

SUPREME COURT, STATE OF COLORADO Court Address: 2 E. 14 <sup>th</sup> Avenue, Denver, CO 80203		<div style="border: 1px solid black; padding: 5px; text-align: center;">           FILED IN THE            SUPREME COURT              NOV 18 2008              OF THE STATE OF COLORADO            SUSAN J. FESTAG, CLERK         </div>
Court below: Colorado Court of Appeals Case No. 05 CA 2432 Opinion by Judge Marquez Trial Court: District Court, Arapahoe County Case No. 04 CV 1774 Division 402, Judge Leonard		
<b>PETITIONER:</b> CATHOLIC HEALTH INITIATIVES COLORADO d/b/a Villa Pueblo Towers		▲ COURT USE ONLY ▲
<b>RESPONDENTS:</b> CITY OF PUEBLO, COLORADO DEPARTMENT OF FINANCE, and LARA BARRETT AS DIRECTOR		
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<b>REPLY BRIEF OF RESPONDENT/CROSS PETITIONERS          CITY OF PUEBLO, COLORADO, ET. AL.</b>		

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## **ISSUE FOR REVIEW**

Whether the Court of Appeals erred in its interpretation and application of the City's sales and use tax exemption for religious organizations by applying a rule of broad and liberal construction which has heretofore been limited to property tax exemptions under Colorado Constitution, art. X, section 5.

### **REPLY WITH RESPECT TO CATHOLIC HEALTH'S STATEMENT OF THE CASE**

The City has argued that the tangible personal property used and consumed in providing the Physical Care Services at a fee was found by the Court of Appeals as being necessarily incidental to the Spiritual Ministry including the operation of a chapel. Catholic Health appears to argue that such property used in providing this type of commercial activity, wherein goods and services are paid for and provided in direct competition with other private enterprises, was not found by the Court of Appeals to be justified as an incidental use. Answer-Reply Brief at pp. 24-25. Catholic Health would construe the following ultimate finding of the Court of Appeals as applying to some other potential, unidentified nonexempted items which were neither argued before nor considered by the Court of Appeals:

In view of a policy of receptiveness toward exemptions for religious endeavors, we conclude the sales and use of all tangible personal property at issue here are within the “conduct of [Villa Pueblo’s] regular religious functions” as the term is used in Pueblo’s municipal code. Because we see no argument or indication in the record that the nonexempted items were not used in Catholic Health’s operation of Villa Pueblo, **we conclude that the property is used for purposes necessarily incidental to the exempted primary use.** See *Mauer v. Young Life, supra*. Accordingly, under the stipulated facts regarding Catholic Health’s mission and evidence of religious activities at Villa Pueblo, **the exemption for the remainder of the property should have been granted.**

Catholic Health Initiatives Colorado v. City of Pueblo, 183 P.3d 612, 619 (Colo.App. 2007) (emphasis added).

Contrary to Catholic Health’s argument, the remainder of the property not granted an exemption by the District Court were those items used in providing the Physical Care Services like refrigerators and stoves. Vol. 3, p. 16, l. 21-25). It was these “nonexempted items” which were found by the Court of Appeals to be property used for purposes necessarily incidental to the exempted primary use.

Furthermore, if Catholic Health’s position was correct and the commercial activities were not deemed an incidental use, the Court of Appeals would have had no need to limit such commercial activity by the following requirements: (a) is it an integral part of the organization’s ministry; (b) do the amounts received exceed the expenses; (c) is the activity for gain or profit; and (d) are the sums paid devoted to the organizations’ purpose. Catholic Health, 183 P.3d at 618.

Nor would there have been a rational basis for the Court of Appeals to distinguish Fairview Haven v. Dept. of Revenue, 506 N.E.2d 341 (Ill. App. 1987), Evangelical Lutheran Good Samaritan Soc. v. Buffalo County Bd. of Equalization, 500 N.W.2d 520 (Neb. 1993), Christian Retirement Homes, Inc. v. Bd. of Equalization, 180 N.W.2d 136 (Neb. 1970); and Yakima First Baptist Homes, Inc. v. Gray, 510 P.2d 243 (Wash. 1973) on the basis that the homes for the elderly considered in such cases were not operated at a loss. Catholic Health, 183 P.3d at 619.



