

BEFORE THE STATE BOARD OF EQUALIZATION

FOR THE STATE OF WYOMING

IN THE MATTER OF THE APPEAL OF)	
MOUNTAIN VISTA RETIREMENT)	
RESIDENCE FROM A DECISION OF)	Docket No. 2012-78
THE FREMONT COUNTY BOARD OF)	
EQUALIZATION 2012 PROPERTY)	
VALUATION)	

DECISION AND ORDER

APPEARANCES

Thomas N. Long and Aaron J. Lyttle of Long Reimer Winegar Beppler LLP appeared on behalf of Mountain Vista Retirement Residence (Mountain Vista or Petitioner). Oral argument by Mr. Long.

Jodi A. Darrough, Deputy Fremont County and Prosecuting Attorney, appeared on behalf of Tara Berg, Fremont County Assessor (Assessor or Respondent). Oral argument by Ms. Darrough.

DIGEST

This is an appeal from a decision of the Fremont County Board of Equalization (County Board) affirming the Assessor's denial of the exemption and the 2012 valuation of Petitioner's property. Petitioner filed a Notice of Appeal with the State Board of Equalization (State Board) effective September 5, 2012. Mountain Vista and the Assessor filed briefs as allowed by the October 3, 2012, State Board Briefing Order and October 25, 2012, Order Granting Motion for Extension of Time. The parties presented oral arguments to the State Board on February 19, 2013.

The State Board, Chairman Steven D. Olmstead, Vice Chairman Paul Thomas Glause and Board Member E. Jayne Mockler, considered the County Board Record, Mountain Vista's Notice of Appeal, Petitioner's Opening Brief, Brief of Respondent, Petitioner's Reply Brief and the parties' oral arguments.

We evaluate the appeal of the County Board decision by Mountain Vista against our standard of review: whether the decision was arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, and/or contrary to law. *Rules, Wyoming State Board of Equalization, Chapter 3 § 9*. The decision of the County Board is affirmed.

ISSUES

Mountain Vista raised one general issue: “Was the County Board’s decision reviewing the Fremont County Assessor’s 2012 assessment of Mountain Vista’s property supported by substantial evidence, in accordance with procedures required by law, and neither arbitrary, capricious, nor inconsistent with law?” [Petitioner’s Opening Brief, p. 3]. Mountain Vista argued:

1. “Mountain Vista is a charitable association.”
2. “Mountain Vista is a benevolent association.”
3. “To the extent the County Board relied on the Department’s property tax rules imposing additional requirements on charitable or benevolent associations that provide senior housing facilities, such reliance was based on rules that exceed the Department’s statutory authority.”
4. “Mountain Vista’s property is neither used for private profit nor primarily for commercial purposes.”

[*Petitioner’s Opening Brief*, pp. 12, 20, 21, 27].

The Assessor identified substantially the same general issue: “Was the decision of the Fremont County Board of Equalization supported by substantial evidence, in observance with procedure required by law, and not arbitrary or capricious in nature, an abuse of discretion, or in excess [of] statutory jurisdiction, authority, limitations and right?” [*Brief of Respondent*, p. 4]. The Assessor argued:

1. “Mountain Vista is a taxable commercial entity pursuant to Department Rules, Chapter 14, § 13(a)(ii).”
2. “Department Rules, Chapter 14, section 13(a)(ii) must be read as a whole and not selectively.”

3. “Mountain Vista is not a charitable or benevolent organization.”
4. “Federal income tax and State sales tax exemptions are irrelevant.”
5. “Taxation or exemption of other facilities is irrelevant to this matter.”
6. “The Department of Revenue did not exceed its statutory authority when it promulgated rules regarding senior housing authorities.”
7. Mountain Vista’s “property is used primarily for commercial purposes.”

[*Brief of Respondent*, pp. 2, 6, 7, 9, 12, 13, 15].

The Board restates the issues as follows:

1. Was the decision by the Fremont County Board of Equalization affirming the Assessor’s decision to deny Mountain Vista a property tax exemption supported by substantial evidence and neither arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law?
2. Is Mountain Vista a charitable or benevolent association?
3. Did the Department of Revenue exceed its statutory authority when it promulgated rules regarding senior housing authorities?

PROCEEDINGS BEFORE THE COUNTY BOARD

The County Board conducted a hearing on July 24, 2012. The County Board entered its decision on August 6, 2012, affirming the Assessor’s 2012 valuation and the nonexempt status determination for Mountain Vista’s property. The decision was mailed to Petitioner on August 6, 2012. [County Board Record, Vol. I, p.1, County Board Record, Vol. II, pp. 14, 408–413].

JURISDICTION

The State Board is required to “hear appeals from county boards of equalization.” *Wyo. Stat. Ann. § 39-11-102.1(c)*. Petitioner filed a timely appeal with the State Board effective September 5, 2012, appealing the August 6, 2012, County Board decision. *Rules, Wyoming*

State Board of Equalization, Chapter 3 § 2. [Notice of Appeal; County Board Record, pp. 408–413].

STANDARD OF REVIEW

When the State Board hears appeals from a county board, it acts as an intermediate level of appellate review. *Laramie County Board of Equalization v. Wyoming State Board of Equalization*, 915 P.2d 1184, 1188 (Wyo. 1996); *Union Pacific Railroad Company v. Wyoming State Board of Equalization*, 802 P.2d 856, 859 (Wyo. 1990). In its appellate capacity, the State Board treats a county board as the finder of fact. *Id.* In contrast, the State Board acts as the finder of fact when it hears contested cases on appeal from final decisions of the Department of Revenue (Department). *Wyo. Stat. Ann. § 39-11-102.1(c)*. This sharp distinction in roles is reflected in the State Board Rules governing the two different types of proceedings. *Compare Rules, Wyoming State Board of Equalization, Chapter 2 with Rules, Wyoming State Board of Equalization, Chapter 3.*

The State Board standards for review of a county board decision are, by Rule, nearly identical to the Wyoming Administrative Procedure Act standards which a district court must apply in reviewing an agency action, findings of fact, and conclusions of law. *Wyo. Stat. Ann. § 16-3-114(c)(ii)*. However, unlike a district court, the State Board will not rule on claims a county board has acted “[c]ontrary to constitutional right, power, privilege or immunity.” *Wyo. Stat. Ann. § 16-3-114(c)(ii)(B)*. The State Board’s review is limited to a determination of whether a county board’s action is:

- (a) Arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;
- (b) In excess of statutory jurisdiction, authority or limitations or lacking statutory right;
- (c) Without observance of procedure required by law; or
- (d) Unsupported by substantial evidence.

