied to all charitable property tax exemption, including the "hospital" exemption under section 15-86 of the Property Tax Code.

On February 25, 2019, in Midwest Palliative the court held that the Korzen factors are the accepted framework for deciding whether property can be considered to be used exclusively for charitable purposes. (Midwest Palliative at para 15) It held that all the Korzen factors are considered in determining whether a particular property was being put to charitable use. (Midwest Palliative at Para 22)

The Korzen Criteria

There has been much discussion of Korzen and the Korzen Criteria or Korzen Factors in this case. As stated above, there are a number of cases that cite to Korzen and they all make clear that Korzen is the definitive standard for evaluation of the constitutional criteria regarding charitable use. Here is what Korzen actually states:

> The concept of property use which is exclusively charitable does not lend itself to easy definition. Therefore each individual claim for tax exemption must be determined from the facts presented. However, though past decisions of this court provide no precise formula for resolving questions of purported charitable use, they do furnish guidelines and criteria which should be generally applied.
>
> It has been stated that a charity is a gift to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, persuading them to an educational or religious conviction, for their general welfare -- or in some way reducing the burdens of government [citation omitted];
>
> that the distinctive characteristics of a charitable institution are that it has no capital, capital stock or shareholders, earns no profits or dividends, but rather derives its funds mainly from public and private charity and holds them in trust for the objects and purposes expressed in its charter [citations omitted];
>
> that a charitable and beneficent institution is one which dispenses charity to all who need and apply for it, does not provide gain or profit in a private sense to any person connected with it, and does not appear to place obstacles of any character in the way of those who need and would avail themselves of the charitable benefits it dispenses [citation omitted];
>
> that the statements of the agents of an institution and the wording of its governing legal documents evidencing an intention to use its property exclusively for charitable purposes do not relieve such institution of the burden of proving that its property actually and factually is so used [citations omitted];
>
> and that the term "exclusively used" means the primary purpose for which property is used and not any secondary or incidental purpose.

> These principles constitute the frame of reference to which we must apply plaintiff's use of its property to arrive at a determination of whether or not such use is in fact exclusively for charitable purposes [paragraph breaks inserted at semicolons and period] (Korzen, 156-157; 541-542)

All Korzen Factors Apply to Use

It has been asserted by plaintiff that only one Korzen factor applies to the use of property and that the other factors apply to ownership. That is a mischaracterization of what the higher courts have held and continue to hold. Plaintiff here disputed the plain language of Oswald and filed a motion asking this court to construe Oswald. This court held that "Oswald did not eliminate or reduce the Korzen factors." It held that "Oswald did not change the requirements to obtain a charitable exemption and that all Korzen factors are a part of the constitutional 'charitable use' test." Memorandum Opinion on Cross-Motions for Summary Determination of a Major Issue/Case Management Order entered on November 26, 2018.

The Illinois Constitution authorizes property tax exemption and it creates two categories. One category is real property owned by government and the other is "property used exclusively for agricultural and horticultural societies, and for school, religious, cemetery and charitable purposes." [emphasis added] (1970 Illinois Constitution, Article IX, Section 6) The Korzen factors apply to the Constitution, not to any statute. The constitution does not refer to ownership where it creates non-government tax exemption for certain specific property uses. The Constitution uses the specific word used: "property used exclusively for." [emphasis added] The Korzen factors apply to use and use means use of the subject real property.

Korzen also makes abundantly and redundantly clear that when performing this constitutional evaluation, it is the use of the property that is the basis upon which an entity might be eligible for exemption:

> The concept of property use which is exclusively charitable does not lend itself to easy definition. Therefore each individual claim for tax exemption must be determined from the facts presented. However, though past decisions of this court provide no precise formula for resolving questions of purported charitable use, they do furnish guidelines and criteria which should be generally applied. (Korzen, 156; 541)
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> ***
>
> that the statements of the agents of an institution and the wording of its governing legal documents evidencing an intention to use its property exclusively for charitable purposes do not relieve such institution of the burden of proving that its property actually and factually is so used; and that the term "exclusively used" means the primary purpose for which property is used and not any secondary or incidental purpose. These principles constitute the frame of reference to which we must apply plaintiff's use of its property to arrive at a determination of whether or not such use is in fact exclusively for charitable purposes [citations omitted, emphasis added] (Korzen, 157; 542)

This very issue has been considered directly and clearly by the Illinois Appellate Court for the First District in the Midwest Palliative opinion filed February 25, 2019. (Midwest Palliative at para 20-22) Midwest had asserted that only one Korzen factor was related to use and should have been considered. The court stated:

> Midwest posits that the first five Korzen factors concern only whether the property is owned by a charitable institution...We find Midwest's argument on this point to be unpersuasive. [emphasis added] (Midwest Palliative at para 21-22)

That court also held that:

> ...just because an institution is a non-profit and performs good deeds does not mean that the institution is using its real

property exclusively for charitable purposes as that term is used in the Illinois Constitution. (para 29)

***

...Midwest's primary purpose is providing hospice and palliative care to patients who can pay for the care or who have insurance or access to government sources for payment. [emphasis added] (para 38)

The Korzen factors are constitutional evaluations and therefore apply in the exact same way to exemption sought under section 15-86 as under section 15-65 of the Property Tax Code. Both have to meet the same constitutional requirements under Article IX, Section 6.

BREAKING DOWN THE KORZEN CRITERIA

Korzen: Reducing the Burden of Government

It has been stated that a charity is a gift to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, persuading them to an educational or religious conviction, for their general welfare -- or in some way reducing the burdens of government (Korzen, 156-157; 541);

Plaintiff required applicants to apply for government assistance before they could receive charity care from plaintiff. (Trial Exhibits 16, 40, 93, 106, 117, 165, 199, 216, 2426) Plaintiff's policy thereby increased the burdens on government when it required that people first apply for and get all the government benefits for which they are eligible before plaintiff would contribute to the person's care. It should also be noted that by requiring patients to apply for government benefits, plaintiff was also increasing its own income because it was the indirect beneficiary of those government benefits it demanded its patients apply for.

Additionally, plaintiff cannot be relieving a burden on a unit of government which that unit of government does not have. Neither the city nor the county nor any defendant officers have an obligation to provide medical care.

Korzen: Capital

> "...that the distinctive characteristics of a charitable institution are that it has no capital, capital stock or shareholders..." (Korzen, 157; 541)

Plaintiff maintains that it can satisfy this criteria from Korzen by merely stating that as a not-for-profit it does not issue capital stock or pay dividends. That is insufficient to satisfy even the first part of this criteria. Korzen distinguishes between capital and capital stock. While it may be true that plaintiff does not issue stock and therefore does not pay a dividend, plaintiff does retain a significant amount of capital in the form of liquid assets, property and equipment, investments and other assets. In the first year involved in this litigation, 2004, plaintiff's assets exceeded $700 million. (Trial Exhibit 68, p.5) By 2011, plaintiff's assets had grown to over $2.1 billion. (Trial Exhibit 252, p.4) Capital is the wealth, whether money or property, owned or employed in business by an individual, firm or corporation. Plaintiff has considerable capital.