## REPLY WITH RESPECT TO CATHOLIC HEALTH'S STATEMENT OF FACTS

### Facts not of Record.

Catholic Health presented the following statements and attached exhibits which are not part of the record and, more importantly, not part of the Stipulated Facts:

(a) A district court recently concluded that Catholic Health's operation of an identical facility in the City of Thornton is a religious activity entitled to exemption from sales and use tax under an identically<sup>1</sup> worded provision.

Answer-Reply Brief at p.1 and attached Exhibit A.

(b) The charging of fees is motivated by a sincerely held religious belief including: (i) Catholic Health's religious principles demand that residents who are able to pay do so, and (ii) paying such fees when able provides a spiritual benefit to the resident. Answer-Reply Brief at p. 6 and attached Exhibit B.

(c) Centura Health and Catholic Health have been granted tax exemptions for all of their facilities in all municipalities, except for Pueblo. Answer-Reply

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<sup>1</sup> The City denies that the facilities are identical and more importantly that the exemptions are identical and specifically notes that the City's exemption only applies to those religious activities and functions which come within the definition of "*charitable organization.*"

Brief at p. 1.

For obvious reasons, the Court's review of this issue is limited to the statements and facts appearing of record and such record and the Stipulated Facts cannot be amended by additional exhibits or factual assertions of Catholic Health. Laessig v. May D&F, 402 P.2d 183, 185 (Colo. 1965); and Johnson v. Colorado State Bd. of Agriculture, 15 P.3d 309, 311 (Colo.App. 2000).

With respect to Catholic Health's assertion that the facility in Pueblo is the only facility which has not qualified for a tax exemption and if such an assertion is true, the City is compelled to make an observation. Given the demographics of the City, it is striking and odd that the Catholic Health has not qualified for an exemption based upon charitable activities.

It should also be emphasized that, contrary to Catholic Health's attempt to characterize the City as being on some sort of mission to collect more taxes, the City is not out to deny qualifying tax exemptions. If there is any doubt with respect to this issue, it may be helpful to reflect upon the following: (a) the amount in controversy is not of a significant amount to the City's collection of sales and use tax revenue, i.e. \$22,587.68 (Rec. Vol. 2, p. 399); (b) the Court of Appeals ruled in favor of Catholic Health and found that Catholic Health was

exempt from payment of the tax liability; and (c) it was Catholic Health which petitioned this Court for certiorari review of the Court of Appeals decision.

### **Effect of and Inferences from the Stipulated Facts**

In the District Court, trial of this case was waived and the matter was submitted to the Court for determination as a matter of law based on the Stipulated Facts. Rec. Vol. 2, p. 398. Each of the parties have borne some risk in entering the Stipulated Facts depending upon what the applicable law would ultimately be determined to be. For example, the Court of Appeals rejected the City's argument that such exemption should be strictly construed and adopted a broad and liberal construction which disregarded the presumption against tax exemption and allowed exemption for incidental uses. Under such construction, the Court of Appeals was able to conclude that the commercial activities of operating a retirement, assisted living or nursing home were exempt as necessarily incidental to the exempted primary use.

If the City is correct in its argument with respect to the application of a strict rule of construction Catholic Health would have to establish under the Stipulated Facts that it is clearly entitled to the exemption. *See General Motors Corp v. City and County of Denver, 990 P.2d 59, 74 (Colo. 1999)* (There is a strong

presumption in Colorado against tax exemption); and Crested Butte South Metropolitan District v. Hoffman, 790 P.2d 327, 330 (Colo. 1990) (A stipulation of facts does not affect the application of presumptions, which are provided for by statutes and common law).

