

STATE OF MICHIGAN
COURT OF APPEALS

INVOLVED CITIZENS ENTERPRISES, INC.,

Petitioner-Appellant,

v

TOWNSHIP OF EAST BAY,

Respondent-Appellee.

UNPUBLISHED

October 29, 2009

No. 284706

Tax Tribunal

LC No. 00-305734

Before: Jansen, P.J., and Fort Hood and Gleicher, JJ.

PER CURIAM.

Petitioner appeals as of right from a consent judgment of the Michigan Tax Tribunal. This appeal addresses the reclassification of the subject property as commercial instead of tax exempt, which was upheld in the tribunal's grant of summary disposition to respondent. We affirm.

In the early 1990s, Grand Traverse County, where petitioner and respondent are located, determined that there was insufficient capacity at a local ice rink owned by the county and operated by petitioner to accommodate its various user groups—including area schools, individuals, and local amateur ice skating and ice hockey associations. A county bond initiative was proposed in September 1995 to fund construction of a new ice arena adjacent to the existing ice rink, known as Howe Arena. However, the proposal was defeated. Petitioner was nevertheless able to complete construction on a new ice rink facility, called Centre Ice Arena (CIA), in 1997. CIA was funded in part through two limited obligation revenue bonds, totaling \$4.8 million, issued by the Economic Development Corporation of Grand Traverse County. The land on which CIA was built was donated to petitioner, and petitioner raised an additional \$1 million through fundraising efforts and usage fees from Howe Arena.

CIA was tax exempt until respondent's assessor conducted an audit of exempt properties in the county in November 2003. As a result of the audit, petitioner was added to the tax roll in March 2004. Petitioner appealed the assessor's decision to respondent's board of review, which stated that it did not have the requisite "expertise to determine whether the property qualifies as a charitable organization," and suggested that petitioner appeal the case to the Tax Tribunal. Both parties filed motions for summary disposition before the tribunal, and the Michigan Townships Association filed an amicus curiae brief in support of respondent.

Petitioner argued before the tribunal that it was a charitable institution because it provided a gift to the public through CIA, which was “open and available for use by the general public without restriction.” Petitioner also argued that it was a charitable institution because it lessened the burdens of local government, and because it charged a fee only to cover part of its operating costs. Respondent asserted that CIA did not provide a service to the general public, but rather its appeal was limited to participants in skating activities, the services could not be deemed charity because they did not lessen the burden on local government, and the fee was not nominal irrespective of the comparisons to private operations.

The tribunal denied petitioner’s motion for summary disposition and granted respondent’s motion for summary disposition. The tribunal rejected petitioner’s arguments and found that CIA did not qualify for any of the property tax exemptions authorized by the relevant statutes. The tribunal concluded that petitioner was not a charitable institution pursuant to MCL 211.7o. Specifically, the tribunal stated that petitioner did not meet the second part of the test established by our Supreme Court in *Engineering Society of Detroit v Detroit*, 308 Mich 539, 550; 14 NW2d 79 (1944), and later confirmed in *Ladies Literary Club v Grand Rapids*, 409 Mich 748, 751; 298 NW2d 422 (1980), for determining whether an organization qualifies for a charitable exemption. The tribunal found that petitioner did not meet the second part of the test because it did not offer a “gift” to the general public, but instead only made the subject property (the CIA) available to the public for a fee.¹ Petitioner contends that the tax tribunal erred in failing to classify the property as tax exempt.

Appellate review of the tribunal decision is limited. Unless fraud is alleged, the appellate court reviews the decision for a misapplication of the law or adoption of the wrong legal principle. *Liberty Hill Housing Corp v Livonia*, 480 Mich 44, 49; 746 NW2d 282 (2008) (Citations omitted). The tribunal’s factual findings are deemed conclusive provided they are supported by competent, material, and substantial evidence on the whole record. *Id.* When statutory interpretation is at issue, appellate review of the tribunal’s decision is de novo. *Id.* Tax exemptions are disfavored, and the burden of proving the right to an exemption is on the party claiming the exemption. *Elias Bros Restaurants, Inc v Treasury Dep’t*, 452 Mich 144, 150; 549 NW2d 837 (1996). The Legislature must expressly grant an exemption from the state taxing power; it will not be implied. *VanderWerp v Plainfield Twp*, 278 Mich App 624, 627-628; 752 NW2d 479 (2008) (Citations omitted). Tax exemptions must be strictly construed in favor of the taxing body because tax exemptions upset the desirable balance achieved by equal taxation. See *Michigan Baptist Homes & Dev Co v Ann Arbor*, 396 Mich 660, 669-670; 242 NW2d 749 (1976). In an appeal from an order of the Tax Tribunal, the appellant bears the burden of proof. *ANR Pipeline Co v Dep’t of Treasury*, 266 Mich App 190, 198; 699 NW2d 707 (2005).