Korzen: Profits and Dividends

> "...earns no profits or dividends..." (Korzen, 157; 541)

Plaintiff receives a significant amount of income from the operation of both its not-for-profit entities and its very

significantly profitable for-profit entities. In fiscal year 2004, plaintiff had total net revenue of $342.9 million (Trial Exhibit 68, p.7), with $294.4 million attributable to net patient service revenue. By 2011, the plaintiff's net revenue exceeded $1.6 billion with over $1 billion attributable to premium revenue from health insurance alone. (Trial Exhibit 252, p.6) The amount of charitable care provided by plaintiff is truly *de minimis* in comparison to these actual revenues.

Korzen: Charitable Income

> "...but rather derives its funds mainly from public and private charity and holds them in trust for the objects and purposes expressed in its charter..." (Korzen, 157; 541)

Plaintiff has little or no revenue from charitable contributions. There is not an income line item specifically attributable to charitable contributions for any year between 2004 and 2011 on plaintiff's consolidated financial statements. (Trial Exhibits 68, p.7; 107, p.6; 130, p.7; 151, p.6; 166, p.6; 188, p.6; 222, p.6; 242, p.6; 252, p.6) Plaintiff offered no evidence on its income from charitable contributions.

Plaintiff admitted in its opening statement that it cannot satisfy this criteria and that plaintiff does not obtain its funds primarily from charitable donations. On the last day of trial, plaintiff objected to Trial Exhibit 2640 part number 16 stating:

> It's an objection that we have raised previously with respect to donations. Given that the Carle Foundation is not disputing that it does not primarily -- it does not receive funds primarily from public or private donations, we think this is irrelevant. (Statement of A. Doehring, Trial Transcript, January 31, 2019, p.115, lines 13-18)

This was directly in issue in Midwest Palliative. In oral argument, which is published on the state court website, the court said:

> The difficulty is--is that you have thirty to thirty-two million dollars in revenue. Right? That are not generated by charitable contributions. They're not even close to being primarily generated by charitable contributions. It seems to me that if the funds aren't generated through charitable sources, the expenditure of those funds are not expenditure of charity. They are expenditure of your general revenue that is generated through medicare medicaid and private insurance and personal payment. What's the charity? The good works are not charity in themselves. It's great that we have palliative care centers. It's great that we have hospice but not—-that doesn't mean that it's charitable. https://multimedia.illinois.gov/court/AppellateCourt/Audio/2019/1st/020619_1-18-1321.mp3 at 16:00 to 16:55.

The Midwest Palliative opinion noted:

> In reviewing the financial data submitted, the ALJ observed that .4% of Midwest's operating revenue came from charitable contributions. The overwhelming majority of its operating revenue came from "net patient services" of which 88% of the revenue came from Medicare or Medicaid reimbursement. The ALJ took note that 94% of the revenue Midwest generated was from billing patients: exchanging medical services for payment, as a business. (para 24)

The record shows that plaintiff in this case received little or nothing from charitable donations. Its income is derived from fees-for-services provided in its hospital and clinical settings and from premiums sold by its for-profit Health Insurance company. It is in the business of selling medical services and health plans. It had gross patient service revenue of over $1.7 Billion in 2011. (Trial Exhibit 252, p. 14) Midwest Palliative stated:

> The Department is not required to find that an entity that receives the maximum amount that Medicare or Medicaid will pay

> for its services is serving the public altruistically such that it is entitled to pay no property taxes. There is nothing wrong with Midwest being able to receive payment for its services. The fact that most of its patients can pay just puts Midwest in line with other medical service businesses--purveyors of medical services for remuneration. (para 32)

Korzen: Dispensing of Charity

> "...that a charitable and beneficent institution is one which dispenses charity to all who need and apply for it..." (Korzen, 157; 542)

Plaintiff has rephrased this Korzen criterion in various pleadings and briefs by asserting that it gives charity care to all who apply and "qualify." The word "qualify" does not appear in the Korzen criterion. Korzen actually reads: "all who need and apply for it." Also, it is apparent that by the use of the word "apply," the Illinois Supreme Court meant those who ask for it. There is nothing to suggest that the court was proposing that a person in need of medical treatment should be required to fill out a bunch of forms and get letters verifying no income and other such things. This is apparent also from the court saying organizations claiming to be exclusively a charity shall not be "placing obstacles of any character in the way of those who need and would avail themselves of the charitable benefits it dispenses." (Korzen, 157, 542)

Plaintiff dispenses some charity but strictly on its own terms. Plaintiff sets its own standards which it then applies. According to plaintiff's data, plaintiff denied almost half of the applications for charity from 2004 through 2012. During this period, plaintiff denied 53,223 applications (Trial Exhibit 333, Denial Summary) and approved 59,757 (Trial Exhibit 334, Summary of Approvals). For those

people for which plaintiff approves, it requires that they first obtain all the government benefits they can.

Plaintiff has re-imagined the language of Korzen to say that charity is given to all who apply and qualify for it, but only after you first apply for government funding of your care and then only if plaintiff deems your application has sufficient merit based on plaintiff's own internally created screening criteria.

Korzen: Gain or Profit to Individuals

> "...does not provide gain or profit in a private sense to any person connected with it..." (Korzen, 157; 542)

Although plaintiff does not pay money in the form of dividends on stock since it does not have stock, it provides substantial shares of its revenue to a select group of its management. In fiscal year 2004, Dr. Leonard, plaintiff's CEO, received $244,783 in salary and benefits from plaintiff itself. Plaintiff also used its other related entities to compensate officers and key employees like Dr. Leonard. Dr. Leonard received an additional $225,046 from 5 related or subsidiary organizations of plaintiff for a total compensation of $469,829 that fiscal year. Plaintiff reported on its Form 990 for fiscal year 2004 that between itself and its related entities it compensated its officers, directors, trustees and key employees $1,622,044. (Trial Exhibit 68, p.29-30)

When plaintiff and its related entities laid off employees in 2008 (Trial Exhibit 1157), Dr. Leonard's compensation had just increased from $870,263 in fiscal year 2007 (Trial Exhibit 153, p.23) to

$955,884 in fiscal year 2008 (Trial Exhibit 168, p.32). While the remaining employees of plaintiff and its related entities were subject to a pay freeze in 2009 (Trial Exhibit 1158), Dr. Leonard and the other officers and key employees compensation continued to increase. (Trial Exhibit 1037, p.36) By 2011, Dr. Leonard's total reported compensation from plaintiff and its related entities had grown to $1,286,756 and the total compensation from plaintiff and its related entities it to its officers, directors, trustees and key employees grew to $11,002,768. (Trial Exhibit 1040, p.8)

These compensation amounts may be within industry standards and may be appropriate for a successful business, but they are not appropriate for an entity claiming to be exclusively or primarily charitable when compared to the amount of charity care plaintiff claims to have disbursed.

Korzen: Obstacles to Those Who Need and Apply

> "...does not appear to place obstacles of any character in the way of those who need and would avail themselves of the charitable benefits it dispense..." (Korzen, 157; 542)

This is partly discussed in the section above regarding dispensing charity to all who apply for it. Plaintiff has an entire system of placing obstacles in the way of persons seeking medical services who cannot pay for it. They start with what the medical industry refers to as chargemaster rates. Chargemaster is a listing of the sticker prices which are the equivalent of a retail price before discounts are applied. The actual prices, such as those it charges to Health Alliance Medical Plans, its own wholly owned medical insurance

company, are about half of the chargemaster rate. The annual financial reports illustrate the normal discounts provided to third-party payers where they list the difference between "gross patient revenue" and "net patient revenue". For example, see Trial Exhibit 130 at p. 14 that shows the difference between gross and net is "Less discounts, allowances, and estimated contractual adjustments under third-party reimbursement agreements." It then shows that the percentage net to gross was 50.38% for 2006 and 52.80% for 2005. In other words, plaintiff discounted its prices to most payers by nearly 50%. On the other hand, patients in the charity care program are billed at the retail, or chargemaster rate, before their charity discounts are applied.

