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### The Tax Status of Ohio Property Used for Low-Income Housing

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THE TAX STATUS OF OHIO PROPERTY USED FOR LOW-  
INCOME HOUSING

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I. SCOPE OF NOTE

Anyone involved in the world of nonprofit organizations understands that tax exemption is vital to the operation and survival of the organizations, and to the continuation of their contributions to society. Without the federal 501(c)(3) status, for example, many nonprofit organizations in America would be unable to raise sufficient funding to operate for two reasons. One reason is that additional taxes would strain nonprofit budgets. The most significant reason, however, is that contributions to such organizations are tax deductible.<sup>1</sup> Without such deductions, donors would have less motivation to fund the work of these organizations. Because of its importance nationwide, a great deal has been written regarding the federal tax status of nonprofit organizations. State taxation of nonprofit organizations rarely gets the same attention, particularly the issue of property tax exemption. The

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<sup>1</sup>I.R.C. § 170 (1998).

purpose of this article is to examine the Ohio law regarding the tax status of property used for low income housing.<sup>2</sup>

Currently, Ohio's scheme of taxation does not exempt such property. The Ohio Supreme Court announced the rule denying exemption in *Philada Home Fund v. B.T.A.*<sup>3</sup> Subsequent rulings from the court have cited *Philada* with approval.

This Note argues that the rule denying property tax exemption to low-income housing units is improper. The rule is improper in three significant regards. First, as a matter of social and public policy, the rule is misguided, because it hinders the fulfillment of an important need in Ohio and in American society at large. Second, as a purely legal matter, the original rule denying exemption for these properties resulted as a mistaken application of the existing law regarding the definition of "charitable" use. The third, and most compelling reason, is that the legal basis underlying the original rule has undergone a significant change.<sup>4</sup> The change of the rule's legal foundation is the result of many factors, most notably a 1990 amendment to the Ohio Constitution. Other factors include the actual practice in the nonprofit organizations and affiliated governmental support, and shifts in national and state policy. The old rule, though still applied, is in conflict with the otherwise clearly declared policy of the state. As one writer phrased the case, "there appears to be no logical explanation for the routine denial of exemptions . . . when a charitable institution provides low-rent housing for needy persons."<sup>5</sup>

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<sup>2</sup>There are many possible sources for a definition of low-income or affordable housing. The definitions may come from local non-profit organizations, county agencies, the federal government of the United States, and even the United Nations and private international organizations. These definitions almost invariably contain a combination of numbers, which is necessary since the recipients must be identified in a quantifiable manner. While there are many intricate mechanisms for determining the proper recipients of low-income housing, in the end all of the different schemes are aimed at reducing the cost to the tenant/purchaser to a level below the price in the local market. Someone, somewhere, must make a payment or take a loss, in the name of assisting those too poor to afford decent housing on their own.

<sup>3</sup>214 N.E.2d 431 (Ohio 1966).

<sup>4</sup>As this note is written, the Ohio House of Representatives is considering amending Ohio's property tax exemption law. House Bill 509, introduced on June 24, 1997 with twenty-three sponsors would amend Ohio Revised Code section 5709.12 to grant a two-year exemption to property "held by an organization organized and operated exclusively . . . for the purpose of constructing or rehabilitating residences for the eventual transfer to qualified low-income families through sale, lease, or land-installment contract. . . ." This amendment seems to be exclusively directed at low-income housing tax credit (LIHTC, I.R.C. § 42) and is explicitly limited to two years. As such, the amendment seems limited in comparison to the argument presented in this Note. Furthermore, as this Note argues that exemption should be granted to low-income housing under existing law, the amendment would serve only to cloud issues already badly confused.

<sup>5</sup>Karen Bond Coriell, *Chaos, Contradiction and Confusion: Ohio's Real Property Tax Exemptions*, 53 OHIO ST. L.J. 265, 303 (1992).

## II. POLICY BASIS FOR EXEMPTION

The shortage of affordable housing is consistently identified as one of our society's most pressing problems.<sup>6</sup> The problem is particularly extreme in Ohio, which ranks sixth in the United States in the number of low-income renting households, behind (in order) California, New York, Texas, Florida, and Illinois.<sup>7</sup> The need for affordable housing in Ohio is recognized even by the Ohio Constitution. Article VIII of the Ohio Constitution was added as an amendment in 1990, to declare "adequate housing" a public purpose, and to allow the state to avoid the general prohibition on deficit spending in order to satisfy the need for housing.<sup>8</sup>

It is a matter of basic economics that higher prices lead to reduction in the amount of consumer demand.<sup>9</sup> In this context, of course, the term demand includes both the willingness and the ability to purchase the good in question. Need without means does not create demand in the economic sense because the market will not respond to one who cannot pay the full price. When need for a vital good is outstripped by the price of the good, the effect is referred to as "market failure."<sup>10</sup> As the price of housing rises, more people are squeezed out, and the result is market failure.

There are many organizations within Ohio working to fill the gap created by the failure of the housing market to supply the needs of the poor, most functioning with funds from federal, state, and local sources, along with private support. These organizations use a number of approaches to make housing affordable for the poor, but under the current state of the law, they are not granted exemption on the property used to house low-income families. Ohio courts have previously ruled that even metropolitan housing authorities are liable for property taxes.<sup>11</sup> The tax on the property effectively raises the cost of housing, leading to fewer units being made available to those most in need. The taxes on low-income housing enhance market failure.

Even though the United States is currently experiencing a prolonged period of economic growth, the need for low-income housing in Ohio is not likely to diminish. Quite to the contrary, the need for low-income housing may significantly increase in Ohio, due to the effects of welfare reform. Ohio Works First, Ohio's welfare reform program, includes a strict three year limit on cash benefits, and also provides sanctions for non-cooperation in the form of denial of cash and other benefits.<sup>12</sup>

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<sup>6</sup>OFFICE OF POLICY DEVELOPMENT AND RESEARCH, RENTAL HOUSING ASSISTANCE AT A CROSSROADS: A REPORT TO CONGRESS ON WORST CASE HOUSING NEEDS (1996).

<sup>7</sup>TRACY L. KAUFMAN, NATIONAL LOW INCOME HOUSING COALITION, OUT OF REACH: CAN AMERICA PAY THE RENT? 3 (May 1996).

<sup>8</sup>OHIO CONST. art. VIII, § 16 (Housing assistance).

<sup>9</sup>ANSEL M. SHARP ET AL., ECONOMICS OF SOCIAL ISSUES 33-34 (11th ed. 1994).

<sup>10</sup>Francis M. Bator, *The Anatomy of Market Failure*, 72 Q.J. OF ECON. 351 (August 1958).

<sup>11</sup>See *Youngstown Metro. Hous. Auth. v. Evatt*, 55 N.E.2d 122 (Ohio 1944); *Dayton Metro. Hous. Auth. v. Evatt*, 53 N.E.2d 896 (Ohio 1944); *Columbus Metro. Hous. Auth. v. Thatcher*, 42 N.E.2d 437 (Ohio 1942).

<sup>12</sup>Substitute H.B. No. 408, 122d Leg. (Ohio 1997), codified at various sections of the Ohio Revised Code.