Rules, Wyoming State Board of Equalization, Chapter 3 § 9.

Since the State Board Rules are patterned on the judicial review provision of the Wyoming Administrative Procedure Act, we look to precedent interpreting Wyoming Statutes section 16-3-114(c) for guidance. For example, we must apply this substantial evidence standard:

When an appellant challenges an agency's findings of fact and both parties submitted evidence at the contested case hearing, we examine the entire record to determine if the agency's findings are supported by substantial evidence. *Colorado Interstate Gas Co. v. Wyoming Department of Revenue*, 2001 WY 34, ¶ 8, 20 P.3d 528, 530 (Wyo.2001); *RT Commc'ns, Inc. v. State Bd. of Equalization*, 11 P.3d 915, 920 (Wyo.2000). If the agency's findings of fact are supported by substantial evidence, we will not substitute our judgment for that of the agency and will uphold the factual findings on appeal. "Substantial evidence is more than a scintilla of evidence; it is evidence that a reasonable mind might accept in support of the conclusions of the agency." *Id.*

Chevron U.S.A., Inc. v. Department of Revenue, 2007 WY 79, ¶ 9, 158 P.3d 131, 134 (Wyo. 2007).

We also apply this standard when reviewing conclusions of law:

Questions of law are reviewed *de novo*, and "[c]onclusions of law made by an administrative agency are affirmed only if they are in accord with the law. We do not afford any deference to the agency's determination, and we will correct any error made by the agency in either interpreting or applying the law." *Bowen v. State, Dep't of Transp.*, 2011 WY 1, ¶ 7, 245 P.3d 827, 829 (Wyo.2011) (quoting *State ex rel. Workers' Safety & Comp. Div. v. Garl*, 2001 WY 59, ¶ 9, 26 P.3d 1029, 1032 (Wyo.2001)).

Maverick Motorsports Group, LLC v. Department of Revenue, 2011 WY 76, ¶ 12, 253 P.3d 125, 128 (Wyo. 2011).

We review the findings of ultimate fact of a county board *de novo*:

When an agency's determinations contain elements of law and fact, we do not treat them with the deference we reserve for findings of basic fact. When reviewing an "ultimate fact," we separate the factual and legal aspects of the finding to determine whether the correct rule of law has been properly applied to the facts. We do not defer to the agency's ultimate factual finding if there is an error in either stating or applying the law.

Basin Elec. Power Co-op., Inc. v. Dep't of Revenue, State of Wyo., 970 P.2d 841, 850-51 (Wyo. 1998)(citations omitted), *quoted in Britt v. Fremont County Assessor*, 2006 WY 10, ¶ 17, 126 P.3d 117, 123 (Wyo. 2006).

We also apply this “arbitrary and capricious” standard:

Even if sufficient evidence is found to support the agency’s decision under the substantial evidence test, this [Board] is also required to apply the arbitrary-and-capricious standard as a “safety net” to catch other agency action which might have violated the Wyoming Administrative Procedures Act. *Decker v. Wyoming Medical Comm’n*, 2005 WY 160, ¶ 24, 124 P.3d 686, 694 (Wyo. 2005). “Under the umbrella of arbitrary and capricious actions would fall potential mistakes such as inconsistent or incomplete findings of fact or any violation of due process.” *Id.* (quoting *Padilla v. State ex rel. Wyoming Workers’ Safety and Comp. Div.*, 2004 WY 10, ¶ 6, 84 P.3d 960, 962 (Wyo. 2004)).

State ex rel. Wyoming Workers’ Safety and Comp. Div. v. Madeley, 2006 WY 63, ¶ 8, 134 P.3d 281, 284 (Wyo. 2006).

FACTS PRESENTED TO THE COUNTY BOARD

1. On April 4, 2012, the Fremont County Assessor mailed Petitioner the 2012 Notice of Assessment for its Mountain Vista Retirement Residence (Mountain Vista) properties, at 180 Chase Drive, Lander, Wyoming, assessing its commercial land and improvements at \$1,327,908 and its personal property at \$8,246. Mountain Vista owns and operates an independent living facility and provides residential services for the aged. [County Board Record, Vol. I, pp. 6-7, 251-252, 285].
2. On April 20, 2012, Mountain Vista filed a statement contesting the Assessor’s 2012 property tax assessment on grounds it was exempt under Wyoming Statutes section 39-11-105(a)(xxvi). [County Board Record, Vol. I, pp. 1-13].
3. Petitioner did not dispute the values of its properties and improvements. The only issue before the County Board was the exemption status of the property. [County Board Record, Vol. I, pp. 1-13; Vol. II, pp. 14-15, 19, 23-24].
4. Darcy Englert, Service Director of Mountain Vista, appeared on behalf of Mountain Vista and provided testimony. [County Board Record, Vol. II, pp. 23-64, 84-98].
5. Mountain Vista was recognized as a nonprofit corporation under Internal Revenue Code section 501(c)(3) and 509(a)(2) on January 15, 1998. [County Board Record, Vol. I, pp. 133-141; Vol. II, p. 24].