Plaintiff also requires that people asking for charity care prove lack of income. Those people cannot provide a no-income tax return as there is no such thing, so plaintiff required that those people get letters from other people verifying that they have no income. Testimony of Tearinee Boyd, January 11, 2019, p.84, lines 8-18) That requirement alone must stop some people. Some people may still have some self-respect despite their financial situations and not want to ask their friends, neighbors and roommates to verify that they are charity cases. This requirement is certainly an obstacle for many people.

Korzen: Burden of Proof

> "...that the statements of the agents of an institution and the wording of its governing legal documents evidencing an intention to use its property exclusively for charitable purposes do not relieve such institution of the burden of proving that its property actually and factually is so used..." (Korzen, 157; 542)

In Korzen, the Court was reiterating what it had stated in prior cases. It is not public statements, a corporate charter or any other statement of intent that determines whether an entity is entitled to a charitable property tax exemption. The burden is on the applicant to prove that they are an exclusively charitable entity, not that they merely aspire to be one.

> "When applying for a property tax exemption, the burden is on the party seeking the exemption to demonstrate by clear and convincing evidence that the property is being used for exclusive charitable purposes...When determining whether property is within the scope of an exemption, all facts are to be construed and all debatable questions are to be resolved in favor of taxation." Midwest Palliative at para 23.

In a case seeking exemption from tax on real property, the burden of proof is clear and convincing evidence. Clear and convincing evidence has been held to be just a shade short of beyond a reasonable doubt.

Korzen: Exclusive Use

> "...and that the term "exclusively used" means the primary purpose for which property is used and not any secondary or incidental purpose." (Korzen, 157; 542)

Plaintiff asserts that the charitable use can be made on parcels not in issue in this case and that such charitable use, if it actually had existed, can be applied to the subject parcels to

somehow qualify them as charitably used. Plaintiff chose not to introduce evidence to show how much charity care was disbursed on specific properties and objected when the county defendants attempted to introduce documents showing that plaintiff could not determine what services were provided on which parcels and whether the services were even performed on the parcels involved in this case. Plaintiff asserts that no case has held that what gets considered is only the specific property in issue. Many cases discuss this issue.

Midwest Palliative held that the applicant for tax exemption had to "demonstrate by clear and convincing evidence that the property was being put to an exclusively charitable use." The court was addressing whether the specific building was being used exclusively for charitable purposes, without regard to the fact that there was another building on the same parcel which had a charitable exemption. Para 1, 23, 38.

Provena says:

> As detailed earlier in this opinion, eligibility for a charitable exemption under section 15-65 of the Property Tax Code (35 ILCS 200/15-65 (West 2002)) requires not only charitable ownership, but charitable use. Specifically, an organization seeking an exemption under section 15-65 must establish that the subject property is "actually and exclusively used for charitable or beneficent purposes, and not leased or otherwise used with a view to profit." 35 ILCS 200/15-65 (West 2002). When the law says that property must be "exclusively used" for charitable or beneficent purposes, it means that charitable or beneficent purposes are the primary ones for which the property is utilized. Secondary or incidental charitable benefits will not suffice, nor will it be enough that the institution professes a charitable purpose or aspires to using its property to confer charity on others. [emphasis added] (Provena, 394; 1147)

This issue of charitable use of the specific parcels in issue has been directly and clearly addressed by the Fifth District in Three Angels Broadcasting Network v. The Department of Revenue (5th Dist. 2008), 381 Ill.App.3d 679. In that case Three Angels sought both a religious exemption and a charitable exemption. (Three Angels, 681) The Three Angels court at 697 held that:

> It is the primary use of the subject property, and not TABN's activities in other locations or its uses on special occasions, that must be evaluated to determine whether there is a view to profit...Where money is made by the use of a building, that is profit, no matter to what use that money is applied. [emphasis added].

By plaintiff's proposition as stated in court on 1/10/2019 (that they can claim things done in other buildings as supporting the subject building use or words to that effect), an owner could claim an exemption for property not used at all for charitable purposes as long as the owner has some other property somewhere else that is used for charitable purposes. The subject property is the specific parcel for which tax exemption is sought.

Korzen makes clear that the applicant must establish that the property itself is used for a charitable purpose and the later cases reinforce this principle. This is especially problematic for plaintiff since plaintiff has taken the position that it does not need to prove that the charity was provided on the particular parcels involved in this suit. Therefore plaintiff has not provided evidence specific to what actual charitable services, if any, were provided on which of the four parcels in this suit.

Korzen Factors and Plaintiff's Expert

Note that plaintiff's witness who was called as an expert testified that he was not giving an expert opinion as to the Korzen factors. (Trial Transcript, January 16, 2019, p.46, lines 17-24) His testimony did not support plaintiff's assertions about Korzen. Instead, what plaintiff's witness testified to were generalized opinions that were phrased similarly to the Korzen factors, but left key parts of the Korzen criteria unmentioned.

In any event, when there is a dispute it is for the court to determine whether the use of any particular parcel of real property qualifies for tax exemption. It is a question of law. It is not for the legislature and not for a witness claiming to be an expert in the law.

Community Benefit is Not Charity

Plaintiff asserts that doing the things listed in its community benefit report constitute charity. They do not. These other activities have nothing to do with real property tax exemption. Many of these activities would properly be categorized as marketing and advertising. Many of these programs have the effect of promoting the "brand" of plaintiff and are done for the purpose of creating a sense of goodwill or generating more paying or insured customers.

Also it should be recognized that many of the activities which are characterized as community benefits are not necessarily being done on the subject parcels--not even the one involving the study of

hibernation by bears. It is a little unclear what "community benefit" is afforded to the taxing districts because plaintiff supports the study of hibernating bears, let alone how this can be considered the provision of charity. Though it is probably true that the bears themselves have no income.

No actual evidence was adduced to show how the various "community benefits" were in fact charitable in nature. The plaintiff and its witnesses merely state the conclusion that all of the items plaintiff declares to be "community benefits" are in fact also charitable actions. What is clear is that plaintiff recognized that the amount of actual charity care it provided was minimal and therefore plaintiff needed to try to reconstitute some of the other activities it participated in as charitable in an effort to try to make its charitable activities appear to be something more than *de minimis*.

As noted earlier, plaintiff already has stated it need not prove which specific parcels it provided charitable services on. Plaintiff compounds its specificity problem by attempting to consolidate all of its purported "community benefits" and asserting that they should also be considered as part of plaintiff's charitable works. Plaintiff's witnesses made generalized statements about these various programs to the effect that they took place on plaintiff's property, but without specifying which specific parcel the activities took place on. When asked on cross-examination about specific locations, plaintiff's witnesses either did not know exactly which parcel the activities took place on, or they identified buildings like the Auditory School, the Mills Breast Institute, St. Joseph Institute for

the Deaf or the University of Illinois that are not located on the four specific parcels involved in this lawsuit.

Likewise, providing services to Medicaid and Medicare patients may be seen in some context as a community benefit. That does not make it charity. The law is clear that it is not charity to accept money from Medicare for the provision of medical services. "Medicare discounts are not charity…." Franciscan Communities, Inc. v. Hamer (2nd Dist. 2012), 2012 IL App (2d) 110431, para 54.