Many within the welfare population are also within the population served by low-income housing. As the sanctions and time limits of Ohio Works First take effect, many recipients will be unable to afford even the limited rent payments that low-income housing providers generally demand. In 1996, the average monthly caseload for public assistance in Ohio was 538,597 individuals.<sup>13</sup> With such a large population affected, the results of sanctions and time limits might have a significant impact on the need for low-income housing.

The current interpretation of charitable use by the Ohio courts and the Board of Tax Appeals ("B.T.A.") is a hindrance to the development of one of Ohio's most pressing needs, particularly in urban areas where the concentrations of homelessness and substandard housing stock are greatest. Ohio's tax law should recognize and support the important public interest in providing low-income housing by revising old constructions of "charity" to fit present-day needs.

### III. LEGAL BACKGROUND

As certain as death, but with a more recent development in human history, taxation is considered an inherent part of sovereign authority.<sup>14</sup> Of course, under our constitutional system of government, the power and authority to tax must be rooted in the constitution of the sovereign.<sup>15</sup> Accordingly, we turn first to Ohio's Constitution.

#### A. *Ohio Constitution Article XII*

The Ohio Constitution addresses taxation in Article XII, which consists of several sections which describe the mechanisms and limitations of the State's powers of taxation. The Ohio Constitution treats taxation with considerable detail, compared to the brevity of the United States Constitution sections dealing with taxation.<sup>16</sup> Our focus, property taxes and relevant exemptions, is the subject of Section 2 of Article XII of the Ohio Constitution:

No property, taxed according to value, shall be so taxed in excess of one per cent of its true value in money for all state and local purposes, but laws may be passed authorizing additional taxes to be levied outside of such limitation, either when approved by at least a majority of the electors of the taxing district voting on such proposition, or when provided for by the charter of a municipal corporation. Land and improvements thereon shall be taxed by uniform rule according to value. . . .

[G]eneral laws may be passed to exempt burying grounds, public school houses, houses used exclusively for public worship, institutions used exclusively for charitable purposes, and public property used exclusively for any public purpose, but all such laws shall be subject to alteration or

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<sup>13</sup>BERTELLI ET AL., *AFDC CASELOAD; A COMPARISON OF CUYAHOGA COUNTY, OHIO, AND NATIONAL DATA, 1989-1996* (1997).

<sup>14</sup>*McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 429 (1819).

<sup>15</sup>*Mays v. City of Cincinnati*, 1 Ohio St. 268 (1853).

<sup>16</sup>U.S. CONST. art. I, § 8; U.S. CONST. amend. XVI.

repeal; and the value of all property so exempted shall, from time to time, be ascertained and published as may be directed by law.<sup>17</sup>

The Ohio Constitution has been amended many times in regard to property tax exemptions. Although some of these amendments have altered the rules regarding charitable exemptions, the basic exemption for charity has been with us since the beginning. The only constitutional changes regarding charitable property tax exemption have involved the nature of the owner of the property, an issue discussed below.

### *B. Statutory Exemptions*

The constitutional grants of authority and power to tax property have been duly exercised by the Ohio Legislature. The Ohio Code reads: "All real property in this state is subject to taxation, except only such as is expressly exempted therefrom."<sup>18</sup> Exemptions are governed by section 5709.12 of the Ohio Revised Code: "Real and tangible personal property belonging to institutions that is used exclusively for charitable purposes shall be exempt from taxation."<sup>19</sup> In effect, this creates a dual test for property in Ohio; the exemption is met only with proper ownership and proper use.

Through the evolution of Ohio tax law, the question of proper ownership has come to mean ownership by any institution or corporate body of any nature.<sup>20</sup> The true determination then rests on whether the use of the property is to be considered charitable. The Ohio Code does not attempt to define charitable use.<sup>21</sup> The question of the definition of charity will be investigated after a short discussion of the ownership requirement.

### *C. Nature of Owner and Applicable Definitions of Charity*

As noted above, an important feature of section 5709.12 of the Ohio Revised Code is that the land to be exempted must "belong" to an "institution," which disqualifies individual owners from receiving exemption. The exemption is not defeated if title is not perfect (i.e. mortgaged to a bank or held in trust).<sup>22</sup> "We do not say that the legal title must be vested in the institution. If the legal title were held in trust for the sole use and benefit of the institution, the property, in such case, would be regarded as belonging to the institution."<sup>23</sup> The ownership requirement may also be met under a lease, so long as the owner is a qualifying institution. The question of what kind of institution qualifies has been answered differently at different times. Ohio law formerly required that the institution owning the property be a charitable

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<sup>17</sup>OHIO CONST. art. XII, § 2.

<sup>18</sup>OHIO CONST. art. XII, § 2.

<sup>19</sup>OHIO REV. CODE ANN § 5709.01(A) (Banks-Baldwin 1994).

<sup>20</sup>Highland Park Owners, Inc v. Tracy, 71 Ohio St. 3d 405 (1994).

<sup>21</sup>See OHIO REV. CODE ANN. § 5709.12 (Banks-Baldwin 1994).

<sup>22</sup>For example, land and buildings for use by the Catholic diocese are often held in trust by the Archbishop. Gerke v. Purcell, 25 Ohio St. 229 (1874).

<sup>23</sup>Humphries v. Little Sisters of the Poor, 29 Ohio St. 201, 207 (1876).

institution itself. Under the old law "[t]he word 'institutions' mean[t] the corporations or other organized bodies which are instituted to administer the charity."<sup>24</sup> As currently used, the term "institutions" does not exclude ownership by non-charitable organizations.

In *Highland Park Owners, Inc. v. Tracy*,<sup>25</sup> the court reflected this new configuration in ruling that property belonging to an institution and used for charitable purposes may be exempted even if the institution itself is not charitable. *Highland Park* concerned a lakeside parcel of land that was owned by a nonprofit homeowner's organization. The organization was created for the private benefit of the member homeowners, thereby failing to meet the definition of a charitable organization. The lakeside property, however, was maintained by the homeowners as a park open to the public for recreation including fishing, boating, and picnicking. The court granted exemption for the park, determining that the organization was an institution and that the property was dedicated to exclusively charitable use.

As a policy position, this result is better than the conclusion that only a charitable organization could receive exemption for properties used for charitable purposes. Under this rule, even a profit-making enterprise would have some encouragement to dedicate property to charitable use, such as a public park, leaving open private avenues of charity independent of formal organizations.

Part of the *Highland Park* decision concerned the application of a "supplemental definition" of "charitable" provided in the Ohio Code.<sup>26</sup> The Highland court quoted *Episcopal Parish v. Kinney*, where the court had previously adopted Justice Stern's concurrence in *White Cross Hospital Ass'n. v. B.T.A.*:

[T]he definition [in Ohio Rev. Code 5709.121] is not all encompassing. R.C. 5709.12 states "Real and tangible personal property belonging to institutions that is used exclusively for charitable purposes shall be exempt from taxation." Thus, *any* institution, irrespective of its charitable or non-charitable character, may take advantage of a tax exemption if it is making exclusive charitable use of its property. See *Wehrle Foundation v. Evatt* (1943), 141 Ohio St. 467, 49 N.E.2d 52. The legislative definition . . . found in R.C. 5709.121, however, applies *only* to property "belonging to" *i.e., owned by*, a charitable or educational institution, or the state or a political subdivision. *The net effect of this is that R.C. 5709.121 has no application to noncharitable institutions seeking tax exemption*

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<sup>24</sup>Myers v. Benjamin Rose Inst., 110 N.E. 929 (Ohio 1915).