6. On May 1, 1998, the City of Lander issued a \$1.4 million development bond to construct the 19 unit Mountain Vista residential facility. On May 8, 1998, Mountain Vista acquired land from Westward Heights Corporation to build an independent living facility and provide residential services for the aged. Mountain Vista paid property taxes for the facility since 1998. [County Board Record, Vol. I, p. 70, Vol. II, pp. 8, 31, 48-49].
7. Mountain Vista's Articles of Incorporation require that at the dissolution of the corporation its property can go only to a charitable organization, charitable corporation, governmental agency or another public purpose. The property cannot be sold on the open market. [County Board Record, Vol. I, p. 52; Vol. II, p. 32].
8. Mountain Vista maintains two resident programs. Resident applicants may join Mountain Vista through a membership fee or through a month to month lease. An applicant must be age 55 or older and apply to Mountain Vista's board for membership or to lease a residence. A personal interview may be required if the applicant is not known to a board member, staff member or current resident. [County Board Record Vol. I, pp. 310, 318, 320; Vol. II, pp. 53-54, 56, 61, 66-68].
9. Each resident must complete an Independent Living Assessment and meet physical requirements which demonstrate the individual can live independently or with the aid of a spouse or roommate. The assessment must be current at the time of initial occupancy. A resident's physical health is reassessed after an illness or a fall, to determine whether the individual can continue to live at Mountain Vista safely and independently. [County Board Record, Vol. I, pp. 310-311 and 318; Vol. II, pp. 51-53, 66-67].
10. Applicants must also meet financial thresholds to live at Mountain Vista. Although the thresholds are not predetermined, the applicant must demonstrate the financial means to pay the initial membership fee and monthly service fees or the means to pay the lease. [County Board Record, Vol. I, pp. 311, 316, 319; Vol. II, pp. 52-53, 56-57, 68].
11. For residents who select a membership at Mountain Vista, a one-time membership fee is assessed. The fee is calculated in \$10,000 increments, beginning at \$10,000 and extending to \$110,000, although the top tier is established at \$115,000. The membership fee determines the service fee; a higher membership fee lowers the monthly service fee. Residents choose their initial membership fee and service fee based on their personal financial goals and choice of housing unit. A membership in Mountain Vista conveys no property interest in a unit. A unit cannot be sold, but it may be subleased. If a member resident moves or dies the membership fee is reimbursed through a sliding scale based on residence longevity. [County Board Record, Vol. I, p. 319; Vol. II, pp. 56-61, 63].

12. Residents who select the lease option pay a monthly rent, based on the size and location of the unit, the rent includes the monthly service fee. The lease requires a \$2,000 refundable deposit. Leases are not pro-rateable and require a 30 day notice of intent to vacate the unit. [County Board Record, Vol. I, p. 320].

13. Full membership is vested after 10 years and is available to members and lessees. Vested membership enables a resident to pay the lowest service fee. [County Board Record, Vol. I, p. 312; Vol. II, pp. 56, 59].

14. All residents pay the monthly service fee, which is calculated as the member's or lessee's proportionate share of the sum required to meet Mountain Vista's annual expenses. The proportionate share is based on the size of the unit. The membership option allows a resident to tailor their monthly service fee to their personal financial goals, choosing a higher membership fee lowers the monthly service fee. An increase in the service fee requires a 60 day notification. [County Board Record Vol. I, pp. 312, 319, 322; Vol. II, pp. 54-55, 58-59].

15. The service fee includes property taxes, cable television, water, sewer, garbage, snow removal, and amenities such as lawn care, exterior window washing, usage of the common area, entrance security/emergency call systems and general maintenance. Additional services, such as meals, not provided in the service fee are charged directly to the residents. [County Board Record, Vol. I, pp. 310, 312, 313; Vol. II. pp. 53, 63, 67-69].

16. Residents pay for their own telephone, gas, electricity, personal property insurance and liability insurance. [County Board Record Vol. I, p. 319; Vol. II, pp. 58-59, 69].

17. Residents provide their own furnishings, although there is some furniture available from donations. Furnishings are not provided by Mountain Vista. [County Board Record, Vol. II, pp. 54, 77-79].

18. Mountain Vista's bylaws require it to provide limited health and wellness services. These services include: wellness programs, health screenings and transportation for residents to health providers for care and treatment, scheduled transportation daily throughout the community for doctor or hospital visits, personal emergency response system, social and recreational programs for older persons, information counseling for residents and such other services as determined by Mountain Vista to be necessary for its residents. While some of these services are included in the service fee, some have additional costs, which are charged to the residents. [County Board Record, Vol. II, pp. 28-29].

19. Mountain Vista received revenue from investment interest and donations to help offset costs for the residents. In 2009, expenses totaled \$257,073.00, interest and donations totaled \$19,300. In 2010, expenses totaled \$249,048.00, interest and donations totaled \$80,500;

however, one donation of \$65,000 was a restricted gift and not available to offset expenses. [County Board Record, Vol. I, Exhibit K, pp. 356-372; Vol. II, p. 74].

20. In 2010, Mountain Vista leased one apartment and an administrative space to Westward Heights Corporation and accounted for the income under service fees. [County Board Record Vol. I, Exhibit K, p. 367].

21. Tara Berg, Fremont County Assessor, appeared in support of her position. [County Board Record, Vol. II, pp. 65-93].

22. The Assessor relied on Department of Revenue Rules, Chapter 14, Property Tax Exemption Standards, sections 12 and 13, and Wyoming Statutes section 39-11-105, to evaluate Mountain Vista's operations and support her decision to deny the exemption. [County Board Record, Vol. I, pp. 325-338; Vol. II, pp. 71,75-76,79].

23. The Assessor's initial consideration concerned Mountain Vista's use of the property. She determined the fees the residents paid were used to pay for the operation of the facility and concluded that this action made the property commercial. She also determined the fees paid by Mountain Vista residents were comparable to and in competition with housing in the private sector, which supported her conclusion that the use of the property was commercial. She decided Mountain Vista's use of the property for commercial purposes made it ineligible for a charitable or benevolent association exemption. [County Board Record, Vol. II, p.76].