Percentage Amounts of Charity

Plaintiff asserts that there are no cases that discuss specific amounts of charity care. There are a number of cases that discuss the amount of charity care provided. As already discussed and quoted above, Midwest Palliative has a great deal of discussion about percentage amounts of charity care.

Community Health Care v IDOR (3rd Dist. 2006), 369 Ill.App.3d 353, 357, says that CHC by its own admission uses its property for free or discounted medical service 27% of the time and as a not-for-profit medical clinic 73% of time. The court held that CHC had not established it is entitled to exemption.

In Riverside Medical Center v. IDOR, 342 Ill.App.3d 603, 609, the court rejected 3% as making it a charity and said it must provide exclusively charity care. The court rejected the notion that Medicaid or Medicare are charity saying "the evidence indicates that the primary use of the clinics is to provide care to patients who are

able to pay, either individually or through Medicare, Medicaid or private insurance".

Even Provena's statements regarding Provena providing a meager amount of charity constitute a discussion of the quantity of charity care provided.

Sisters of the Third Order

Plaintiff has on multiple occasions stated that Sisters of the Third Order v. Board of Review (Ill. 1907), 231 Ill. 317; 83 N.E. 272 stands for the proposition that an entity can be eligible for a charitable property tax exemption when providing for a small percentage of charity patients.

Here is the part that plaintiff misrepresents:

> Since January 1, 1906, and up to the time of the hearing before the board of review, the hospital has been receiving and caring for patients at the rate of about 1500 per year, about five per cent of whom were charity patients and about six per cent of whom were county patients. (Sisters, 320; 273)

Plaintiff suggests that means that the remaining 89% paid in full for their services. That is not what the above statement says. All this means is that 89% of the patients contributed some amount.

> Those who are able to pay are charged from $8 to $25 per week, the price being graded with reference to the location, size and general desirability of the room occupied by the patient. (Sisters, 320; 272)

This does not say they paid an amount sufficient to cover all of the care they received. The case does not say what percentage those

patients paid and it certainly does not say they paid a sufficient amount to cover their care entirely.

Closer examination of Sisters illustrates how different the entity in Sisters was from modern health care institutions like plaintiff. The facility was run by actual sisters (nuns) who are conscripted into service. They give (donate) all their assets to the facility when they become members and those assets are used to keep the facility running:

> Those women who become members of the corporation convey and absolute title to all their property, of every kind, to the corporation, and bind themselves to engage in nursing and caring for sick and injured patients in hospitals owned by the corporation during the remainder of their lives. For so doing they receive no pay or remuneration whatever, except board, clothing, and a room or other space in which to live in the hospital building. (Sisters, 319; 272-273)

The corporation is managed by those conscripted sisters, not by doctors or paid administrators and no one makes any money from the institution.

Sisters does give an example of an entity that would not be charitable:

> It is, of course, possible that a hospital might be established and conducted for the professional and financial benefit of certain physicians, and that it might make a pretense of receiving charity patients for the purpose of bringing itself within the statute exempting the property of institutions of public charity from taxation, … (Sisters, 274; 323)

That is an apt description of plaintiff.

Restoration of Exemptions

Plaintiff talks about having its tax exemption "restored." In the context of "restoring" its exemption, it can only be referring to restoring the exemption that it had in years prior to 2004. The exemptions prior to 2004 were exemptions based on Section 15-65 of the property tax code. Plaintiff has withdrawn its claims based on Section 15-65, so it cannot be seeking "restoration" of that tax exemption. It cannot be seeking "restoration" of a 15-86 exemption as 15-86 did not exist during the 2004-2011 period or prior to it. Plaintiff may assert that it does not matter, that a tax exemption is a tax exemption. That is not what the statutes say and that is not what the courts say and that is not what plaintiff has said in its complaints in versions earlier than the sixth version known as the Fourth Amended Complaint as amended.

Retroactivity of Section 15-86

The legislature included a retroactivity provision in section 15-86. When the legislature includes a retroactivity provision, that is the only retroactivity provision. There is no need for the court to try to determine whether the legislature intended that a statute is to have retroactive application in any other manner or whether it is only to have prospective application.

The retroactivity provision for 15-86 states specifically that it applies to applications for property tax exemption that were pending before the Illinois Department of Revenue on the effective date of the statute, which was in June 2012. While plaintiff did have 15-65

hearings and applications pending at an earlier time, plaintiff withdrew its requests for hearings and obtained a dismissal of the 2004, 2005, 2006 and 2007 hearings in 2010. (Trial Exhibits 3017, 3018, 3019) Plaintiff withdrew its applications for years 2008 and 2009 in 2012. (Trial Exhibit 3116) Plaintiff never submitted applications for 2010 or 2011 for these parcels under Section 15-65. Plaintiff had no applications or pending hearings before the Illinois Department of Revenue for any of the parcels or years in this case at the time the statute went into effect.

Section 23-25(e)

This case was filed under section 23-25(e) of the Property Tax Code, 35 ILCS 200/23-25(e). That section has been held to amount to reenacting the common law tax injunction under certain circumstances. It does not constitute a cause of action. It only allows a property owner to proceed in court under the limited circumstances instead of proceeding before an administrative agency--the Illinois Department of Revenue. Among its requirements is that the property owner had a tax exemption of a similar basis at another time. Plaintiff had a 15-65 exemption. It is now seeking a 15-86 exemption which is the hospital exemption. That did not exist at any time in issue. Plaintiff could not have had a 15-86 exemption at any time covered by the complaint or before.

The use of 23-25(e) is merely the ticket through the door of the court room. The plaintiff must still prove that it is eligible for the claimed exemption for each parcel and each year for which it

makes a new claim. The assertion of the fact that you received an exemption in a prior year is merely proof that you were granted an exemption in that year. It is not proof that you actually qualified in that year. There is no *res judicata* effect from one year to the next. There is no right to a continuing exemption.

In other words, 23-25(e) gets you into court. Once you have gotten into court, you still have to prove that you actually qualify for the exemption for the claimed parcel and year.

Interest

Plaintiff seeks payment of the amounts it paid for real property taxes on the subject parcels for the years 2004-2011. In addition to that, plaintiff seeks payment of interest from the dates of each payment of the real property taxes which it owed. There are two sections of the Property Tax Code that address interest on tax refunds.

Plaintiff seeks repayment of the taxes it paid by means of the court ordering the issuance of a Certificate of Error. The Property Tax Code at section 20-178 (35 ILCS 200/20-178) provides for payment of interest to a taxpayer when a refund is made pursuant to a Certificate of Error issued under sections 14-15, 14-20 or 14-25. Section 14-15 applies only in counties of 3,000,000 or more population. Section 14-20 applies in counties of less than 3,000,000 population. However, section 14-20 applies only where a certificate of error is issued by the supervisor of assessments or the board of review because of an error in valuation. Section 14-25 may apply in

this case. It concerns tax exempt property and authorizes a certificate of error under certain circumstances. If the court determines that the subject real property qualifies for the tax exemption which it seeks, it would next determine if section 14-25 applies. If it is determined that section 14-25 applies, then section 20-178 applies.

Where section 20-178 applies, "… interest shall be paid from 60 days after the certificate of error is issued … to the date the refund is made." Section 20-178 does not provide for the payment of interest for any time prior to the issuance of the certificate of error or for the first 59 days after the issuance of the certificate of error. There is no prejudgment interest authorized.