In this context, Catholic Health has misconstrued the City's argument with respect to the Spiritual Ministry. The City identifies the Spiritual Ministry not as self-serving claims to appear sensitive but to note those activities which could be exempt under the Ordinance. The point of the City's argument is that there is no basis in the Stipulated Facts to find that Catholic Health was assessed sales and use tax with respect to any tangible personal property stored, used or consumed with respect to the Spiritual Ministry. As the City argued in the District Court, "This conclusion is supported by the fact that the [Stipulated Facts do] not claim that any of the audit line items relate to any of these facets of operation." Rec. Vol. 2, p. 619.

In entering the Stipulated Facts, Catholic Health's position was and is that the entire operation of Villa Pueblo qualified for an exemption as a regular religious activity and function. Answer-Reply Brief at p. 10. To the extent Catholic Health is incorrect with respect to the applicable law, including the rule

of strict construction, it must overcome the presumption against tax exemption and prove, based upon the Stipulated Facts, that it is clearly entitled to an exemption. There is no basis as Catholic Health appears to argue for remanding the matter to amend the Stipulated Facts. Answer-Reply Brief at pp. 10-11.

With respect to Villa Pueblo's motivation to charge residents for the Physical Care Services, Catholic Health argues that the City is attempting to "renege" on its stipulation. Answer-Reply Brief at p. 5. Such a position misconstrues the City's argument as to what findings may be properly inferred from the Stipulated Facts which is certainly within this Court's review. *See Southland Corp. v. D.C. Burns Realty & Trust Co.*, 444 P.2d 394, 396 (Colo. 1968) (overruling the trial court's findings which were improperly inferred from the stipulated facts).

Catholic Health asserts that Villa Pueblo is motivated by a sincerely held religious belief to charge residents for the Physical Care Services. Catholic Health identifies the following stipulation in support of such inference (Answer-Reply Brief at p. 5) "To Catholic Health, providing housing and care for the elderly is a religious activity that is motivated by a religious belief." Rec. Vol. 2,

p. 409.<sup>2</sup>

The City does not believe that Catholic Health's assertion can reasonably be inferred from the stipulation. The existence of such inference is ultimately for this Court's determination based on the Stipulated Facts.

### **Tax Treatment**

Catholic Health has argued that the City's position and the decision of the Executive Director are inconsistent with its prior actions. Answer-Reply Brief at p. 1. It should be pointed out that the decision of the Executive Director related to the construction and application of the City Ordinance not state statute. The fact that Catholic Health has been granted certain tax exemptions by the State of Colorado does not entitle it to an exemption from sales and use taxes imposed by a home rule municipality such as the City. Berman v. City & County of Denver, 400 P.2d 434, 436-437 (Colo. 1965); Security Life & Acc. Co. v. Temple, 492 P.2d 63, 64-65 (Colo. 1972); and Winslow Const. Co. v. City and County of Denver, 960 P.2d 685, 692-695 (Colo. 1998).

More importantly, the fact that Catholic Health's overall operation is non

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<sup>2</sup> Catholic Health mistakenly quotes the stipulation as including the term "sincere" which it does not. Rec. Vol. 2, p. 409.

profit does not mean that the operation of Villa Pueblo is conducted at a loss. Contrary to Catholic Health's assertion, the Stipulated Facts do not establish what type of loss, if any, is occasioned by Villa Pueblo. The Stipulated Facts do quantify the loss associated with one aspect of Villa Pueblo's services (the life care contracts) and losses with respect to all of Catholic Health's facilities. Rec. Vol. 2, p. 422. Noticeably absent from the Stipulated Facts is any statement of revenue and expenses, or similar record, with respect to Villa Pueblo's activity within the City.

It is how Catholic Health conducts its operation in the City which determines its qualification for the City's tax exemption. This is true irrespective of whether any profit resulting from the operation of Villa Pueblo is dedicated to exempt purposes benefitting other persons outside the City. This point is best understood by reflecting on the fact that the sales and use taxes make possible, to a certain extent, the very existence and operation of Villa Pueblo. Villa Pueblo would be an odd and somewhat hazardous operation without the basic services provided by the City and paid for by the sales and use taxes, for example, police protection, fire and emergency protection and infrastructure including streets and traffic control. As such, what Catholic Health may be doing in other

jurisdictions is of little relevance in determining whether it is exempt from paying the City's sales and use taxes; the payment of which, by the residents, businesses and retailers in the City, obviously benefit Villa Pueblo.