<sup>25</sup>644 N.E.2d 284 (Ohio 1994).

<sup>26</sup>Ohio Rev. Code Ann. § 5709.21 (Banks-Baldwin 1994).

Real property and tangible personal property belonging to a charitable or educational institution or to the state or a political subdivision, shall be considered as used exclusively for charitable or public purposes by such [entity], if it meets one of the following requirements:

(A) It is used by such [entity], or by one or more other such [entity] under a lease, sublease, or other contractual arrangement;

(1) As a community or area center [for the arts];

(2) For other charitable, educational, or public purposes.

*under R.C. 5709.12. Hence the first inquiry must be directed to the nature of the institution applying for an exemption. . . .*<sup>27</sup>

The idea of dual coverage has led to a great deal of confusion regarding Ohio's charitable property tax exemption.<sup>28</sup> One law applies to those properties owned by charities, schools, and the government and the other applies to properties not owned by charities but still used for charitable purposes. The confusion this engenders may only be a surface effect, however, because it seems that the definition of "exclusive charitable use" is the same under either statute.<sup>29</sup>

#### IV. DEFINING CHARITY

##### A. Comparison of Definitions of Charity

It is difficult to determine, under Ohio law, whether or not there exist different definitions of "charitable" for use in different contexts. For instance, the definition of "charitable use" of land is a consideration for sales tax exemption. The power to tax sales of goods and services is contained in section 3 of Article XII, of the Ohio Constitution.<sup>30</sup> Section 5739.02 of the Ohio Revised Code governs sales tax and provides many types of exemptions. For example, the sale of "building and construction materials and services" to a building contractor is exempt from taxation if the materials and services are to be included in a building or improvement that is: 1) built under government contract (local, state, or federal); 2) "accepted for ownership" by the government after completion; 3) for agricultural use by one engaged in that business; 4) for use as a house of worship, for religious education, or for exclusively charitable purposes; 5) a professional sports facility built pursuant to Ohio Revised Code section 307.696; or 6) in another state and exempt under that state's property tax law.<sup>31</sup> Again, it seems that the "charitable purposes" in the fourth exemption refers to the properties exempt under section 5709.12 or section 5709.121. Consequently, the definition of what is charitable should be the same for all three sections of the Code.

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<sup>27</sup>*Highland Park Owners, Inc.*, 644 N.E.2d at 285-86.

<sup>28</sup>*Coriell*, *supra* note 5.

<sup>29</sup>The major change in the charitable exemption wrought by the passage of Ohio Revised Code Section 5709.121 was that use "in furtherance of or incidental to" charitable purposes would be considered as "exclusively charitable use" if the owner was a charitable institution. Thus, exemption was obtained for auditorium and hall use for presentations in the arts but also rented to private groups for non-charitable purposes in *Galvin v. Masonic Toledo Trust*, 296 N.E.2d 542 (Ohio 1973). The B.T.A. approved the exemption, reasoning that by holding the property only for charitable uses, and forgoing the revenue from private noncharitable use, the trust would not be able to maintain the auditorium and would be forced to shut it down. The court affirmed the B.T.A.'s opinion that the new statute allowed exemption since the rental of space for private noncharitable use was incidental to maintaining the auditorium for public presentations in the arts. The change in definition of charitable use, therefore, was expanded by including use incidental to charity, but the core question of what is charity is still unanswered by the Legislature.

<sup>30</sup>OHIO CONST., art. XII, § 3.

<sup>31</sup>OHIO REV. CODE ANN § 5739.02 (Banks-Baldwin 1994).

The issues are further confused when we consider definitions of charity available regarding other sections of the Ohio Revised Code. As mentioned above, there are two references to charity in the property tax sections of the Ohio Revised Code. There are also two references in the sales tax code: one reference for sales of goods to a charitable organization, and one reference to sales of building materials for inclusion in a building exempt from property taxes as used exclusively for charitable purposes. There are also references to charity in Ohio's criminal law,<sup>32</sup> estate tax law,<sup>33</sup> the Ohio Charitable Solicitation Act,<sup>34</sup> laws relating to trusts,<sup>35</sup> and a good deal more.<sup>36</sup> In some cases, the relevant section of the Code will provide a definition of charitable for a particular purpose, where the definition of charity seems to be particular to the context in which it is used (e.g. the criminal code reference).

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<sup>32</sup>Chapter 2915 of the Ohio Revised Code prohibits gambling, but provides exemptions for certain charitable organizations to engage in bingo and other games of chance for fund-raising. A definition of "charitable organization" is provided at Ohio Revised Code Section 2915.01(H), which makes reference to I.R.C. Sections 501(c)(3), (4), (8), (10), and (19), and limits its application to certain named purposes, rather than using a broad definition of charity. It seems that in this case, there are some organizations which may be exempt from Ohio property taxes as charitable, but still might not qualify for exemption from the Ohio criminal sanctions for games of chance.

<sup>33</sup>The Ohio Revised Code allows a deduction for estate taxes on grants [t]o or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, and no substantial part of the activities of which is carrying on propaganda or otherwise attempting to influence legislation. . . . OHIO REV. CODE ANN § 5731.17(A)(2) (Banks-Baldwin 1994). The determination as to what purposes are to be considered charitable is left entirely open to judicial interpretation.

<sup>34</sup>OHIO REV. CODE ANN. ch. 1716 (Banks-Baldwin 1994). A definition of "charitable purpose" is given at Section 1716.01(B):

Any purpose described in section 501(c)(3) of the Internal Revenue Code; [or] Any benevolent, philanthropic, patriotic, educational, humane, scientific, public health, environmental conservation, civic, or other eleemosynary objective or any objective that benefits law enforcement personnel, fire fighters, or other persons who protect the public safety.

'Charitable purpose' is not limited to only those purposes for which contributions are tax deductible under section 170 of the Internal Revenue Code.

It seems clear that the definition of charitable purpose provided here is to be limited only to the registration requirements of organizations who solicit funds for charitable purposes. The definition here seems to be broader than that used for tax exemption, but an organization determined to be charitable for the purpose of tax exemption would fall under this definition.

<sup>35</sup>The Ohio Revised Code defines a charitable trust as "any fiduciary relationship . . . to deal with the property within this state for any charitable, religious, or educational purpose." OHIO REV. CODE ANN. § 109.23. The question as to whether the purpose of the trust is charitable is left completely open to judicial interpretation. The judicial interpretation of what is charitable for the purpose of a trust has a long, confusing history.

<sup>36</sup>Other uses of "charity" in Ohio relate to hospitals, liquor licenses, and institutions for the care of children, for example.