24. The Assessor also decided that Mountain Vista's requirements that residents provide their own furnishings, pay for the operation costs of the facility and pay for extra amenities supported her conclusion that the use of the property was for commercial purposes and therefore nonexempt. She cited Department Rule, Chapter 14, Sec. 13 (a)(ii) to support this determination. [County Board Record, Vol. II, pp. 77-79, 82-83].

25. Although she determined Mountain Vista was nonexempt because of its commercial use, the Assessor specifically addressed whether Mountain Vista could qualify for the exemption as a charitable or benevolent association as defined in Department Rules, Chapter 14, Property Tax Exemption Standards, Sec. 12. [County Board Record Vol. II, pp. 70-73; County Board Record Vol. I, pp. 325-338].

26. The Assessor concluded Mountain Vista was not a charitable association because its primary purpose was not charity. She determined Mountain Vista's costs, which were similar to other rental properties in the community, the limitations of its membership to a small, finite group of individuals with sufficient financial means, and the requirement that residents must pass a health screening and be able bodied, excluded it from classification as a charitable association. [County Board Record, Vol. II, pp. 72-73, 82-83].

27. The Assessor also reviewed Mountain Vista's property for potential exempt status as a benevolent association. She interpreted benevolent to mean "giving without expectations" and concluded Mountain Vista did not qualify for an exemption as a benevolent association. [County Board Record, Vol. II, pp. 72-73].

28. The Assessor also considered Department Rule, Chapter 14, section 12(c)(iii) to support her determination that Mountain Vista's classification, as tax exempt under Internal Revenue Code, section 501(c)(3) and its exemption from state sales and use tax, did not automatically qualify it for an ad valorem tax exemption. [County Board Record, Vol. II, p. 71, 75-76].

29. In her testimony the Assessor reviewed the exemption status of other properties in Fremont County and around the state that serve the same or similar functions as Mountain Vista to help explain why Mountain Vista was ineligible for the exemption. [County Board Record, Vol. II, 79-82, 84].

30. On August 6, 2012, the County Board, by a 4 to 1 majority, affirmed the Assessor's 2012 determination of the non exempt status of the Mountain Vista property and upheld the \$1,327,908.00 valuation. In its decision, the County Board recognized the Assessor's argument that the commercial use of the property made it nonexempt, and further concluded that Mountain Vista was not "charity" and was therefore ineligible for the exemption. The decision was mailed to Petitioner on August 12, 2012. [County Board Record Vol. I, pp. 408-13].

31. On September 5, 2012, Mountain Vista filed its Notice of Appeal with the State Board. [Notice of Appeal].

APPLICABLE LAW AND DISCUSSION OF ISSUES

Principles of Law

32. The exemption of property from ad valorem taxation rests in provisions of the Wyoming Constitution, Wyoming Statutes, and Wyoming Department of Revenue (Department) Rules. The Wyoming Constitution, article 15, section 12 provides:

Exemptions from taxation.

The property of the United States, the state, counties, cities, towns, school districts and municipal corporations, when used primarily for a governmental

purpose, and public libraries, lots with the buildings thereon used exclusively for religious worship, church parsonages, church schools and public cemeteries, shall be exempt from taxation, and such other property as the legislature may by general law provide.

33. The Wyoming Legislature has exempted thirty-eight types of property from taxation. *Wyo. Stat. Ann. § 39-11-105(a)*. At issue in this case is:

(a) The following property is exempt from property taxation:

* * *

(xxvi) Property used by a secret, benevolent and charitable society or association, including any fraternal organization officially recognized by the University of Wyoming or any community college, and senior citizens centers to the extent it is not used for private profit nor primarily for commercial purposes by the society, association or center, or lessee thereof;

Wyo. Stat. Ann. § 39-11-105(a)(xxvi).

34. The Wyoming Supreme Court has previously summarized a number of useful precepts concerning statutory interpretation:

In interpreting statutes, our primary consideration is to determine the legislature's intent. All statutes must be construed in *pari materia* and, in ascertaining the meaning of a given law, all statutes relating to the same subject or having the same general purpose must be considered and construed in harmony. Statutory construction is a question of law, so our standard of review is *de novo*. We endeavor to interpret statutes in accordance with the legislature's intent. We begin by making an inquiry respecting the ordinary and obvious meaning of the words employed according to their arrangement and connection. We construe the statute as a whole, giving effect to every word, clause, and sentence, and we construe all parts of the statute in *pari materia*. When a statute is sufficiently clear and unambiguous, we give effect to the plain and ordinary meaning of the words and do not resort to the rules of statutory construction. Moreover, we must not give a statute a meaning that will nullify its operation if it is susceptible of another interpretation.

Moreover, we will not enlarge, stretch, expand, or extend a statute to matters that do not fall within its express provisions.

Only if we determine the language of a statute is ambiguous will we proceed to the next step, which involves applying general principles of statutory construction to the language of the statute in order to construe any ambiguous language to accurately reflect the intent of the legislature. If this Court determines that the language of the statute is not ambiguous, there is no room for further construction. We will apply the language of the statute using its ordinary and obvious meaning.

BP Am. Prod. Co. v. Dep't of Revenue, 2005 WY 60, ¶ 15, 112 P.3d 596, 604 (Wyo.2005) (internal citations and quotations omitted). We must accept statutes as they are written; neither omitting words that are included, nor including words that are omitted. *Id.*; *Hede v. Gilstrap*, 2005 WY 24, ¶ 6, 107 P.3d 158, 163 (Wyo.2005); *Fontaine v. Bd. of County Comm'rs of Park County*, 4 P.3d 890, 895 (Wyo.2000); *In re Adoption of Voss*, 550 P.2d 481, 485 (Wyo.1976).

Cheyenne Newspapers, Inc. v. Building Code Board of Appeals of the City of Cheyenne, 2010 WY 2, ¶ 9, 222 P.3d 158, 162 (Wyo. 2010).

35. “The omission of words from a statute must be considered intentional on the part of the legislature. Words may not be supplied in a statute where the statute is intelligible without the addition of the alleged omission. Words may not be inserted in a statutory provision under the guise of interpretation. The Supreme Court will not read into laws what is not there.” *Matter of Adoption of Voss*, 550 P.2d 481, 485 (Wyo. 1976) (citations omitted).