Catholic Health also emphasizes the fact that St. Mary-Corwin Hospital has been granted an Exempt License for all aspects of its operation "that were entitled to charitable or religious exemption from Pueblo sales and use tax." Rec. Vol. 2, p. 425. The City does not readily perceive the relevance of this fact.

Given the decision in Provena Covenant Medical Center v. Dept. of Revenue of State, 894 N.E. 2d 452 (Ill.App .2008), the City can understand, however, Catholic Health's desire to have a facility such as St. Mary-Corwin Hospital be given a "blanket" exemption as a regular religious activity and function. In Provena, the taxpayer was a not-for-profit, full-service, general acute care hospital and operated as an "apostolic mission and health care ministry of the Catholic Church." Provena, 894 N.E.2d at 479. The court had little difficulty in rejecting Provena's claim for religious use exemption. Provena, 894 N.E.2d at 478-480. The more controversial issue resolved in Provena, was the Court's determination that Provena did not qualify for a charitable use exemption, which is unusual for a not-for-profit hospital. Provena, 894 N.E.2d at 459-478. The



determination has significant monetary impact, i.e. in excess of one million dollars a year. Provena, 894 N.E.2d at 456.

## ARGUMENT IN REPLY

### **I. THE COURT OF APPEALS ERRED IN ITS INTERPRETATION AND APPLICATION OF THE CITY'S SALES AND USE TAX EXEMPTION FOR RELIGIOUS ORGANIZATIONS BY APPLYING A RULE OF BROAD AND LIBERAL CONSTRUCTION WHICH HAS HERETOFORE BEEN LIMITED TO PROPERTY TAX EXEMPTIONS UNDER COLORADO CONSTITUTION ART. X, §5**

#### **A. The Religion Clauses do not require that the City's sales and use tax exemption be broadly construed.**

Catholic Health argues that the Religion Clauses require a broad and liberal construction of the City's sales and use tax exemption, and generally identify concerns with respect to improper entangling and chilling effects in support of such claim. Answer Reply Brief at pp. 42-43. To the extent Catholic Health relies upon Mauer v. Young Life, 779 P.2d 1317 (Colo. 1989) and Colorado constitutional and statutory property tax exemption for its argument, the City has distinguished their application to the City's sales and use tax exemption.

Opening-Answer Brief at pp. 31-38. The City would additionally note that religious exemptions from property taxes in all jurisdictions would have to be broadly and liberally construed if Catholic Health's positions were true. This, however, is not the case. See F.P. Renner, Annotation, Construction of Exemption of Religious Body or Society from Taxation or Special Assessment,

168 A.L.R. 1222 (1947) (identifying a number of jurisdictions in which the strict rule of construction and burden of proof is applied against a religious body or society seeking a religious exemption from property taxes).

In its argument, Catholic Health does not identify the improper entangling and chilling effects which would require a broad and liberal construction, other than presumably as it has argued such issue in its brief. Answer-Reply Brief at p. 43. Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327 (1987) appears to be the foremost case that focuses on the entanglement and chilling effects which Catholic Health asserts are applicable to this case. Answer-Reply Brief at p. 35 and *see* Opening Brief at pp. 41-42. As the City has previously argued, the broad exemption in Amos was supported by the need to protect religious organizations from comprehensive government regulation the application of which would have a direct effect upon such organizations' free exercise rights. Opening-Answer Brief at p. 24. It should be kept in mind that the broad exemption in Amos was enacted by the legislature not mandated by the Establishment Clause. In fact, it was only upheld against an Establishment Clause claim because it constitutionally accommodated the organizations' free exercise rights. As stated by the Court, "[I]n order to

perceive government action as a permissible accommodation of religion, there must be in fact an identifiable burden *on the exercise of religion* that can be said to be lifted by the government action.” Amos, 483 U.S. at 348 (O’Connor concurring).