Where Section 23-20 applies, it authorizes payment of interest from the date of payment of the tax. However, Article 23 in its entirety concerns only the subject of tax objections. Tax objections are filed where there is a dispute over valuation of real property. "… if any person desires to object to all or any part of a property tax for any year, <u>for any reason other than that the property is exempt from taxation…</u>." [emphasis added] 35 ILCS 200/23-5. Plaintiff made clear in its letters to the Board of Review that it was not contesting the valuations placed on the parcels. (Trial Exhibit 3013) Proceedings seeking property exemption are expressly excluded from the application of Article 23.

The subject parcels at one time had partial charitable tax exemptions under section 15-65. What occurred in this case is that

plaintiff paid the real property tax bills on the subject parcels and later filed forms PTAX-300 with the Illinois Department of Revenue--applications for charitable tax exemptions under section 15-65. The Department held that plaintiff did not qualify for charitable tax exemptions on the subject parcels. Plaintiff sought an administrative trial before the Department on its applications. At a later time, plaintiff filed similar proceedings in the circuit court pursuant to section 23-25(e) which authorized having its claims for exemption determined by the court instead of the Department. At a later time, plaintiff sought to dismiss its administrative proceedings and proceeded only in court.

In 2012, after all the years in issue in this case, the legislature enacted a hospital exemption and called it section 15-86. In 2014, plaintiff added to the complaint a claim for hospital tax exemption under section 15-86. Shortly before trial, plaintiff withdrew completely all claims that it was entitled to charitable exemption under 15-65. It then fully abandoned all claims that it was entitled to the tax exemption for which the Department had already ruled that plaintiff was not entitled.

This case went to trial only on the claim of whether plaintiff qualified for the newly created hospital tax exemption under 15-86. Whatever theory plaintiff might have sought to support its claim for interest on taxes paid after denial of its claim for charitable tax exemption under 15-65, there is no cognizable claim under which payment of interest could apply to its present claim under 15-86.

It is especially odd that plaintiff asserts that the law authorizes it to be paid interest for years prior to the existence of the type of exemption it now seeks. Although section 15-86 allows retroactive application under very specific circumstances, it does not provide for a retroactive award of interest.

Form PTAX-300H Created in 2013

Plaintiff created demonstrative exhibits that only can be described as phony PTAX-300H forms using data from 2004-2011 in an attempt to show that plaintiff would have qualified for an exemption under section 15-86 for 2004-2011 had section 15-86 actually existed in 2004-2011. Note that the footnote notation in exhibits themselves indicate that the form was created or revises in February of 2013. (Demonstrative Trial Exhibits 446 through 453)

In addition to the fact that there was no such exemption in the law in those years, the PTAX-300H form which plaintiff used was incomplete. Although the Illinois Department of Revenue created form PTAX-300H and plaintiff used such form for years after section 15-86 was enacted, that form is incomplete. The Illinois Department of Revenue failed to require any information to show compliance with the Korzen factors as now required under Oswald. The Illinois Supreme Court in Oswald held thereafter that compliance with the Korzen factors was mandated by the Illinois Constitution for exemption under section 15-86. The incomplete PTAX-300H was not sufficient for the 15-86 exemptions which the Department granted after the statute had been enacted. Plaintiff cannot establish meeting the constitutional

requirements for 2004-2011 using a form that does not require that information.

THE CONTRACT CLAIM: COUNT XXXV

The Contract, A P.I.L.O.T. Agreement

The contract which is the subject of Count XXXV for breach of contract provided in essence that the contracting taxing districts would withdraw their then-pending intervention in an administrative proceeding, by which plaintiff was seeking real property tax exemption for some of its other real property, and those taxing districts would not initiate or participate in any further such interventions on plaintiff's future applications for real property tax exemption.

This agreement would have eliminated any opposition to plaintiff's applications for the next 15 years by these taxing districts, thereby increasing the likelihood of plaintiff being able to avoid having to pay real property taxes for those 15 years. In exchange, plaintiff was to pay the taxing districts certain specified amounts of money. The total amount of payments to the taxing districts for agreeing to the 15 year contract was to be $775,000. The taxing districts would receive that amount by way of the contract instead of whatever amounts they might have received as tax revenues.

The contract provided for direct payments to the taxing districts from plaintiff in lieu of the payments they would otherwise receive from property taxes in regard to plaintiff's specific properties, in other words it was a contract for payment in lieu of taxes. Such a

contract is specifically authorized by the Property Tax Code at 35 ILCS 200/15-30. That section further provides that no such agreement may have a duration exceeding five years. The payments cannot be in excess of the amount of the taxes reasonably calculated to be due if there were no such agreement and the real property was not granted tax exemption. The statute does not prohibit an agreement wherein the payments in lieu are less than the taxes would have been.

The Contract as Now Asserted by Plaintiff

Plaintiff now asserts that the contract was not intended to be a PILOT agreement. Non-home rule taxing districts have only the authority expressly granted by the legislature. If plaintiff were correct and the contract is not a PILOT agreement and if one can ignore that there is no other statutory authority for any similar kind of contract, the maximum duration of such a contract then is a maximum of four years.

The governing body of a unit of local government is limited in its authority to make a contract for a term not going beyond the term of the present governing body. The term of the governing body here is four years. The limitation cannot exceed that. It could be less since it is limited to the unexpired term. The only potentially applicable exception in this circumstance is the PILOT agreement statute outlined in the previous section.

Governing Body Cannot Bind Future Governing Bodies

The payment in lieu of taxes agreement, the contract in Count XXXV, was for a period of 15 years. As such, it was unauthorized. The taxing districts had no statutory or other authority to make such a contract. The authority of 15-30 is limited to an agreement of no more than five years duration. The contract is void *ab initio*. Because the contract is void *ab initio*, it cannot be amended to become a contract of five years duration.

While the most frequent example found in the appellate and supreme court cases involve employment contracts, this can occur in any kind of contract. A contract for services that extended for a duration longer than the term of the supervisor in office was held *ultra vires* and void *ab initio*. Cannizzo v. Berwyn Township 708 Community Mental Health Board (1st Dist. 2000), 318 Ill.App.3d 478, 488. It is contrary to the effective administration of a political subdivision to allow elected officials to tie the hands of their successors. Grassini v. DuPage Township (3rd Dist. 1996), 279 Ill.App.3d 614, 620; Cannizzo at 482-483. Persons dealing with municipal corporation are charged with knowledge of the limitations of the power of that municipal corporation for any contract attempted to be entered into. Cannizzo at 487. "A county board may not contract to bind succeeding county boards to their contracts." 1973 Op.Atty.Gen.Ill.108, 112.

The Purpose of the Contract

The contract expressly recites that the taxing bodies had intervened in administrative proceedings to contest the issuance of

tax exemptions to plaintiff for a parcel of real property located at 810 West Anthony Drive, Urbana, Illinois. (Section entitled "Recitals," at subsection B) It further states that the taxing bodies challenged both the charitable status of plaintiff and the exclusive and primary use of the property. (Recitals – subsection C) The purpose of the contract was for the taxing bodies to agree not to bring any further actions contesting the issuance of property tax exemptions to plaintiff. Plaintiff attempted to contract away its obligation to prove that it was actually entitled to real property tax exemption.

All of the taxing district defendants complied with the contract. None of the parties defendant initiated any action against or involving plaintiff to intervene in any tax exemption proceeding of plaintiff.