36. The Department is required to decide all questions that may arise with reference to the construction of any statute affecting the assessment, levy and collection of taxes, in accordance with the rules, regulations, orders and instructions prescribed by the department and to promulgate rules and regulations necessary for the enforcement of all tax measures. *Wyo. Stat. Ann. § 39-11-102(c)(xxi) and (xix)*.

37. The Department shall also confer with, advise and give necessary instructions and directions to the county assessors as to their duties. *Wyo. Stat. Ann. § 39-11-102(c)(xvi)*. A county assessor has a corresponding duty to “[f]aithfully and diligently follow and apply the orders, procedures and formulae of the department of revenue ... for the appraisal and assessment of all taxable property.” *Wyo. Stat. Ann. § 18-3-204(a)(ix)*.

38. Administrative rules have the force and effect of law. *Wyo. Dep't of Revenue v. Union Pacific Railroad Co.*, 2003 WY 54, ¶ 18, 67 P.3d 1176, 1184 (Wyo. 2003). However, “[a]n administrative rule or regulation which is not expressly or impliedly authorized by

statute is without force and effect if it adds to, changes, modifies, or conflicts with an existing statute. Conversely, a rule or regulation which is expressly or impliedly authorized by the enabling statute will be given force and effect.” *Diamond B Services, Inc. v. Rhode*, 2005 WY 130, ¶ 60, 120 P.3d 1031, 1048 (Wyo. 2005) (citations omitted).

39. The Department adopted rules entitled, “Property Tax Exemption Standards.” *Rules, Wyoming Department of Revenue, Chapter 14*. Section 1 of that Chapter provides:

Section 1. Authority.

(a.) These standards provide a reference to accepted definitions, procedures and criteria for the exemption from assessment and taxation of real and personal property.

(b.) All questions of exemption cannot be addressed and answered by rule. These standards are to serve, together with applicable law and Departmental guidelines, as a ready reference to commonly encountered problems. The general law governing exemptions is found in Art. 15,12, Wyoming Constitution and W.S. 39-11-105.

(c.) These rules are promulgated under the authority of W.S. 39-11-102(b).

Rules, Wyoming Department of Revenue, Chapter 14 § 1.

40. The Department’s Rules establish considerations which apply to an assessor’s evaluation of an exemption request:

Section 2. Considerations.

(a.) For county assessed property, county assessors are responsible for making the initial determination of exemption.

* * *

(ii) For all other property, both real and personal, the exemption process begins with the legal presumption the property is assessable utilizing the established principle that taxation is the rule, and exemptions are not presumed. Specific exemptions are provided by statute and constitution. In applying specific exemptions, the statutes and constitution shall be strictly construed. This does not mean, however, any possible doubt must be resolved to approve the exemption. Only if the doubt is well founded should the exemption be denied.

Rules, Wyoming Department of Revenue, Chapter 14 § 2(a)(ii). A presumption imposes upon the party against whom it is directed the burden of proving the nonexistence of the presumed fact is more probable than its existence. *Wyoming Rules of Evidence, Rule 303(a).*

41. The Department Rules further provide and this Board has recognized:

(c.) Three considerations are typically involved in determining whether a property should be exempt:

- (i) Ownership of the property;
- (ii) Use of the property; and/or
- (iii) Type of property.

Rules, Wyoming Department of Revenue, Chapter 14 § 2(c). We take this to be a summary of the character of the many exemptions, rather than a directive to an assessor. Exemptions are typically framed in terms of ownership, use of property, type of property, or some combination of ownership, use, and type. *In re Cheyenne Leads, Inc., Docket No. 2007-52, March 14, 2008, 2008 WL 755826 , ¶ 74 (Wyo. St. Bd. Eq.)* (statutory citations omitted).

42. The Department Rules also provide “[e]xcept for publicly-owned property, the burden is on the owner to prove the property meets exemption requirements. An affidavit or similar form is recommended to establish basic facts on ownership, use and type of property.” *Rules, Wyoming Department of Revenue, Chapter 14 § 3(a).*

43. The Department Rules address secret, benevolent and charitable societies and associations.

Section 12. Secret, benevolent and charitable societies and associations - W.S. 39-11-105(a)(xxvi).

(a.) The following definitions apply:

- (i.) "Secret" means fraternal or lodge-type societies or associations which are not necessarily secret or ritualistic.
- (ii.) "Charity" is a gift for the benefit of an indefinite number of persons in Wyoming, by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works. The fundamental basis for this exemption is the benefit conferred upon the public, and the consequent relief, to some extent, of the burden upon the state to care and advance the interests of its citizens.
- (iii.) "Benevolent" includes purposes which may be deemed charitable, as well as acts dictated by kindness, good will, or a disposition to do good, the objects of which have no relation to the promotion of education, learning, or religion, the relief of the needy, the sick, or the afflicted, the support of public works, or the relief of

public burdens. The term has wider significance than "charitable" as a legal tenet but shall be limited to purposes or activities of sufficient public importance and wide-spread social value.

(iv.) The word "and" in the phrase "secret, benevolent and charitable society or association" shall be understood in the disjunctive, not conjunctive.

(b.) To be exempt under this section, the institution shall fulfill the above definitions, and operate primarily for noncommercial purposes without any element of private profit.

(c.) In making a determination of use for private profit, one distinctive feature is whether the entity has capital stock and a provision for dividends or profits, or whether it derives funds mainly from public and private charity, holding them in trust to be expended only for charitable and benevolent purposes.

(i.) An institution may charge fees or engage in business, but no gain or value may be distributed to members or stockholders. The officers and members may have no pecuniary interest in the property from which they gain. Payments made to officers, employees, contractors and suppliers shall be reasonable and not an indirect means of conferring gain or profit to private persons.

(ii.) Revenue from fees paid by recipients of the charity or services shall be devoted only to the maintenance of the institution or its purposes.