Contrary to Amos, the payment of sales and use taxes does not unconstitutionally burden an organization’s free exercise right. Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 18-20 (1989); Jimmy Swaggart Ministries v. Board of Equalization of California, 493 U.S. 378, 390-391 (1990); and *See* Bob Jones University v. U.S., 461 U.S. 574, 603-604 (1983) (Denial of [tax exempt status under 501(c)(3) of the Internal Revenue Code] will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenents).

Catholic Health’s reliance on the following cases for a broad construction of the City’s sales and use tax exemption or as being otherwise applicable to this case are distinguishable on the same basis and specifically are not concerned with exemption from sales and use taxes:

- (a) NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979)  
(application of the National Labor Relations Act, which could

- potentially subject issues such as method and manner of catechesis of parochial school children to the jurisdiction of the NLRB, was interpreted not to extend to parochial schools);
- (b) Kelly v. Methodist Hospital of Southern California, 997 P.2d 1169 (Cal. 2002) (scope of religious exemption against wrongful termination claim under the Fair Employment and Housing Act);
- (c) Farnam v. Crista Ministries, 807 P.2d 830 (Wash. 1991) (scope of religious exemption against wrongful termination claim under Washington anti-discrimination laws wherein the Court specifically rejected reliance upon state's real property tax law which required a strict construction);
- (d) Wisconsin v. Yoder, 406 U.S. 205 (1972) (Free Exercise Clause prohibited the State of Wisconsin from compelling Amish parents to cause their children to attend formal high school through the age of 16);
- (e) Espinoza v. Rusk, 634 F.2d 477 (10<sup>th</sup> Cir. 1980), *aff'd*. 456 U.S. 951 (1982) (city's licensing scheme found unconstitutional

because it restricted first amendment rights by requiring prior approval under imprecise standard); and

- (f) University of Great Falls v. NLRB, 278 F.3d 1335 (D.C. Cir. 2002) (scope of exemption and related analysis for religious exemption under National Labor Relations Act, which Act could subject religious university to engage in collective bargaining that might substantially burden its free exercise rights).

**B. The City's argument with respect to the scope of the religious exemption is within the issues certified for review and has not been waived.**

The stipulated issue before the District Court was whether the operation of Villa Pueblo during the audit period was exempt from sales and use tax. Rec. Vol. 2, p. 399. Pursuant to the April 25, 2006 Notice of Waiver, Catholic Health waived its claim that Villa Pueblo was exempt from taxation as a charitable activity of a religious or charitable organization and elected "to base its claim for exemption exclusively on its claim that the operation of Villa Pueblo is a religious activity of a religious organization that is exempt from sales and use tax under the City of Pueblo's code." Rec. Vol. 2, p. 555.

The City's argument with respect to this issue in the proceedings below was limited to what the City mistakenly and perhaps simplistically thought to be an easily perceived conclusion, that a retirement, assisted living or nursing home facility did not clearly qualify for a religious exemption.

Although the Court of Appeals' decision was favorable to Catholic Health, Catholic Health petitioned this Court for certiorari review. The core issue raised in said petition was the argued need for a bright line test. Reply in Support of Petition for Writ of Certiorari at p. 1. Such a test would define in a very broad manner the scope of the City's exemption and the activities which qualified. This was something the Court of Appeals refused to do. Catholic Health, 183 P.3d at 619.

In response to Catholic Health's petition, the City objected to such review as going beyond the sole stipulated issue of the parties, and the Court granted the petition over the City's objection. Opposition Brief to Villa Pueblo's Petition for Writ of Certiorari at p. 16. In this context, it was incumbent upon City to expand its argument to address the issue certified and set forth its argument defining the scope of the exemption, which the City has attempted to do. Determining the scope of the exemption is clearly necessary to and comprised within the issues

accepted for certiorari review and may be considered. C.A.R. 53(a)(1).