In most sections of the Revised Code, however, as in the sections regarding property taxes, the reference to charity comes without any definition. The definition of charity applied to these sections seems to be transferrable, as when a court interprets the probate code with reference to definitions of charity given in the context of property tax exemption,<sup>37</sup> or when a case deciding property tax exemption refers to cases concerning sales taxes,<sup>38</sup> or limits of tort liability for charitable organizations.<sup>39</sup> None of these sections involving charity provide anything in the way of guidance as to what is and what is not charity. The Ohio Constitution provides no definition either. When the statutes are boiled down to their basics, the word "charity" is left almost completely open to common law interpretation. Legislation regarding charity is often enacted with the understanding that the common law will operate to determine what activities are included.<sup>40</sup> "Charity," as used in the original Ohio Constitution and later iterations, was a matter of common understanding, mostly through reference to the law of charitable trusts. Nothing in that regard has truly changed,<sup>41</sup> despite all of the legislative and constitutional developments in the history of Ohio tax law.

### B. Broad Definitions of "Charity"

To understand "charity" in Ohio, then, we must understand common law definitions. Usually, in looking to define a term, one starts with a general, broad definition designed to cover any application. This is not the situation in Ohio case law defining "charity." For the most part, broad definitions are studiously avoided, simply because there are no useful ones. More often, charity is defined in the negative, excluding those activities which are not charitable and therefore not deserving of exemption.<sup>42</sup>

Of the historic attempts to broadly define charity, the definition offered by Lord McNaghten is considered classic:

'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads. The trusts last referred to are not the less charitable in the eye of the law, because

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<sup>37</sup>Planned Parenthood Ass'n. v. Tax Comm'r, 214 N.E.2d 222 (Ohio 1996).

<sup>38</sup>Cogswell Hall, Inc. v. Kinney, 506 N.E.2d 209 (Ohio 1987) (citing National Church Residences v. Lindley, 479 N.E.2d 870 (Ohio 1985)).

<sup>39</sup>Goldman v. Friars Club, Inc., 107 N.E.2d 518 (Ohio 1952) (citing Waddell v. YWCA, 15 N.E.2d 140 (Ohio 1938)).

<sup>40</sup>The United States Internal Revenue Code, for instance, embodies the common law concept of charity. Rev. Rule 71-447, 1971-2 C.B. 230; *see also* Bob Jones Univ. v. United States, 461 U.S. 574 (1983). Ohio case law also borrows freely from centuries of common law development when considering charity for purposes of taxation and trust law.

<sup>41</sup>One change that some observers would consider significant is that the job of deciphering the common law concept of charity is increasingly performed by administrative agencies rather than courts.

<sup>42</sup>Coriell, *supra* note 5, at 296.

incidentally they benefit the rich as well as the poor, as indeed, every charity that deserves the name must do either directly or indirectly.<sup>43</sup>

Another broad definition is offered in the Ohio case *Gerke v. Purcell*,<sup>44</sup> which involved an application for exemption of property owned by the Archbishop of the Diocese of Cincinnati and held in trust for the Catholic church for various Church uses, including worship, education, and a parsonage. Concerning the school buildings and attached grounds, the court declared them ineligible for exemption under the constitutional provisions for "public school-houses," because in that context the word "public" refers to the ownership of the schools.<sup>45</sup> The school grounds, however, were declared to be eligible for exemption under the provision for "institutions of purely public charity."<sup>46</sup> The court provided the following broad, general definition of charity:

The meaning of the word "charity," in its legal sense, is different from the signification which it ordinarily bears. In its legal sense it includes not only gifts for the benefit of the poor, but endowments for the advancement of learning, or institutions for the encouragement of science and art, and, it is said, for any other useful and public purpose. 3 Steph. Com. 229. Lord Camden described a charity as a "gift to a general public use, which extends to the rich as well as the poor." Ambl. 651.<sup>47</sup>

Another attempt to give a broad, general definition of charity was in the case of *American Issue Publ'g Co. v. Evatt*.<sup>48</sup> That case involved a publishing company owned and operated by The Temperance Education Foundation, which opposed the use of alcohol, an activity "in harmony with the policy of this state."<sup>49</sup> The company was structured to make a profit which was directed to the parent nonprofit organization. The court stated, without citing authority, that "'Charity' has been broadly defined as that which benefits mankind and betters its condition."<sup>50</sup>

In a 1966 case, *Planned Parenthood Ass'n v. Tax Comm'r*,<sup>51</sup> the court stated

When the last syllable has been uttered in the quest to define charity (and the attempts have been legion) this hallmark will survive: charity is the attempt in good faith, spiritually, physically, intellectually, socially and economically to advance and benefit mankind in general, or those in need of advancement and benefit in particular, without regard to their ability to

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<sup>43</sup>Commissioners for Special Purposes of the Income Tax v. Pemsel, (1891) A.C. 531, 583.

<sup>44</sup>25 Ohio St. 229 (1874).

<sup>45</sup>*Id.* at 242-43.

<sup>46</sup>*Id.* at 244.

<sup>47</sup>*Id.* at 243.

<sup>48</sup>28 N.E.2d 613 (Ohio 1940).

<sup>49</sup>*Id.* at 614.

<sup>50</sup>*Id.*

<sup>51</sup>214 N.E.2d 222 (Ohio 1966).

supply that need from other sources and without hope or expectation, if not with positive abnegation, of gain or profit by the donor or by the instrumentality of the charity.<sup>52</sup>

Though Planned Parenthood concerned the interpretation of "charity" in the context of the probate code, the court cited to cases and authorities regarding trusts and property taxes. While the court in this case did not explicitly hold that there is no difference in the meaning of charity in these different contexts, neither did the court make any mention that there is a difference.

### C. Rationales for Exemptions

Of the little general discussion of the nature of charity in Ohio case law, even less discussion is devoted to the theories supporting charitable exemption. Most Ohio Supreme Court opinions dealing with tax exemption issues are terse and to the point. The greater part of the opinions are dedicated to considerations of statutes and previous case law.

The theories that have currency in the United States have been summarized by one national commentator to include such rationales as: tradition dictated by a history of various privileges; long standing public policy; "inherent tax theory;" freedom of association; special lobbying efforts by various interest groups; and "lessening of the burdens of government."<sup>53</sup> The "government burden" rationale for exemption is based on the idea that if an organization is relieving government of a burden it would otherwise bear, that organization is acting as an agent of or actually a part of government itself.<sup>54</sup> In effect, taxing an organization that relieves government of a burden it would otherwise bear would mean government is taxing itself. The magnitude of the government burden borne by nonprofit organizations is clear from the fact that "the nonprofit sector actually delivers a larger share of the health and human services financed by government than do public agencies themselves."<sup>55</sup>

The IRS explicitly supports the "government burden" rationale for charitable exemption.<sup>56</sup> In the scant discussion within Ohio case law, there are hints that, among others, the government burden theory also applies in Ohio.<sup>57</sup>

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<sup>52</sup>*Id.* at 225.

<sup>53</sup>BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* 6-21 (6th ed. 1995).

<sup>54</sup>*Id.*

<sup>55</sup>Jeffrey L. Brudney, *The Involvement of Volunteers in the Delivery of Services: Myth and Management*, *PUBLIC PERSONNEL ADMINISTRATION: PROBLEMS AND PROSPECTS* (Steven W. Hayes and Richard C. Kearney eds., 3d ed. 1995).