MCL 211.7o(1) provides as follows:

¹ The tribunal stated that the parties agreed that petitioner met the first and third parts of the test. The fourth part of the test was not addressed. The tribunal noted that the third element of the test was later found unconstitutional because it denied equal protection to institutions that were not incorporated in Michigan, citing *Chauncey & Marion Deering McCormick Foundation v Wawatam Twp*, 186 Mich App 511, 514-515; 465 NW2d 14 (1990).

Real or personal property owned and occupied by a nonprofit charitable institution while occupied by that nonprofit charitable institution solely for the purposes for which that nonprofit charitable institution was incorporated is exempt from the collection of taxes under this act.

The Court's opinion in *Ladies Literary Club* preceded this version of the statute, but the thrust and essential purpose of the statute remains the same. See *Ladies Literary Club*, *supra* at 751. In *Ladies Literary Club*, the Court set forth the following test:

A claimant seeking the real property exemption must establish four elements . . . :

“(1) The real estate must be owned and occupied by the exemption claimant;

“(2) The exemption claimant must be a library, benevolent, charitable, educational or scientific institution;

“(3) The claimant must have been incorporated under the laws of this State;

“(4) The exemption exists only when the buildings and other property thereon are occupied by the claimant solely for the purpose for which it was incorporated.” [*Id.*, quoting *Engineering Society of Detroit*, *supra* at 550.]

Certain factors are important in determining whether an institution is a “charitable institution” within the meaning of the statute. *Wexford Medical Group v City of Cadillac*, 474 Mich 192, 215; 713 NW2d 734 (2006). These factors include the following:

(1) A “charitable institution” must be a nonprofit institution.

(2) A “charitable institution” is one that is organized chiefly, if not solely, for charity.

(3) A “charitable institution” does not offer its charity on a discriminatory basis by choosing who, among the group it purports to serve, deserves the services. Rather, a “charitable institution” serves any person who needs the particular type of charity being offered.

(4) A “charitable institution” brings people's minds or hearts under the influence of education or religion; relieves people's bodies from disease, suffering, or constraint; assists people to establish themselves for life; erects or maintains public buildings or works; or otherwise lessens the burdens of government.

(5) A “charitable institution” can charge for its services as long as the charges are not more than what is needed for its successful maintenance.

(6) A “charitable institution” need not meet any monetary threshold of charity to merit the charitable institution exemption; rather, if the overall nature of the institution is charitable, it is a “charitable institution” regardless of how much money it devotes to charitable activities in a particular year. [*Id.*]

The parties did not dispute that petitioner was a nonprofit institution. However, the tribunal found that petitioner did not satisfy the other *Wexford Medical* factors.

Petitioner does not present arguments to demonstrate that it is organized chiefly for charity, as required by *Wexford Medical*, and it is not for this Court to “rationalize the basis for the claim” of error. *Nat’l Waterworks, Inc v Int’l Fidelity & Surety, Ltd*, 275 Mich App 256, 265; 739 NW2d 121 (2007). Petitioner does argue that its purpose meets the definition of “charity” outlined in *Wexford Medical*. The cited definition is the following:

[Charity] . . . [is] a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either 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 for life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government. [*Wexford Medical, supra* at 214 (citations and internal quotation marks omitted; alteration in original).]

Petitioner argues that it provides a gift to the community through CIA because petitioner does not operate it as a source of income, and because CIA is open to the general public “without restriction.” However, *Wexford Medical* provides that a charity must provide a gift that benefits an indefinite number of persons in one of several ways, as set forth above. In reaching its decision, the tribunal held that this requirement was not met where the electors rejected the bond proposal to fund the construction for this type of recreational activity by a three to one margin. Petitioner’s operation of CIA does not benefit the public in any of the ways described in the *Wexford Medical* definition of charity. Petitioner’s argument that it provides a gift to the general public by providing recreational opportunities at a “discount” is not one of the benefits of charity contemplated by the Court in *Wexford Medical*. The tribunal’s decision was supported by competent, material, and substantial evidence on the whole record. *Liberty Hill, supra*. Therefore, the tribunal did not err in holding that petitioner was not a charitable institution within the meaning of *Wexford Medical*, and thus that it was not entitled to the property tax exemption for charitable institutions set forth in MCL 211.7o.