(iii.) A grant of sales/use tax exempt status by the State as a qualified charitable organization, or the grant of income tax exempt status by the Internal Revenue Service as a "501(c)(3)" or similar organization, is not binding in making the determination of whether the property of the entity is exempt from ad valorem taxation. Assessors may consider compliance with and operation under the tax exempt provisions of the Internal Revenue Service Code or an exemption from sale and use tax as a rebuttable presumption the institution's operations are reasonable and not for profit.

(iv.) The matter of private profit concerns the way property is used, not solely the ownership thereof. The entire use of the property by all concerned shall be considered.

(d.) The property at issue shall not be used primarily for a "commercial purpose", that is use of property or any portion thereof to provide services, merchandise, area or activities for a charge, which are generally obtainable from any commercial enterprise and are collateral to the purpose of the secret, benevolent and charitable society or association.

- (i.) Commercial purpose includes, without limitation, the operation for charge of bars, restaurants, dancing areas, merchandise shops, housing, theaters and bowling alleys.
- (ii.) The use of property for commercial purpose is controlling, not whether or not a profit is actually made nor how the revenue is ultimately used. If an activity is considered "commercial", it does not become "non-commercial" merely because the revenue derived from the commercial use is devoted to charitable or authorized purposes.
- (e.) If a secret, benevolent and charitable society or association confers a benefit only upon the citizens of another state, its property is not exempt.

Rules, Wyoming Department of Revenue, Ch. 14 § 12.

44. The Department's Rules also discuss the exemption for "senior citizen centers" contained in the same subsection of the Wyoming Statutes.

Section 13, Senior citizen's centers - W.S. 39-11-105(a)(xxvi):

(a.) "Senior citizen centers" include property used to provide transportation, information, and recreation facilities and other services which enable senior citizens to maintain their independence and avoid institutionalization.

* * *

(ii.) Housing made available to senior citizens which is not part of a senior citizens' center (such as a retirement home) is exempt only if the entity owning the property meets the criteria of a "charitable and benevolent society or association" in Section 11 [sic] of this Chapter. A retirement home is taxable if the residents provide their own furnishings and are charged for the cost of operating the home, including extra amenities enjoyed by the residents. Such a retirement home constitutes a commercial enterprise, even if operated on a non-profit basis with reduced charges.

Rules, Wyoming Department of Revenue, Chapter 14 § 13(a)(ii). (The charitable and benevolent society or association provision is found in *Rules, Wyoming Department of Revenue, Chapter 14 § 12, supra* ¶ 43).

45. An assessor's valuation is presumed valid, accurate, and correct. This presumption survives until overturned by credible evidence. *Britt v. Fremont County Assessor*, 2006 WY 10, ¶ 23, 126 P.3d 117, 125 (Wyo. 2006); *Thunder Basin Coal Company v. Campbell County, Wyoming Assessor*, 2006 WY 44, ¶ 13, 132 P.3d 801, 806 (Wyo. 2006); *Teton Valley Ranch v. State Board of Equalization*, 735 P.2d 107, 113 (Wyo. 1987). A mere difference of opinion as to value is not sufficient to overcome the presumption. *J. Ray*

Co. v. Hudson, 370 P.2d 364, 370 (Wyo. 1962); *Thunder Basin Coal Company v. Campbell County, Wyoming Assessor*, 2006 WY 44, ¶¶ 13, 48, 132 P.3d 801, 806, 816 (Wyo. 2006). “The burden is on the taxpayer to establish any overevaluation.” *Hillard v. Big Horn Coal Co.*, 549 P.2d 293, 294 (Wyo. 1976).

46. The Wyoming Supreme Court stated the decision of whether an organization is eligible for a charitable tax exemption must “focus on whether the charity primarily engages in activities providing an indefinite number of persons in the general public with benefits designed to aid them in an educational, moral, physical, or social manner.” The issue of “whether the charity provides access to those benefits in an equal and non-discriminatory way” must also be considered. *Dep’t of Revenue v. Casper Legion Baseball Club, Inc.*, 767 P.2d 608, 611 (Wyo. 1989).

47. This appeal turns, at least in part, on the question of whether there is substantial evidence in the record which reasonably supports the County Board decision to deny Mountain Vista an exemption. In determining whether the required substantial evidence is present, the State Board will not substitute its judgement for findings reasonably supported by evidence in the County Board record. *Laramie County Bd. of Equalization v. State Bd. of Equalization*, 915 P.2d 1184, 1188-1189 (Wyo. 1996); *Holly Sugar Corp. v. State Bd. of Equalization*, 839 P.2d 959 (Wyo. 1992); *Sage Club, Inc. v. Employment Sec. Comm’n*, 601 P.2d 1306, 1310 (Wyo. 1979). While substantial evidence may be less than the weight of the evidence, it cannot be clearly contrary to the overwhelming weight of the evidence. The Wyoming Supreme Court has stated “[s]ubstantial evidence is a term of art best described as relevant evidence that a reasonable mind can accept as adequate support for an agency’s conclusion.” *Sidwell v. State Workers’ Comp. Div.*, 977 P.2d 60, 63 (Wyo. 1999).

Discussion

48. At the center of this discussion is Wyoming Statutes section 39-11-105(a)(xxvi) providing the property tax exemption to charitable and benevolent associations. The statute provides an exemption for these associations only if “the property is not used for private profit nor primarily for a commercial purpose.” *Wyo. Stat. Ann § 39-11-105(a)(xxvi)*, *supra* ¶ 33. The statute does not define a charitable or benevolent association; however, by inserting specific “use” language as a qualifier for the exemption, the Legislature set parameters or limitations on the exemption. It is not a blanket property tax exemption for charitable or benevolent entities.

49. The authority to define “private profit” and “commercial purpose” through rule is given to the Department in Wyoming Statutes sections 39-11-102(b), 39-11-102(c)(xii) and (xix). *Supra* ¶ 36. The Department promulgated and implemented Chapter 14, Property Tax

Exemption Standards. *Supra* ¶ 39. These Rules have the full force and effect of law. *Supra* ¶ 38.