<sup>56</sup>Treas. Reg. § 1.501(c)(3)-1(d)(2) (1955).

<sup>57</sup>Two Ohio probate court opinions cite secondary sources as relating the reduction of government burden to the grant of exemption. *See* *Thompson v. Board of Trustees*, 24 Ohio Op. 322 (1942) (citing 3 *PAGE ON WILLS, LIFETIME EDITION* 556); *Thomas v. Harrison*, 24 Ohio Op. 2d 148 (1962) (citing *RESTATEMENT (SECOND) OF TRUSTS* § 368).

## V. DEFINITION OF CHARITY AS APPLIED TO LOW-INCOME HOUSING

A. *The Philada Line*

We might think that property held by a nonprofit organization and used for low-income housing fits the broad definitions of property used exclusively for charitable purposes. We might also conclude that property held by a nonprofit organization and used for low-income housing benefits the poor and also fits the "government burden" rationale for exemption, because governments expend significant resources for low-income housing. To the contrary, though, *Philada* and other Ohio cases regarding such property denies exemption.

The leading case in this regard is that of *Philada Home Fund v. B.T.A.*<sup>58</sup> *Philada* concerned property and the building upon it belonging to an Ohio nonprofit corporation and used for the purpose of providing housing for "aging and needy self-respecting persons of good character,' . . . at rentals at or below cost."<sup>59</sup> The court stated;

The charitable purpose of the nonprofit corporation which owns this housing and holds it for rent only to aged and needy persons at or below cost may be admitted, but the exemption is claimed under Section 5709.12, Revised Code, which extends exemption only to property "that is exclusively used for charitable purposes." The only use of this property is for private residential housing. A long line of Ohio cases hold that property partly or incidentally used for private residence is nonexempt as not used exclusively for charitable purposes.<sup>60</sup>

Note first that the court here declares that the charitable purpose of the *Philada Home Fund* may be admitted. At no point does the *Philada* court decide that providing low income housing is not a charitable endeavor. The court denies exemption on the basis that residential use is not "exclusively" charitable.

Justice Brown cites a "long line" of cases that seem convincing at first blush, but further investigation reveals that the case law is not so simple. While there are many cases denying exemption for certain properties used as residences, none of them stand for the proposition that residential use automatically destroys the charitable use of property. Cases allowing exemption for certain residential buildings will be discussed below.

The *Philada* court quoted the earlier case *Dayton Metro. Housing Auth. v. Evatt*<sup>61</sup> regarding the requirement of a firm policy basis for the granting of tax exemption:

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<sup>58</sup>214 N.E.2d 431 (Ohio 1966).

<sup>59</sup>*Id.* at 135.

<sup>60</sup>*Id.* at 137.

<sup>61</sup>53 N.E.2d 905, 928 (Ohio 1944). The Dayton Metropolitan Housing Authority was a state-created agency in charge of producing and managing low-income housing in the Dayton area in conjunction with federal programs. The Authority applied for exemption for the properties so used. This case was decided under General Code Section 5351, the predecessor to Ohio Rev. Code Section 5709.12. In this case, however, the exemption was applied for under the exemption for "public property used for a public purpose," not the charitable exemption. The court denied the exemption, based on contemporary constitutional definitions of "public use" as applied to the power of eminent domain. The court in Dayton MHA relied

the private homeowner whose property is located on the opposite side of the street from the property of the appellant [housing] authority should not be penalized in the support of his government by increased taxes upon his property to make good the loss of public revenues resulting from the tax exemption of the property of the authority, unless the people of the state, through constitutional or legislative enactment, clearly adopt a policy which makes such discrimination possible.<sup>62</sup>

The *Philada* court echoed this statement by emphasizing its position that

until the code of regulations and the practice of *Philada* gives assurance that a benefit to the public generally commensurate with the loss of tax revenue is clearly present, we must hold that the claimed exemption violates the fundamental constitutional requirement of tax uniformity and equality, and that the proposed use is not exclusively charitable.<sup>63</sup>

The *Philada* case was a four-to-three decision. Justice Brown wrote the opinion, with a concurrence by Justices Zimmerman, Matthias, and Herbert. Chief Justice Taft, with Justices Schnieder and O'Neill, dissented. The dissenting opinion, by Justice Schneider, discussed the history of the constitutional debate regarding changes to the Ohio Constitution in 1912.<sup>64</sup> Debate before the passage of the 1912 amendment to Article XII, section 2 concerned the words "used exclusively for charitable purposes."<sup>65</sup>

Delegate Winn first calls attention to three institutions located then and now in the city of Springfield. . . . It is universally accepted that those institutions admitted only members or dependents of members of the respective societies and further that residential quarters were maintained on their grounds for such members of the staff as might be convenient to the institution.<sup>66</sup>

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most heavily on the sixth circuit opinion in *United States v. Certain Lands in the City of Louisville*, 78 F.2d 684 (6th Cir. 1935). In that case, the court of appeals decided that the federal government did not have the power to condemn property through the power of eminent domain for use as low-cost housing, because "[t]he public interest that would thus be served, however, cannot, we think, be held to be a public use for which the government, in the exercise of its governmental functions, can take private property." *Id.* at 688. In *Hawaiian Housing Authority v. Midkiff*, 467 U.S. 229 (1984), however, the United States Supreme Court decided that eminent domain was properly exercised by the state in forcing owners of land to sell to the state so that the state could sell to tenants on the land, for the purpose of correcting market failure in real estate. The fact that the property was to end up in private hands after the exercise of the power was no bar. Therefore, that much of Dayton seems unsound.

<sup>62</sup>*Philada*, 214 N.E.2d at 434.

<sup>63</sup>*Id.*

<sup>64</sup>*Id.*

<sup>65</sup>*Id.* at 435.

<sup>66</sup>*Id.* at 437.

The main thrust of the dissent's argument was to point out that the amendment was to make constitutionally sound an earlier determination of the charitable use of these properties. The debate pointed out that the rule used to exempt these institutions was not consonant with the constitution as then in force.<sup>67</sup> The amendment was in order to catch up with an evolving notion of what was considered charitable. The constitutional amendments continued to the point where "plenary power," was granted by the constitution to the General Assembly to decide what was to be subject to exemption from property taxes as was decided in *Denison University v. B.T.A.*<sup>68</sup> The *Philada* majority read the Constitution as limiting the authority to grant these exemptions in the case of the Philada Home Fund, while the dissent argues that the *Denison* decision held otherwise. The *Philada* dissent also included a strong policy argument:

The majority has decided, in effect, that, although one who is ill but fully able to pay for the treatment of his illness may receive that treatment of his illness in a tax- exempt hospital, even though substantially every other patient is equally free from financial need . . . one who is aged and without the resources with which to provide himself and his dependents with safe and sanitary housing may not have that need fulfilled by the Philada Home Fund free of taxation.<sup>69</sup>

The dissent seemed to articulate a major fault of the *Philada* rule and its later application. Of the principal definitions of what is charitable, the primary definition has most consistently concerned efforts toward the relief of the poor. This is reflected from the preamble to the Elizabethan Statute of Charitable Uses<sup>70</sup> to the modern federal scheme of taxation, and in most formulations of the concept of charity currently in force in Ohio. Providing housing for the poor is certain to be some relief; yet, the court and the B.T.A. have consistently ruled in accordance with *Philada* and against property tax exemption for low income housing.