Moreover, the City's argument as to the scope of the exemption was set forth and contained within its cross-petition. Cross-Petition for Writ of Certiorari at pp. 5-6 ( The scope of the exemption was limited to religious organizations which "freely and voluntarily minister to the . . . spiritual needs of persons . . ." §14-4-21(5), P.M.C.)

The City would further note that a determination of the scope of the exemption should be based on the Ordinance as it is written. As demonstrated in the following section, Catholic Health has failed to do this and appears to have misquoted the Ordinance in what City believes to be a material manner.

**C. The scope of the exemption is properly construed as applying to those activities in which a religious organization freely, voluntarily and exclusively ministers to the spiritual needs of persons.**

Irrespective of whether an organization is seeking exemption for regular religious or charitable functions and activities, the Ordinance clearly and unambiguously requires the organization to be a charitable organization as defined in Section 14-4-21, P.M.C., *See* §§14-4-76(8) and 14-4-77(5), P.M.C. Rec. Vol. 2, pp. 587-589. The definition of charitable organization is set forth in Section 14-4-21(5), P.M.C. as follows:



*Charitable organization* means any entity which:

- a. Has been certified as a not-for-profit organization under Section 501(c)(3) of the Internal Revenue Code; and
- b. Is a religious or charitable organization.

As used in this definition, a *charitable organization* is an organization which exclusively, and in a manner consistent with existing laws and for the benefit of an indefinite number of persons, freely and voluntarily ministers to the physical, mental or spiritual needs of persons, and which thereby lessens the burdens of government.

Rec. Vol. 2, p. 591.

Under the Ordinance, the italicized term "*charitable organization*" includes a religious or charitable organization. Contrary to Catholic Health's assertions, it is the italicized term "charitable organization" which is defined as "an organization which exclusively, and in a manner consistent with existing laws and for the benefit of an indefinite number of persons, freely and voluntarily ministers to the physical, mental or spiritual needs of persons, and which thereby lessens the burdens of government." Catholic Health's attempt to de-italicize this term (Answer-Reply Brief at pp. 17-18) so that it does not apply to religious organizations is contrary to the language of the Ordinance and the specific requirement that the organization be a charitable organization as defined in Section 14-4-21, P.M.C.

Catholic Health argues that the definition of “*charitable organization*” was not meant to apply to regular religious functions and activities and cannot be constitutionally applied to such an exemption. Answer-Reply Brief at pp. 13-20. If this were true, under the Ordinance a religious organization would never be exempt from sales and use tax in the conduct of its regular religious functions and activities since it would never be a “*charitable organization*” as defined in Section 14-4-21, P.M.C.

The definition “*charitable organization*”, however, does apply to and encompasses regular religious functions and activities, being those activities in which a religious organization freely, voluntarily and exclusively minister to the spiritual needs of persons. Under General Conference of Church of God-7th Day v. Carper, 557 P.2d 832 (Colo.1970), the only requirement under the definition “*charitable organization*” which is constitutionally prohibited from being applied to regular religious functions and activities is the requirement that the activity lessen the burden of government. Carper, 557 P.2d at 833-834. This does not mean, however, that a religious organization is relieved from satisfying the other criteria for a valid exemption, i.e. free, voluntary and exclusive. Carper, 557 P.2d at 834 (Nothing we have said here, of course, relieves a religious

organization from the obligation to otherwise satisfy the criteria for a valid religious exemption.)

Catholic Health's reliance on Walz v. Tax Commission, 397 U.S. 664 (1970) is also misplaced. The Court in Walz expressed concern with and found unnecessary the justification of the tax exemption for houses of religious worship upon the social welfare services that some churches perform such as family counseling, aid to the elderly and the infirm, and to children. 397 U.S. at 674. It should be obvious based upon the briefs that freely, voluntarily and exclusively ministering to the spiritual needs of persons is distinct from and not dependent upon the performance of social welfare services including aid to the elderly and the infirm. Spiritual ministry may be nothing more than what is our common experience with public worship service.