50. At the County Board hearing the Assessor reviewed the exemption statutes and rules and explained how she determined Mountain Vista's use of the property was commercial. The commercial use made it ineligible for the exemption. She stated that although the commercial use and the profit status are intertwined, the commercial use of the property was superior and controlled the decision to deny the exemption. *Supra* ¶¶ 22-24.

51. In her review the Assessor determined Mountain Vista was not a charitable or a benevolent association. She agreed with Mountain Vista that it was organized and operated as a nonprofit association and that the fees it charged only covered expenses and maintenance of the facility. However, she concluded the exclusivity of its membership, the membership fee, security deposit, monthly fees and charges for additional services, in addition to the health requirements and the fact the residents do not own the property and they must provide their own furnishings, established the use of the property as commercial and disqualified it for the exemption. *Supra* ¶¶ 25-27.

52. The Assessor interpreted the statutes and rules to mean that regardless of whether the property owner is considered to be a charitable or benevolent association, or whether it has federal tax exempt status or a state sales tax exemption, the standard which controlled the final decision to deny the exemption was the commercial use of the property. *Supra* ¶ 28.

53. At the County Board hearing the Assessor argued the costs associated with living at Mountain Vista and the requirement that residents provide their own furnishings fell within the parameters of the Chapter 14 section 13(a)(ii.) of the Department's rules. *Supra* ¶ 44. An Assessor is bound by the Rules. *Supra* ¶ 37. The Assessor begins with the legal presumption "the property is assessable utilizing the established principle that taxation is the rule, and exemptions are not presumed. Specific exemptions are provided by statute and constitution. In applying specific exemptions, the statutes and constitution shall be strictly construed. This does not mean, however, any possible doubt must be resolved to approve the exemption. Only if the doubt is well founded should the exemption be denied". *Rules, Wyoming Department of Revenue, Chapter 14 § 2(a.), supra* ¶ 40.

54. In addition the Assessor's determination is presumed to have followed the appropriate rules. "In the absence of evidence to the contrary, we presume that the officials charged with establishing value exercised honest judgment in accordance with the applicable rules, regulations, and other directives that have passed public scrutiny, either through legislative enactment or agency rule-making, or both." *Amoco Production Co. v. Dept. of Revenue*, 2004 WY 89, ¶ 7, 94 P.3d 430, 435 (Wyo. 2004), *supra* ¶46. The record in this case includes substantial evidence the Assessor properly analyzed and applied the pertinent requirements

of the constitution, statutes, and rules to make the determination that Mountain Vista's use of the property made it ineligible for the exemption.

55. In her argument before the County Board, Ms. Englert reviewed the exemption criteria and explained how she believed Mountain Vista met each of the statutory and regulatory requirements. She explained Mountain Vista's operations model and corporate goals in an effort to establish Mountain Vista's status as a charitable and benevolent association. She emphasized Mountain Vista's position that its property is neither used for private profit nor primarily for commercial purposes. In its decision the County Board reviewed and considered both the Assessor's and Mountain Vista's arguments. They did not find Mountain Vista met the requirements for the exemption and denied the exemption request.

56. As the Wyoming Supreme Court stated in deciding whether an organization is eligible for a charitable tax exemption, the focus must be "on whether the charity primarily engages in activities providing an indefinite number of persons in the general public with benefits designed to aid them in an educational, moral physical, or social manner" and "whether the charity provides access to those benefits in an equal and non-discriminatory way." *Dept. of Revenue v. Casper Legion Baseball Club, Inc.*, 767 P.2d 608, 610 (Wyo. 1989), *supra* ¶ 46. When this standard is applied to Mountain Vista, it is clear it was ineligible for the exemption. Although Mountain Vista provided broad services, those services were only available to a very select, finite group of individuals. Only a limited number of individuals known to the "Mountain Vista Community", who met financial and health thresholds, were accepted as residents. This significantly narrowed the pool of eligible residents and appropriately supported the denial of the exemption. *Supra* ¶¶ 8-17.

57. In its appeal to the State Board, Mountain Vista argued the County Board should have considered Mountain Vista's possible status as a benevolent association as an independent basis for the property tax exemption. [Petitioner's Notice of Appeal, p. 5]. In its decision the County Board found that Mountain Vista did not meet the Legislative threshold to qualify for the exemption as a charitable organization. It specifically found that Mountain Vista was not a "charity" as defined in Department of Revenue Rule, Chapter 14, section 13(a).(ii.). [County Board Record, Vol. I, pp. 411]. The County Board did not make a specific finding regarding Mountain Vista's status as a benevolent association. [County Board Record, Vol. II, p. 411-413].

58. Mountain Vista maintained it met the criteria to qualify for the exemption as both a charitable association and a benevolent association. It asserted the Department's Rules required each exemption be considered independently: "the word 'and' in the phrase 'secret, benevolent and charitable society or association' shall be understood in the disjunctive, not conjunctive." *Rules, Wyoming Department of Revenue, Ch. 14 § 12(a).(iv.)*. In support of this contention, Mountain Vista suggested the definition of benevolence is not as strict as the

definition of charity and it met the criteria through its intention to do good by providing a facility “for the best interest of the health, welfare and for the benefit of the citizens of Lander.” [County Board Record, Vol. II, p. 29].

59. Mountain Vista acknowledged one element of the benevolent definition is that it must “be of sufficient public importance and widespread value” and suggested this was met through the provision of a “gift” to its residents and their families. It provided 15 affidavits in support of this contention. The affidavits are included in the record as Exhibit 8 and were admitted over objection. [County Board Record Vol. I, pp. 54-74; County Board Record, Vol. II, pp. 8-10, 26- 29].

60. The Assessor addressed this issue in her testimony. She stated benevolent “includes purposes which may be deemed charitable as well as directed by kindness. Benevolent is giving without expectations.” It was her conclusion that the costs associated with living at Mountain Vista disqualified it from consideration as a benevolent association. *Supra* ¶ 27.