The Claim of Breaching of Contract by Assessor

The township assessor cannot terminate a non-homestead property tax exemption. Only the state can terminate a non-homestead property tax exemption.

What the contract count, Count XXXV, asserts as a breach has morphed over the years as plaintiff has recognized its inability to prove facts that do not exist. In 2004, the township assessor performed her statutory duty of valuing the subject real property. This was necessary not only because it was the statutory duty of the township assessor to do so but also because plaintiff had partial exemptions on the parcels. It would not be possible to calculate the

amount of the tax and the amount of the exemption without actual values against which to apply the percentage exemption.

In earlier proceedings in this litigation, Judge Leonhard ruled that:

> The Merits of the Motions to Dismiss Count XXVI [now Count XXXV]
>
> The parties-defendant to which count XXVI is directed (referred to in the record as "the settlement defendants") have each filed motions to dismiss. Each of the motions is for the most part substantially similar and will therefore be addressed collectively. All of the motions are based on section 2-615 of the Code of CiviI Procedure. Accordingly, all well pleaded facts in count XXVI must be taken as true and viewed in the light most favorable to plaintiff.
>
> The parties by able counsel raise various competing claims, whether in support of or in opposition to the motions. The court has chosen to address only one of those claims as that claim is readily dispositive of the facial validity of count XXVI.
>
> As previously noted, count XXVI has as a central element the proposition that the Cunningham Township Assessor, in issuing assessment notices for the properties in question, was "acting in the course and scope of her employment with the Township." The court is of the view that this allegation betrays a fatal infirmity in plaintiffs theory of liability.
>
> First to be noted is that the township assessor is neither a party to nor a signatory of the settlement agreement. In addition, as defendants well point out, a township assessor is not an employee of a township. Instead, a township assessor is an elected official. As such, a township assessor is no more an employee of a township than is a sheriff (see Moy v. Cook County, 159 Ill.2d 519 (1994)) or a state's attorney (see National Casualty Company v. McFatridge, 604 F.3d 335 (7th Cir.2010)) an employee of the county in which he or she is elected. Moreover, in determining whether one party to an action is an employee of another, "the essential and generally decisive consideration is the right to control." Moy, 159 Ill.2d at 526. Quite aside from the fact that count XXVI is devoid of any factual underpinning that the assessor is subject to the control of the governing body of the township that the assessor serves, so also are the Illinois Compiled Statutes devoid of any legal underpinning to that effect. Requisite facial scrutiny of count XXVI of the second amended complaint

readily establishes that it has a substantial legal deficiency. The respective motions to dismiss are therefore meritorious.

On September 04, 2018, ruling on plaintiff's motion for summary judgment on Count I, the present trial judge ruled:

> It is not in dispute that, for many years as to several of the properties in question, that the assessment was made at full value only to be reduced by a percentage based on non-exempt use. It is also not in dispute that there was new construction that would alter the percentage of the overall property that would be tax-exempt. When the overall scheme of the Code is considered as well as the unique facts and circumstances of this case, this Court is of the opinion that the Cunningham Township Assessor and the Champaign County Supervisor of Assessments had the authority to assess Plaintiff's properties. Section 9-70 states that the general role of local assessment authorities is to assess non-exempt property. But that section does not preclude them from doing so. Section 9-75 allows them to "revise and correct an assessment as appears to be just." Section 16-70 clearly implies that local assessment officers can assess what is purported to be exempt property and that the Board of Review will hear such cases.
>
> ***
>
> The only logical interpretation of the Code leads this Court to come to the conclusion that, under the unique facts and circumstances of this case, local assessment officials had the right to assess Plaintiff's properties. They needed to place a value on the properties in order for the exemptions to be decided by DOR. Any other view would lead to the absurd result that taxing authorities would never being able to review current assessments/exemptions unless the owner notified them of a change. (Order on Plaintiff's Motion for Summary Judgment on Count I of the Fourth Amended Complaint, entered September 04, 2019, p.15)

This court has consistently recognized that the action of the township assessor was valuation of the real property and was lawful.

The Contract Expressly Allowed Valuation

The contract states at Section Four, second paragraph: "The taxing bodies do not waive actions regarding the valuation, as

opposed to tax-exempt status, of any Carle properties." The parties recognized that valuation, which is what assessment is, was necessary. Just to be clear, they expressly agreed that this would not be considered to be barred by the contract.

Even if that language were not so clearly and unequivocally set forth in the contract, assessment, or valuation, could not be barred by a contract.

Beyond that, the township assessor was not a party to the contract. The township assessor is an independent elected officer. Her statutory function is not to do what the township board wants her to do. Her statutory function is to do what the law requires whether or not the township board or the plaintiff like it. The assessor's obligation is to act in accordance with the Property Tax Code.

Township Assessor is Not an Agent of Township Board

Plaintiff has asserted the legal theory that the township assessor is an employee of the township board and that therefore anything the township assessor does is in law the act of the township board. In trial, the undersigned attorney representing the township assessor, the township and the city, asked the township assessor on direct exam whether the township board ever attempted to control her work. One of the attorneys for the plaintiff objected to the question and asserted that control is irrelevant. The objection was overruled. The township assessor testified that the township board asserted no control over her. (Testimony of Joanne Chester, Trial Transcript, January 24, pp.256-257)

Plaintiff did not stop at merely objecting to the testimony regarding whether the assessor was under the control of the township. Plaintiff went on to state that its claim rested solely on the fact that the Township Assessor is an agent of the Township as a matter of law. (Statement of S. Pflaum, Trial Transcript, January 24, p.256, lines 10-20) As noted above, Judge Leonard already ruled earlier in this case that the township assessor was not under the control of the township.

The Illinois Supreme Court quite recently addressed this. It held that the "mere allegation of agency is insufficient to establish actual agency...Proof of actual agency requires a showing that (1) a principal/agent relationship existed, (2) the principal controlled or had the right to control the conduct of the agent, and (3) the alleged conduct of the agent fell within the scope of the agency." [emphasis added] Bogenberger v. Pi Kappa Alpha Corporation, Inc. (Ill. 2018), 2018 IL 120951, para. 28. "A complaint relying on an agency relationship must contain allegations that the principal expressly or impliedly gave authority to the agent to act on its behalf or that the principal held out the individual as his agent." Bogenberger at para. 30.

The Illinois Supreme Court in Moy v. County of Cook (1st Dist. 1993), 244 Ill.App.3d 1034, 1038, affirmed 159 Ill.2d 519, held that

> In Illinois, the test of agency of whether the alleged principal has the right to control the manner and method in which work is carried out by the alleged agent and whether the alleged agent can affect the legal relationships of the principal."

Moy held that there was no agency between a county sheriff and the county.

In trial, plaintiff's attorney attempted to have its witness, James Leonard, agree with the statement made by plaintiff's attorney that the assessor was the agent of the township board. Objection to that was sustained. It was a leading question and called for a conclusion of law. Plaintiff pleaded no allegations of fact to show agency. Such allegations are required. The allegation of "agency" itself is an allegation of a legal conclusion. There cannot be proof without pleading and there was no evidence adduced--just the attempt of plaintiff's attorney to slip into a question to plaintiff's witness the conclusion that township assessor was an agent of the township board.

Even if agency had been pleaded, there was no allegation and no evidence to show that the act claimed was within the scope of the alleged agency. Plaintiff's attorney objected when defense counsel asked the township assessor whether she was acting under the control of the township board. Plaintiff's attorney asserted that control is irrelevant. (Trial Transcript, January 24, p.256, lines 10-11) Plaintiff cannot change its position now.