Nor is the concept of freely, voluntarily and exclusively ministering to the spiritual needs of persons a vague concept which permits untowed discretion in the taxing authority. This is especially true if the terms such as "freely" are given the narrow and strict construction generally applied to sales and use tax exemptions.

Although Catholic Health believes the Ordinance should have been more

clearly written, this is not a basis to change the Ordinance as written. Even if the Ordinance is ambiguous, the City does not understand how such ambiguity supports Catholic Health's position. Any ambiguity in the language of a sales and use tax exemption must be construed against the taxpayers. Broadmoor Hotel Inc. v. Department of Revenue, 773 P.2d 627, 629 (Colo.App. 1989).

### 1. Effect of the Stipulation

Catholic Health has presented authority for the proposition that the City and this Court must defer to Catholic Health's pronouncement of its religious doctrine and beliefs unless same are found to be insincere. Contrary to Catholic Health's argument, the City has not attempted to dispute or questions the truth of Catholic Health's religious doctrine and beliefs which are set forth in the Stipulated Facts. Catholic Health's conclusory statements that (1) it is motivated by religious belief to charge residents fees, and (2) Physical Care Services are spiritual ministry, however, are not included in the Stipulated Facts. If this Court were to conclude that such statements can be inferred from the Stipulated Facts, that would be the Court's determination and not Catholic Health's. The City does not believe such conclusory statement can be reasonably inferred from the Stipulated Facts, or specifically inferred from the general statement that "To Catholic Health,

providing housing and care for the elderly is a religious activity that is motivated by religious belief.” Rec. Vol. 2, p. 409.

More importantly, deference to Catholic Health’s pronouncements of its religious doctrine and beliefs does not preclude the Court from determining qualification for an exemption. Under a rule of strict construction, the exemption is limited to those activities in which Catholic Health freely, voluntarily and exclusively ministers to the spiritual needs of persons. The activities of Villa Pueblo would have to clearly meet the qualifying requirements of the exemption.

## 2. Effect of Catholic Health’s proposed construction

The City does not believe there is a legitimate secular government interest to support Catholic Health’s proposed broad construction. It is difficult to discern what the limit of such an exemption would be. Although sincerity would be a qualification under Catholic Health’s proposed construction, this provides little assistance in discerning the potential scope of the exemption under such a construction. According to Catholic Health’s own argument, commercial activities, wherein goods and services are paid for and provided in direct competition with other private enterprises, is within the scope of the exemption.

Catholic Health argues that the legitimate, secular government interest supporting such a broad exemption is that “such organization and their religious and charitable activities should be encouraged because they tend to have a beneficial and stabilizing influence on community life.” Answer-Reply Brief at p. 32. Catholic Health cites Walz v. Tax Commission, 397 U.S. 664 (1970) in support of such secular basis. Answer-Reply Brief at p. 32. The scope of exemption in Walz, however, was a very broad organizational exemption which applied to:

Real property owned by a corporation or association organized exclusively for the moral or mental improvement of men and women, or for religious, bible, tract, charitable, benevolent, missionary, hospital, infirmary, educational, public playground, scientific, literary, bar association, medical society, library, patriotic, historical or cemetery purposes. . .

Walz, 397 U.S. at 667.

The City’s exemption, however, is more limited and only applies to those activities in which a qualifying charitable or religious organization freely, voluntarily and exclusively ministers to the physical, mental or spiritual needs of persons.

The significance of the decision in Texas Monthly, Inc. v Bullock, 489 U.S. 1 (1989) is that the exempt religious activities must come within a broader class

of exempt non-religious activities in pursuit of a legitimate secular end. Texas Monthly, Inc., 489 U.S. at 14-17. The secular end promoted by the City's exemption is to relieve from tax liability acts of charity, those acts which are a free, voluntary and exclusive ministry, directed to the physical, mental and spiritual needs of persons.

Catholic Health would construe the ordinance to extend a religious exemption to all activities motivated by religious beliefs and irrespective of whether the activities freely, voluntarily and exclusively minister to the spiritual needs of persons. Such a proposed construction is outside the scope and class of exempt non-religious activities and will ultimately come into conflict with the Establishment Clause.