In *Cogswell Hall, Inc. v. Kinney*,<sup>71</sup> the *Philada* rule was reaffirmed by the supreme court, which cited the syllabus of *Philada*. *Cogswell Hall* concerned an application for exemption from property taxes by an organization whose purpose was "(a) [t]o establish, maintain, and conduct a residence where room and board will be furnished to women, regardless of their age and according to their need [and] (b) to provide opportunities for leisure time activities to said residents thereby aiding their spiritual, mental, and social welfare."<sup>72</sup>

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<sup>67</sup>*Id.*

<sup>68</sup>205 N.E.2d 896 (Ohio 1965).

<sup>69</sup>*Philada*, 214 N.E.2d at 436.

<sup>70</sup>39 Elizabeth I c. 6, "An Acte to reforme Deciets and Breaches of Trust, touching Lands given to Charitable Uses."

<sup>71</sup>506 N.E.2d 209 (Ohio 1987).

<sup>72</sup>*Id.* Here the court cites *National Church Residences v. Lindley*, 479 N.E.2d 870 (Ohio 1985), a sales tax case, as supporting the rule in a property tax case, contradicting the statement in *Philada* that property tax status is not determined by reference to tax status for other purposes.

The *Philada* rule was also determined to be controlling in some related cases, but with a bizarre result. Three cases have relied on *Philada* to deny sales tax exemptions to organizations providing low-income housing. In *Quaker Apartments of Wilmington, Inc. v. Kosydar*,<sup>73</sup> the court denied a claim for exemption from sales tax for building materials sold to an organization which supplied housing to the aged and handicapped under arrangement with the Federal Department of Housing and Urban Development ("HUD"), stating its rule that "the furnishing of low-cost housing at or below market prices, to residents who pay part or all of their rental costs, is not an exclusive use of property for charitable purposes which will result in a tax exemption."<sup>74</sup> A very similar set of circumstances was similarly addressed in *National Church Residences v. Lindley*,<sup>75</sup> and the same rule was again affirmed, under similar facts, in *Columbus Colony Hous., Inc. v. Limbach, Tax*.<sup>76</sup>

Each of these three cases was brought under section 5739.02(B)(12) of the Ohio Revised Code, Sales to Charitable Organizations, not section 5739.02(B)(13), which concerns the sale of "building and construction materials and services" to a building contractor for inclusion in a building exempt from property tax. In each case, the court denied the exemption from sales tax, holding that the organization did not have a charitable purpose despite the unchallenged assertion that the organization furthered governmental objectives and aided in the relief of poverty.<sup>77</sup>

In purporting to uphold the *Philada* rule, these cases actually cause damage to the language of the *Philada* case itself. First, these cases decide an exemption from sales tax on the basis of a property tax case which stated that reference to exemption under other types of taxes is "not helpful or dispositive of the inquiry here which involves the twofold test of whether this real estate claimed to be exempt under section 5709.12, Ohio Rev. Code, is used exclusively for charitable purposes."<sup>78</sup> Second, the *Philada* court determined that the charitable purpose of the fund "may be admitted," and that the case turned on the question of "exclusive use," while *Quaker Apartments*, *National Church Residences* and *Columbus Colony Housing* read *Philada* to simply state that providing low-income housing itself is not a charitable purpose.<sup>79</sup> The statute interpreted in these cases does not mention use of property at all, but "organizations operated exclusively for charity," through "relief of the poor."<sup>80</sup>

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<sup>73</sup>479 N.E.2d 870 (Ohio 1985).

<sup>74</sup>*Id.* at 875-76.

<sup>75</sup>*Id.* at 870.

<sup>76</sup>544 N.E.2d 235 (Ohio 1989).

<sup>77</sup>*Columbus Colony Housing, Inc.*, 544 N.E.2d at 237; *National Church Residences*, 479 N.E.2d at 875; *see also Quaker Apartments of Wilmington, Inc. v. Kosydar*, 309 N.E.2d 863, 865 (Ohio 1974).

<sup>78</sup>*Philada*, 214 N.E.2d at 434-35.

<sup>79</sup>*Columbus Colony Housing*, 544 N.E.2d at 237; *National Church Residences*, 479 N.E.2d at 875; *Quaker Apartments*, 309 N.E.2d at 865.

<sup>80</sup>OHIO REV. CODE ANN § 5739.02(B)(12) (Banks-Baldwin 1994).

The rule in the *Philada* case is still routinely applied by the Tax Commissioner of Ohio.<sup>81</sup>

*B. Fallacies of Philada*

In denying various exemptions to the organizations providing low income housing, the court has relied principally on three factors. The first, and seemingly most important, is the fact that some rent is charged for the housing.<sup>82</sup> The second factor is the use of the property for a private residence.<sup>83</sup> The third factor is the exclusion of the public at large.<sup>84</sup> While these factors might give some indication of the court's reasoning, none of these factors have been considered decisive in other exemption cases. The *Philada* court treats its rationale as axiomatic, but the axioms it relies upon are not at all certain.

One of the principal aspects of low-income housing cited by the court in its denial of exemption is the fact that the applicants charge any rent whatsoever, and that the tenants of low-income housing face the threat of eviction for failure to pay.<sup>85</sup> This factor is significant in the opinions, but is not given much discussion. It seems as though the court is denying that the housing could be charitable since it is not given away for free, somehow viewing a rent subsidy as not going far enough to be charitable. This is out of keeping with most charity jurisprudence, however, since many charities charge all or most of their patrons for something. A center for performing arts still charges admission, charity hospitals bill almost all patients for services, charitable educational institutions may still charge some tuition, and charitable publishing organizations charge for their publications.

The general rule in this regard, which has been sustained to the present day, is clearly laid out in *Davis v. Cincinnati Camp Meeting Ass'n*.<sup>86</sup> The case involved an application for exemption of property held in trust for the Methodist Episcopal Church "for the uses and purposes of carrying on and conducting religious camp meetings and other public meetings, for religious, educational, and other public charitable purposes. . . ."<sup>87</sup> The ground included unimproved lots for camping, an icehouse, a grocery and dry goods store, and a residence for the sexton of the camp, all said to be incidental or instrumental in the use of the campground. Oftentimes, those attending camp meetings were charged a fee. The fact that a fee was charged was the only point which the auditor submitted as requiring the denial of exemption. The court stated that the charges to patrons "are not inconsistent with the finding, that none of its property is leased or used with a view to profit."<sup>88</sup>

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<sup>81</sup>In the matter of an application for exemption of real property from taxation for the tax year 1995, DTE case no. ZE3362, journal entry.

<sup>82</sup>*Philada*, 214 N.E.2d at 433.

<sup>83</sup>*Id.*

<sup>84</sup>*Id.*

<sup>85</sup>*Id.*

<sup>86</sup>49 N.E. 401 (Ohio 1897).

<sup>87</sup>*Id.* at 402.

<sup>88</sup>*Id.* at 413.