Next, petitioner contends that the tribunal’s conclusion that petitioner was not organized chiefly or solely for charity was based on its erroneous finding that petitioner was recreational in nature. According to petitioner, the tribunal has previously determined that organizations whose primary purpose are recreational may be construed as charitable institutions for purposes of the property tax exemption. However, the tribunal’s previous examination of the issue occurred long before the Court’s decision in *Wexford Medical*. In its opinion in the instant case, the tribunal noted that in an earlier case it “did not consider whether the [petitioner] was organized chiefly, if not solely, for charity. Nor did the tribunal consider whether the [petitioner’s] overall nature was charitable.” These considerations clearly must form a part of the tribunal’s analysis after *Wexford Medical*.

The tribunal's decision in the instant case considered not only the nature of the activities provided by petitioner, but also their availability to the general public. Petitioner argued before the tribunal that it "never refused a person the ability to use the arena due to their inability to pay the usage fee," but the tribunal noted that petitioner did not provide any specific evidence that it had waived fees for individuals using the facility. Rather, petitioner "relie[d] primarily on the charity of its user groups for its charitable claim," noting that one of the hockey associations that used CIA "granted every request for assistance or waiver of fees by its members due to financial hardship for the 2003-2005 seasons." However, the Court's definition of a charitable institution in *Wexford Medical* does not contemplate this sort of "charity by proxy." Nor is it necessarily the case that even if petitioner had directly granted the waiver of fees to hockey players, it would qualify for an exemption under *Wexford Medical*, as such waivers do not meet the definition of charity as described in that case. See *Wexford Medical*, *supra* at 214. Rather, the imposition of a monetary threshold when addressing charitable institutions is the province of the Legislature. *Id.* Therefore, petitioner's claim that the tribunal erred in concluding that petitioner was a recreational rather than a charitable organization that was primarily available to a small class of users rather than to the general public lacks merit.

We also reject petitioner's argument that the tribunal erred by adding an additional requirement to the legal definition of "charity." The tribunal cited our Supreme Court's definition of "charity" in *Wexford Medical* and earlier cases, and noted that the Court has held that the proper focus in determining whether an entity is a charitable institution is "whether an organization's 'activities, taken as a whole, constitute a charitable gift for the benefit of an indefinite number of persons.'" (Quoting *Michigan United Conservation Clubs v Twp of Lansing*, 423 Mich 661, 673; 378 NW2d 737 (1985)). The tribunal rejected petitioner's arguments that it provided a gift to the community through the waiver of its fees when individuals were unable to pay them, and by allowing spectators to watch some hockey games and skating events for free. According to the tribunal, "[t]he true users of the subject property are those who skate." Petitioner has not shown that the tribunal's conclusion was error.

Petitioner submits that the tribunal erroneously found that petitioner could not have lessened the burden of the county unless a governmental requirement existed that the county provide recreational activities for its residents. Petitioner argued before the tribunal that it lessened the burden of the county by providing recreational opportunities that the county therefore did not have to provide. However, as the tribunal noted, petitioner did not cite evidence "upon which to base a claim that it is a duty, a responsibility, or a requirement of a unit of government to provide a skating facility or any specific type of recreational facility." This statement does not, as petitioner argues, add to the definition of charity and to a claimant's burden of proof under the statute. Petitioner based its argument that it was a charitable institution on the claim that it lessened the government's burden, which implies that the government would have otherwise had to provide petitioner's service because of a duty or responsibility. The tribunal's statement merely clarifies this point, and does not add a requirement to the *Wexford Medical* definition of charity, as petitioner argues.

Finally, petitioner contends that the tribunal erred by failing to address the fourth element of the *Ladies Literary Club* test. As we have agreed with the tribunal that petitioner has not

satisfied the second part of the test, we need not address this argument.

Affirmed.

/s/ Kathleen Jansen

/s/ Karen M. Fort Hood

/s/ Elizabeth L. Gleicher