The City cites Appeal of Springmoor, Inc., 498 S.E.2d 177 (N.C. 1998) to illustrate that such conflict even exists in the present case. Catholic Health attempts to distinguish Springmoor by arguing that Villa Pueblo could have qualified as a charitable activity under United Presbyterian Assn. v. Board of County Commr's of Jefferson County, 448 P.2d 967 (Colo. 1968). The City can only respond that Catholic Health waived any such claim for a charitable activity exemption. Rec. Vol. 2, p. 555.

In addition, Catholic Health is asserting a construction of the exemption which is not limited to the facts of this case. Given the breadth of the proposed construction, any religious organization could engage in commercial activities to further its religious beliefs and qualify for a religious exemption even though such activities would not qualify as charitable activities. Certainly any secular for-profit businesses operating in direct competition with such religious organizations would justifiably wonder why it has to pay sales and use tax when the religious organization does not. As the Court stated in Texas Monthly, Inc.:

[W]hen government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion . . . it “provide[s] unjustifiable awards of assistance to religious organizations” and cannot but “conve[y] a message of endorsement” to slighted members of the community. Texas Monthly, Inc., 489 U.S. at 15 (citations omitted).

**D. Catholic Health has failed to clearly establish its right to an exemption.**

As previously argued by City, there is no basis in the Stipulated Facts to find that Catholic Health was assessed sales and use tax with respect to any tangible personal property stored, used or consumed with respect to its Spiritual Ministry.

In order for Catholic Health to establish its claim that the entire operation of



Villa Pueblo qualifies for an exemption, Catholic Health must establish that the Physical Care Services qualify. If a rule of strict construction is applied, Catholic Health must overcome the presumption against tax exemption and, based upon the Stipulated Facts, clearly establish its right to the exemption, i.e. that the Physical Care Services are activities in which Villa Pueblo freely, voluntarily and exclusively ministers to the spiritual needs of persons.

Catholic Health argues that it is impossible to separate physical care from spiritual care and notes that, "it is the manner of providing physical care - the attitudes of faith and love, the feelings of compassion and respect, that are reflected by care - givers ---- that contribute daily to spiritual healing." Answer-Reply Brief at p. 9.

The City does not believe, however, that such potential spiritual benefit transforms the Physical Care Services into spiritual ministry. The essential and distinguishable element of the physical care is that it's directed toward the physical needs of the residents. It is not an exclusive ministry to a persons spiritual needs nor is it free.

Nor is there any constitutional difficulty in discerning the tangible personal property used or consumed in providing the Spiritual Ministry and the tangible

personal property used in providing the Physical Care Services. Tangible personal property, unlike real property, is not generally susceptible to multiple uses, i.e. a parcel of land may be used for both a church and a ranch but a pool table is not susceptible, generally, to this type of multiple use. It is easy to identify the tangible personal property used in providing the Physical Care Services, such as pool tables, televisions, VCRs, refrigerators and stoves. Rec. Vol. 2, p. 417; and See Rec. Vol. 3, p. 16, l. 21-25.

Signed this 17<sup>th</sup> day of November, 2008.



Robert P. Jagger Atty. Reg. No. 24614

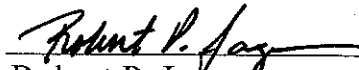
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CERTIFICATE OF COMPLIANCE

Pursuant to C.A.R. 32(a), I certify that this Reply Brief Of Respondents/Cross Petitioners City of Pueblo, Colorado, et. al., contains 5,656 words.

I relied upon the word count of the word-processing system (Word Perfect 10) used to prepare this cross-petition.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after reasonable inquiry.

  
Robert P. Jagger

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply Brief Of Respondents/Cross Petitioners City of Pueblo, Colorado, et. al., was served upon counsel for the Petitioner and Amici Parties, by mailing same, United States mail, postage prepaid this 17<sup>th</sup> day of November, 2008, addressed to:

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