The question of the use of low-income housing as a residence is also given consideration in the *Philada* line of cases, and wrongly so. *Cincinnati Nature Ctr. Ass'n v. B.T.A.*<sup>89</sup> involved a question of the charitable exemption as applied to property and two houses used as a residence for employees of the association who implemented the association's programs, maintained the preserve, and were "on call 24-hours-a-day in order to prevent damage to the property by hunters, motorcyclists and other trespassers."<sup>90</sup> The association received no rent from the employees living in the residences. The B.T.A. had granted exemption to the preserve property, but denied exemption to the parcels used as residences. The court considered the application under section 5709.121 of the Ohio Revised Code for property used "in furtherance of or incidental to [the organization's] charitable, educational, or public purposes and not with a view to a profit."<sup>91</sup> The Ohio Supreme Court affirmed the appeals court finding that "the use of the two houses by employees of the Nature Center as in furtherance of and incidental to its charitable purpose, and was not with a view to profit."<sup>92</sup> The fact that the association received no rent from the property was not even discussed in the opinion.

Use of residences was determined not to be destructive of exclusive charitable use in an earlier case, before the passage of section 5709.121 of the Ohio Revised Code. In *Goldman v. The Friars Club*<sup>93</sup> the supreme court decided that exemption was due for property used as a residence for several young men, a public restaurant, and a bowling alley open to the public for a fee, since the property was "wholly devoted to an overall program of social, religious and educational service to the community. . . ." Recall also that during the debate concerning the 1912 Constitution, Delegate Winn pointed out several properties granted exemption despite their use as residences.

The third consideration relied on to deny exemption to property used as low-income housing is that of public use or public access to the property. This question was addressed in *Herb Soc'y of Am., Inc. v. Tracy*.<sup>94</sup> This case involved property and a building which housed the library, conference room, office, kitchen, and storage area for a nonprofit group which had restrictive membership requirements. Among the requirements for membership was the recommendation of two current members. The purpose of the group was to disseminate knowledge about herbs through public presentations and book sales. The fact that membership in the nonprofit organization was exclusive was a significant factor in the decision by the B.T.A. to deny the society's application for exemption.<sup>95</sup> In reversing the B.T.A., the court restated the definition from *Planned Parenthood*. It also pointed to the status of education as a traditional charitable purpose. The court then restated the principle that:

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<sup>89</sup>357 N.E.2d 381 (Ohio 1976).

<sup>90</sup>*Id.* at 381.

<sup>91</sup>OHIO REV. CODE ANN. § 5709.121(2)(B) (West 1998).

<sup>92</sup>*Id.* at 385.

<sup>93</sup>107 N.E.2d 518 (Ohio 1952). Note that *Friars Club* was decided before *Philada*.

<sup>94</sup>643 N.E.2d 1132 (Ohio 1994).

<sup>95</sup>*Id.*

So long as an institution is operated without any view to a profit and exclusively for a charitable purpose, it is a charitable institution. It need not be open generally to the public if it promotes the lawful advancement of the charitable purpose.<sup>96</sup> This decision was consistent with prior cases, such as *American Committee of Rabbinical College of Telshe v. B.T.A.*,<sup>97</sup> and *Cleveland Bible College v. B.T.A.*<sup>98</sup>

### C. A History of Confusion

These technical contradictions in the law seem confused. Definitions of charity must be understood afresh with each case, since the shape of charity is different with each opinion. Legal educators often liken legal definitions and distinctions to a set of boxes; "[o]n top, the box has a name of a legal category . . . The front panel of the box contains the 'entrance criteria' . . . The right side panel contains the legal consequences created by the rule. If a situation fits 'in the box,' the consequences follow."<sup>99</sup> Different boxes, or categories, receive different treatment. It seems sometimes that the box labeled "charity" in Ohio is actually a set of boxes kept locked in a dark cupboard. You can't see that there is more than one box, but each time you reach in, you pull out something shaped slightly differently. The truth is that there are many definitions of charity, all treated as a singular definition.

One of the few commentators on Ohio tax exemption law surmised that the lack of commentary was due to the complexity and confusion of the law.<sup>100</sup> One might also guess that there is more profit in commenting usefully on laws that help organizations with greater funding than the average exempt organization. Whatever the reason for lack of commentary, the observation that Ohio's tax exemption law is confusing is very apt. The current definitions of charity in Ohio confuse even experts. Confusion in the definition of charity, however, is nothing new.

Like much of the law in the United States, Ohio's charity law finds its roots in England, and its confusion often begins there as well. In the early days of colonial America, British law was the law of the land. In later days, the infant states had no body of case law to turn to, and so turned to English common law. Even later, during the era of expansion, Blackstone's was the only authority available (and portable) before reporting systems were developed in areas where the court rode circuit on horseback. The law of charities was imported wholesale in this manner, along with other common law traditions. We can see this result, for instance, in *Gerke v. Purcell*, where the court cites the opinions of Lords Camden and Holt.<sup>101</sup>

English jurists have sometimes been very candid about the confusion inherent in the law of charities. In the case of *Morice v. Bishop of Durham*, Richards, arguing

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<sup>96</sup>*Id.* at 1134.

<sup>97</sup>102 N.E.2d 589 (Ohio 1951).

<sup>98</sup>85 N.E.2d 284 (Ohio 1949) (Taft, J., concurring).

<sup>99</sup>DANIEL S. KLIENBERGER, AGENCY AND PARTNERSHIP: EXAMPLES AND EXPLANATIONS, xxii (1995).

<sup>100</sup>Coriell, *supra* note 5, at 265.

<sup>101</sup>*Cogswell Hall, Inc. v. Kinney*, 506 N.E.2d 209, 243 (Ohio 1987) (citing *Gerke v. Purcell*, 25 Ohio St. 229 (1874)).

for the Bishop, remarked that it is "very difficult to define to the satisfaction of anyone, what is an object of charity"<sup>102</sup> Lord Sterndale agreed, stating "I . . . am unable to find any principle which will guide one easily, and safely, through the tangle of cases as to what is and what is not a charitable gift. . . ."<sup>103</sup> According to Andrews, L.C.J., "Judicial minds have operated not always consistently on facts admittedly different; and the result can only be described as in a measure chaotic."<sup>104</sup>

## VI. CONSTITUTIONAL CHANGE TO THE *PHILADA* POLICY BASIS

### A. *Ohio Constitution Article VIII, § 16*

The *Philada* line of cases is based on the premise that the people of the state of Ohio have expressed no policy supporting housing within the state. The *Philada* court demanded "assurance that a benefit to the public generally commensurate with the loss of tax revenue is clearly present," and the *Dayton MHA* court proclaimed exemption would wait until "the people of the state, through constitutional or legislative enactment, clearly adopt a policy which makes such discrimination possible."<sup>105</sup> We may argue about whether the state indeed had such a policy at the time *Philada* was decided, but it is clear that the state has such a policy today. The 1990 amendment to the Ohio Constitution is a declaration of such a policy.

In 1990, the Ohio Constitution was amended to allow deficit spending for the purpose of housing assistance, as an exception to the general constitutional prohibition against deficit spending.<sup>106</sup> This Note does not argue that the amendment

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<sup>102</sup>10 Ves. 521, 531 (1805).