Plaintiff attempted to prove agency by showing that township assessor made reports to the township board at monthly public meetings and that the township board approved a resolution on signatures on checks--an ordinary requirement of banks that the governing body of a unit of government identify who was going to sign

checks. It is the unit of government, which is a taxing body, that raises revenue and in whose name the bank accounts are created. Asking the assessor to occasionally sign a check so that a payment can go out on time does not create an agency relationship.

Township Assessor is an Independent Elected Officer

A township assessor is an independent elected official, not an employee of the township board, and is not subject to control by the township board. The township officers are independent elected officers and a governmental body cannot bind the actions of an independently-elected officer in performing his or her statutory functions. Heller v. Jackson County Board (1979), 71 Ill.App.3d 31, 37-38; Kotche v. Winnebago County Board (1980), 87 Ill.App.3d 1127, 1131.

As stated above, independent officials do not have an agency relationship with the governing body of the unit of government. O'Connor v. County of Cook (1st Dist. 2003), 337 Ill.App.3d 902, 909; Libertyville Township (2nd Dist. 1984), 121 Ill.App.3d 587, 598. The township board does not have control over the employees in the offices of the elected township officials. Township Code, 60 ILCS 1/100-5. To a limited extent, the appraisals of the elected township assessors are subject to supervision by the county supervisor of assessments (chief county assessment officer). Property Tax Code, 35 ILCS 200/9-15.

Even if the township assessor had signed the contract she had no authority to enter an agreement that controls how she assesses

properties. ILCS 200/25-15. If the township assessor cannot enter the agreement herself, then clearly the township board cannot enter the agreement on her behalf. Contracts entered into by public officers that are expressly prohibited by law are void and *ultra vires*. Diversified Computer Services, Inc. v. Town of York (1982), 104 Ill.App.3d 852, 858.

The Claimed Breach by the Taxing Districts

As time went by, plaintiff hit upon a new theory of how the contract was breached. Twenty-nine months after the initial complaint was filed, plaintiff added the contract count and the taxing districts as defendants. The additional defendants were served with summonses. The summonses required that the new defendants file answers or otherwise plead. The defendants did so. It is now the assertion of plaintiff that by doing what the law required them to do upon being sued by plaintiff, those defendants violated the contract. Plaintiff asserts in its post-trial brief that the taxing districts "insinuated themselves into the litigation." What plaintiff means is that plaintiff inserted the taxing districts into the litigation and now claims that it was a violation of the contract to do what the law required in response to the action of plaintiff. Plaintiff contends that defending a lawsuit is a breach of a contract that by its terms concerned an agreement by which the governing bodies would force future governing bodies to disregard their statutory obligations and not oppose future applications for tax exemption to which plaintiff may not be entitled.

Plaintiff's attorney asserted during opening argument and plaintiff's attorneys reiterated at various times throughout the trial that the city and township were breaching the agreement merely by participating in the proceedings. Plaintiff's attorney even interrupted the undersigned attorney during the proceedings to assert that the undersigned attorney was breaching the agreement "right now". Plaintiff's attorney's objective there primarily was to interrupt defendants' attorneys, a frequent tactic. Of more significance, plaintiff's attorneys were asserting that by merely being in court and asking questions of witnesses, defendants or perhaps their attorneys were breaching the contract during the trial 17 years after the date of the contract.

Plaintiff is essentially arguing that it has successfully induced the city and township defendants to breach the contract by adding them as parties to the complaint. By that logic, it is the plaintiff's action of adding the city and township as parties to the complaint that has actually caused the breach, not the defendants.

It is most important to keep in mind that plaintiff in fact received what it sought. No defendant took any action to interfere with any exemption applications filed by plaintiff. While plaintiff made payments for five years it received 15 years of defendant taxing districts never doing what the contract stated would not be done.

Attorney Fees

In Illinois, attorney fees cannot be awarded in litigation except in clearly defined circumstances. The exceptions are where attorney

fees are authorized by statute and where attorney fees are agreed to by contract. An example of attorney fees authorized by statute is the Illinois Marriage and Dissolution of Marriage Act. A typical example of attorney fees agreed to by contract is a lease to an apartment.

In this case there is no statute authorizing an award of attorney fees to the plaintiff. Note that the plaintiff does not cite such a statute.

Plaintiff seeks attorney fees for its claimed breach of contract. The contract is the basis for its Count XXXV. It is attached to the Fourth Amended Complaint--as amended (Fourth Amended Complaint was amended by order entered 9/28/2018). The contract itself does not have a provision allowing for the award of attorney fees.

Plaintiff seeks attorney fees by way of Count XXXV for whatever attorney fees it incurred in Count I and Counts III through XXXIV of the same complaint in the event it prevails in this litigation. Plaintiff cannot recover attorneys fees based on Count I as that Count has previously been decided against plaintiff. In regard to whether plaintiff can recover attorney fees based on Counts III through XXXIV, plaintiff asserts that the court can disregard the established law and award attorney fees if it sees fit to do so. In support of this proposition, plaintiff cites Ritter v. Ritter (1943), 381 Ill. 549 and Sorenson v. Fio Rito (1st Dist. 1980), 90 Ill.App.3d 368, 372-374.

Ritter makes the point that if person A commits a tort against person B that necessitates person B having to sue person C to preserve B's real property rights, then person B is allowed to sue person A to recover the fees person B had to expend in pursuing the claim against person C. Plaintiff in our case is seeking attorneys fees for a claim it has made against defendants in the same case and there is no claim in this case that defendants have impeded plaintiff's real property rights. Clearly Ritter is not applicable.

Sorenson was a malpractice case in which that court said that attorney fees incurred in a prior case were made necessary by the malpractice. It said that in that prior case the attorney fees were just ordinary losses. The dissent disagreed with the majority overruling a prior decision on this point.

Plaintiff chose not to cite the case of Evink v. Pekin Insurance Company (2nd Dist. 1984), 122 Ill.App.3d 246, 251-252. Evink, citing Sorenson, makes it clear that the exception made in Sorenson was limited to cases in which "the loss or expenses were caused by the defendant's wrongful conduct." 122 Ill.App.3d at 251. This refers to illegal conduct of a tortious nature. The tort immunity act would apply to any claim of tortious conduct and that has been raised as an affirmative defense. In the present case, this court has already ruled that the act of the township assessor in valuing the real property was not wrongful.

Plaintiff also complains that the city and the township "insinuated themselves into the litigation." The defendants were

served with summonses. They were required to file answers. The doing of an act mandated by law cannot be considered wrongful. Plaintiff seems to be asserting that the act of the defendants in appearing in court after being sued was a breach of contract. That is addressed in detail elsewhere in this brief. If somehow the act of a unit of government in defending a lawsuit filed against it could be a breach of contract, that does not authorize an award of attorney fees. This has been directly addressed. In Dreyfuss Metal Company v. Berg (First Dist. 1990), 210 Ill.App.3d 189, 199, the court held that a breach of contract did not rise to the level of "… illegal or wrongful conduct..." authorizing an award of attorney fees. [emphasis added] Before the exception can be considered, the conduct must amount to a tort. Goldstein v. Dabs Asset Manager, Inc. (First Dist. 2008), 381 Ill.App.3d 298, 302.