61. The Assessor also reiterated her decision that whether Mountain Vista was a charitable or benevolent association was not the determining factor in her decision to deny the exemption. Her conclusion was based on her determination that Mountain Vista’s property was primarily used for commercial purposes. This controlled her final decision. *Supra* ¶¶ 23, 25-27.

62. The Department’s Rules provide significant guidance concerning this exemption. *Rules, Wyoming Department of Revenue, Chapter 14, § 12, supra* ¶ 43. This guidance extends to the most obvious interpretation of this issue. By Rule, “the word ‘and’ in the phrase ‘secret, benevolent and charitable society or association’ shall be understood in the disjunctive, not conjunctive.” *Supra* ¶ 43. On this point Mountain Vista is correct, to qualify for the exemption it did not have to be a both a charitable and a benevolent association.

63. However, the County Board did not base its decision solely on its own finding that Mountain Vista was not a charity, but rather on the Assessor’s denial of the exemption based on the commercial use of the property. In its final decision and order it ruled that Mountain Vista did not meet its burden to provide “sufficient credible evidence” that the Assessor’s determination was incorrect or unlawful. It decided the Assessor “presented sufficient credible evidence” to reach her determination and upheld her process and her decision to deny the exemption. [County Board Record, Vol. I, pp. 412-13]. Mountain Vista has not shown that absent a specific finding by the Count Board regarding Mountain Vista’s benevolent status that a different result would have occurred, nor was the County Board required to make such a finding. Their responsibility was to ensure that the Assessor’s process and determination were sound and supported by the evidence. *Supra* ¶ 47.

64. On appeal, Mountain Vista also maintained the Department, through its Rule, Chapter 14, section 13(a)(ii), *supra* ¶ 44, exceeded its statutory authority by narrowing the definitions of charitable and benevolent associations to such an extent that the legislature’s intent to provide charitable and benevolent associations property tax relief cannot be accomplished. [Petitioner’s Opening Brief, pp. 21-27, Petitioner’s Reply Brief, pp. 8-12]. Mountain Vista stated their rules do not require residents to provide their own furniture and argued the Department Rule is onerous and conflicts with the Legislature’s intent to encourage the development of housing projects like Mountain Vista. [Petitioner’s Opening Brief, pp. 25-27; Petitioner’s Reply Brief, pp. 6-8, 10-11].

65. Mountain Vista policies required residents to pay, through their lease or service fee, for the costs of operating the property (including the additional costs of many extra amenities) and provided furnishings only to the extent they were available from previous donations. *Supra* ¶¶ 14, 15, 17. Thus, while Mountain Vista’s rules don’t require a resident to provide their own furniture, it is implied residents will provide this additional resource. This supports the assessor’s application of Chapter 14, section 13(a)(ii.) of the Department’s Rules, and further supports her determination and the County Board’s conclusion that Mountain Vista did not meet the exemption criteria.

66. The Department’s Rule, Chapter 14, section 13(a)(ii.), *supra* ¶ 44, naturally follows the requirement in section 12(d.) of Chapter 14, *supra* ¶ 43, which states that housing used for a “commercial purpose” is ineligible for a property tax exemption and that the commercial purpose controls the exemption. It is also consistent with the statutory requirement in Wyoming Statutes section 39-11-105(a)(xxvi), *supra* ¶ 33, that “use” of the property for a “commercial purpose” is a controlling element in determining eligibility for the exemption. It logically adds to the review process by further refining the “use” standard as it is applied to a very specific type of housing, housing available to individuals which is not part of a senior citizens center.

67. Administrative rules have the force and effect of law. *Supra* ¶ 38. Mountain Vista has not demonstrated the Department promulgated and implemented Chapter 14, section 13(a)(ii.) of its Rules, *supra* ¶ 44, in violation of its statutory mandate or authority. *Supra* ¶ 36. Nor has Mountain Vista shown the Assessor applied the Department’s Rule in error. *Supra* ¶ 37. It has not provided evidence to support its contention that the rule is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law or that absent the application of this specific rule, it would have qualified for the exemption.

68. The decision by the Fremont County Board of Equalization to deny Mountain Vista a property tax exemption was supported by substantial evidence and was neither arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

69. The County Board correctly affirmed the Assessor's determination that Mountain Vista is not a charitable or benevolent association entitled to a property tax exemption pursuant to Wyoming Statutes section 39-11-105(a)(xxvi).

70. The Department of Revenue did not exceed its statutory authority when it promulgated rules regarding senior housing authorities.

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ORDER

IT IS THEREFORE HEREBY ORDERED the Fremont County Board of Equalization Order affirming the Assessor's 2012 valuation of the Mountain Vista Retirement Residence property is **affirmed**.

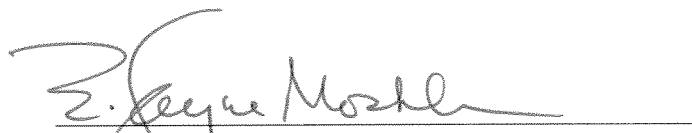
Pursuant to *Wyo. Stat. Ann. § 16-3-114 and Rule 12, Wyoming Rules of Appellate Procedure*, any person aggrieved or adversely affected in fact by this decision may seek judicial review in the appropriate district court by filing a petition for review within 30 days of the date of this decision.

DATED this 24th day of December, 2013.

STATE BOARD OF EQUALIZATION


Steven D. Olmstead, Chairman


Paul Thomas Glause, Vice-Chairman


E. Jayne Mockler, Board Member

ATTEST:


Jana R. Fitzgerald, Executive Assistant

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of December, 2013, I served the foregoing **DECISION AND ORDER** by placing a true and correct copy thereof in the United States Mail, postage prepaid, and properly addressed to the following:

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cc: State Board of Equalization;
Commission/Treasurer/Clerk - Fremont County;
Department of Revenue, Property Tax Division
ABA State and Local Tax Reporter