Also, plaintiff offered no evidence of any kind concerning attorney fees. Plaintiff rested. Plaintiff declined to offer rebuttal evidence. The trial is over.

The Contract Is The Entire Agreement

At Section Seven the contract provides:

> ENTIRE AGREEMENT
>
> This agreement embodies the entire agreement of the parties. There are promises, terms, conditions or obligations other than those contained herein. This instrument supercedes all previous communications, representations, or agreements either verbal or written between the parties. The parties acknowledge that no representation of any fact or opinion was made by one party to the other or anyone on their behalf to induce the parties to execute this agreement.

The contract itself bars any award of attorney fees for claimed breach of the contract. The very purpose of an integration clause is to make clear and unambiguous that everything not expressly included in the contract is excluded from the contract. If plaintiff wanted an attorney fee provision in the contract it could have included one. If there were a law authorizing attorney fees that law has been waived and excluded by the parties to this contract.

OTHER ISSUES

Unconstitutionality

The township has raised the issue of facial unconstitutionality of section 15-86. While the Illinois Supreme Court has ruled on that issue in the Oswald case, that court expressly declined to foreclose future attack on section 15-86. The township addresses this issue briefly so as to make it clear that the issue has not been abandoned.

Section 15-86 by its terms creates a property tax exemption for hospitals without regard to whether a hospital meets the requirements for an exemption under the Illinois Constitution of 1970, article IX, section 6. Section 15-86 by its terms creates a special category of exemption for property owned by hospitals and used as hospitals with additional requirements different from any other kind of exemption.

The township raises a valid-rule challenge to Section 15-86. The township asserts that the no-set-of-circumstances test has no rational application in a valid-rule challenge as the legislature had no authority to enact the statute as written. The Fourth District in

Carle II held the statute to be unconstitutional because it did not require compliance with the Korzen factors and the court could not fix that. The Fourth District agreed with the Township and declared it had some difficulty with the application of the no-set-of-circumstance test. In Oswald, the First District agreed that the statute as written did not require compliance with the Korzen factors but that such compliance was mandated by the Illinois Constitution. To resolve this, the First District held it could fix the statute by implying the constitutional language of Korzen into the statute. The Illinois Supreme Court adopted the First District approach.

Because the valid-rule challenge was raised in an amicus brief and not in the appellant brief of Oswald, the Illinois Supreme Court declined to address the validity of the no-set-of-circumstances test. The court pointed out that plaintiff Oswald did not carry her burden of proof and that she had conceded the issue of the no-set-of-circumstances test. The court held this to be fatal to Oswald's case. The Oswald court acknowledged that there may be future constitutional challenges and that the court may reconsider the application of the no-set-of-circumstances test in a future case.

Finis

Cunningham Township, the Cunningham Township Assessor and the City of Urbana have addressed the genuine issues properly raised by the actual pleadings and presently before the court. They do not concede anything which plaintiff asserts. The fact that this brief does not respond to everything in plaintiff's brief should not be taken to be

conceding any point asserted by plaintiff or anything which plaintiff poses as an issue.

CONCLUSION

The court should order that:

Plaintiff did not prove that any of the four parcels in this case, PINs 91-21-08-310-001, 91-21-08-307-005, 91-21-08-309-005, and 91-21-08-304-018, were used primarily for charitable purposes for any of the years 2004 through 2011;

Plaintiff did not satisfy the Korzen criteria for a charitable property tax exemption for any of the four parcels in this case, PINs 91-21-08-310-001, 91-21-08-307-005, 91-21-08-309-005, and 91-21-08-304-018, for any of the years 2004 through 2011;

Plaintiff is not entitled to a real property tax exemption under Section 15-86 of the Property Tax Code for any of the four parcels in this case, PINs 91-21-08-310-001, 91-21-08-307-005, 91-21-08-309-005, and 91-21-08-304-018, for any of the years 2004 through 2011;

Plaintiff did not have applications pending before the Illinois Department of Revenue for any of the four parcels in this case, PINs 91-21-08-310-001, 91-21-08-307-005, 91-21-08-309-005, and 91-21-08-304-018, on June 14, 2012, when PA 97-688 was enacted and Section 15-86 became law;

Section 23-25(e) of the Property Tax Code does not apply to any claim for exemption for years prior to the enactment of Section 15-86

unless the claim falls within the specific retroactivity provision of the Public Act;

Plaintiff is not entitled to any amount of interest regardless of whether plaintiff had established entitlement to real property tax exemption. No section of the Property Tax Code authorizes the court to award interest on such an exemption. Interest applies by statute when there is a refund made pursuant to section 23-20 and 23-5 pursuant to a tax objection over valuation of the property. Exemption proceedings are excluded expressly under article 23. The tax objection procedure does not apply to exemption. Under 20-178 when a certificate of error is issued concerning a tax exemption, the county collector pays interest if and only if the refund is not made within 59 days after issuance of the certificate of error. In that situation, interest accrues only beginning with the 60th day after issuance of the certificate of error;

The contract of Count XXXV of the Fourth Amended Complaint exceeded the authority of the governing bodies;

The contract of Count XXXV of the Fourth Amended Complaint exceeded the number of years allowed under Section 15-30 of the Property Tax Code for PILOT Agreements;

The contract of Count XXXV of the Fourth Amended Complaint exceeded the authority of the governing bodies for other kinds of contracts as it extended past the remaining terms of office of the governing body members who approved it;

The contract of Count XXXV of the Fourth Amended Complaint is *ultra vires* and *void ab initio*;

The Cunningham Township Assessor is an independent elected officer;

The Cunningham Township Assessor is not an agent of the township or the township board;

The Cunningham Township Assessor does not act under the control of the township board;

The Cunningham Township Assessor was not a signatory on the contract of Count XXXV of the Fourth Amended Complaint;

The contract of Count XXXV of the Fourth Amended Complaint expressly allowed the Cunningham Township Assessor to perform the statutorily required duties to assess property;

This court has already ruled that the Cunningham Township Assessor acted within her statutory duties;

The Cunningham Township Assessor did not breach, or cause to be breached, the contract of Count XXXV of the Fourth Amended Complaint;

Cunningham Township, from 2002 through 2017, did not intervene in, or participate in any intervention, on any real property tax exemption applications of plaintiff;

The City of Urbana, from 2002 through 2017, did not intervene in, or participate in any intervention, on any real property tax exemption applications of plaintiff;

Cunningham Township did not breach, or cause to be breached, the contract of Count XXXV of the Fourth Amended Complaint;

The City of Urbana did not breach, or cause to be breached, the contract of Count XXXV of the Fourth Amended Complaint;

The contract of Count XXXV of the Fourth Amended Complaint had no provision for attorney fees;

Plaintiff is not entitled to attorney fees under the contract;

Plaintiff is not entitled to attorney fees under the law;

Plaintiff is not entitled to attorney fees under any theory.

Respectfully Submitted,

/s/Frederic M. Grosser
Frederic M. Grosser

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that on May 13, 2019, the foregoing *Closing Argument Of Cunningham Township, City of Urbana And Cunningham Township Assessor* is being filed electronically with the Clerk's Office of the Circuit Court of the Sixth Judicial Circuit, Champaign County, Illinois, and the electronic filing system will provide electronic service of such filing to the email addresses of the following recipients:

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/s/Frederic M. Grosser
Frederic M. Grosser

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the

statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

Date May 13, 2019 /s/Frederic M. Grosser
Frederic M. Grosser

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