<sup>103</sup>*In Re Tetley*, 1 Ch. 258, 266 (1923).

<sup>104</sup>*Trustees of the Londonderry Presbyterian Church House v. Commissioners of Inland Revenue*, (1946) NI 178, at 187-88.

<sup>105</sup>214 N.E.2d at 433.

<sup>106</sup>OHIO CONST. art. VIII, § 16 (Housing assistance), reads:

To enhance the availability of adequate housing in the state and to improve the economic and general well-being of the people of the state, it is determined to be in the public interest and a proper public purpose for the state or its political subdivisions, directly or through a public authority, agency, or instrumentality to provide, or assist in providing, by grants, loans, subsidies to loans, loans to lenders, purchase of loans, guarantees of loans, or otherwise as determined by the assembly, housing, including shelters to provide temporary housing, in the state for individuals and families by the acquisition, financing, construction, leasing, rehabilitation, remodeling, improvement, or equipping of publicly or privately owned housing, including the acquisition of real property and interests in real property. Laws, including charters, ordinances, and resolutions, may be passed to carry into effect those purposes, including but not limited to the authorization of the making of grants, loans, subsidies to loans, loans to lenders, purchase of loans, and guarantees of loans by the state or its political subdivisions, directly or through a public authority, agency, or instrumentality, which laws, charters, ordinances, resolutions, grants, loans, subsidies to loans, loans to lenders, purchase of loans, guarantees of loans, and any other actions authorized by the general assembly shall not be subject to the requirements, limitations, or prohibitions of any other section of Article VIII, or Sections 6 and 11 of Article XII, Ohio Constitution.

granted tax exemption to property used for low-income housing directly. The amendment's plain language neither purports to grant exemption to any property nor mentions exemption at all. Instead the amendment significantly alters the policy basis on which previous supreme court decisions relied for denying exemption to low-income housing. Where the court previously declared that the public at large retains no benefit when housing is provided to those who cannot afford it, this amendment declares that it is indeed a benefit to the state to ensure adequate housing is available. The people of Ohio, through the state's Constitution, find that it will "improve the economic and general well-being of the people of the state," and that it is "in the public interest and a proper public purpose" to assist in providing housing "for individuals and families."<sup>107</sup> To understand how this acts to overturn the *Philada* line of cases, one must fully understand the amendment.

#### B. Meaning of the Amendment

The 1990 amendment operates as one of the few exceptions to the general rule against deficit spending in sections 2 and 3 of Article VIII. Article VIII contains several specific exceptions to this general rule, and it is interesting to note that most of the exceptions have a cap on the amount of debt allowed for that purpose, while section 16 has no such limit.<sup>108</sup> The amendment also allows for debt incurred for its purposes to escape the operation of section 6, Article XII, which prohibits the state from incurring debt for "internal improvements," and section 11, Article XII, which prohibits the state and its subdivisions from incurring or renewing bonded debt without providing at the same time for the levying and collecting of taxes to cover the bonded debt.<sup>109</sup> The housing amendment explicitly retains power for the general

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The general assembly also may authorize the issuance by the state, directly or through its public authorities, agencies, or instrumentalities, of obligations to provide moneys for the provision of or assistance in the provision of housing, including shelters to provide temporary housing, in the state for individuals and families, which obligations are not supported by the full faith and credit of the state, and shall not be deemed to be debts or bonded indebtedness of the state under other provisions of this constitution. Such obligations may be secured by a pledge under law, without necessity for further appropriations, of all or such a portion as the general assembly authorizes of revenues or receipts of the state or its public authorities, agencies, or instrumentalities, and this provision may be implemented to better provide therfor [sic].

The powers granted under this section are independent of, in addition to, and not in derogation of other powers under laws, charters, ordinances, resolutions, or this constitution, including the powers granted in Section 14 of Article VIII and Articles X and XVIII, and the provision of any capital improvements under Section 2i of Article VIII, Ohio Constitution. The powers granted under this section do not impair any law, charter, ordinance, or resolution enacted prior to the effective date of this section or any obligations issued under such law, charter, ordinance, or resolution. The powers granted under this section are subject to the power of the general assembly to regulate taxation and debt of political subdivisions, including the regulation of municipal taxation and debt pursuant to Section 6 of Article XIII and Section 13 of Article XVIII, Ohio Constitution.

<sup>107</sup>*Id.*

<sup>108</sup>OHIO CONST. art. VIII, §§ 2-3, 13-16.

<sup>109</sup>OHIO CONST. art. VIII, § 16.

assembly to regulate municipal finance even for the purpose of providing housing assistance. The housing amendment also explicitly denies any limitation of the exceptions to deficit spending in other sections of Article VIII.

The 1990 amendment contains the statement, "The powers granted under this section do not impair any law, charter, ordinance, or resolution enacted prior to the effective date of this section or any obligations issued under such law, charter, ordinance, or resolution."<sup>110</sup> This language refers to housing assistance provided by the state or its subdivisions under laws effective before the passage of this amendment in 1990. The reference to "obligations issued under such law" makes this clear. The language is entirely silent as to property tax exemption.

### C. *Effect on Philada Rationale*

The United States Supreme Court addressed the issue of the effect of changes in public policy on the law of charitable tax exemption in *Bob Jones Univ. v. United States*.<sup>111</sup> That case concerned a decision by the IRS to discontinue grants of exemptions to educational institutions with discriminatory admissions policies. Up until 1970, schools were granted 501(c)(3) exemption regardless of discrimination. Revenue Ruling 71-447 declared that such schools were not charitable within the common law conception of charity embodied in the Internal Revenue Code.<sup>112</sup> The Supreme Court declared that:

An unbroken line of cases following *Brown v. Board of Education* establishes beyond doubt this Court's view that racial discrimination in education violates a most fundamental national public policy, as well as rights of individuals . . . It would be wholly incompatible with the concepts underlying tax-exempt status to grant the benefits of tax-exempt status to racially discriminatory educational entities, which "[exert] a pervasive influence on the entire educational process. . . . [R]acial discrimination in education is contrary to public policy. Racially discriminatory educational institutions cannot be viewed as conferring a public benefit within the "charitable" concept. . . .<sup>113</sup>

This case highlights the principle that "the definition of 'charity' depends upon contemporary standards,"<sup>114</sup> because "[q]ualification for tax exemption is not perpetual or immutable; some tax-exempt groups lose that status when their activities take them outside the classification and new entities can come into being and qualify for exemption."<sup>115</sup>

In adapting to contemporary standards, charity law is prospective. New organizations and new activities develop over time which are charitable by societal

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<sup>110</sup>*Id.*

<sup>111</sup>461 U.S. 574 (1983).

<sup>112</sup>*Id.* at 574.

<sup>113</sup>*Id.* at 593, 595-96.

<sup>114</sup>*Id.* at 593, n.20.

<sup>115</sup>397 U.S. 664, 673 (1970).

standards, though they might not fit older definitions of charity. The Ohio Supreme Court has recognized that statutes may operate prospectively in this manner.<sup>116</sup>

A statute may include by inference a case not originally contemplated when it deals with a genus within which a new species is brought. Thus a statute making it unlawful to willfully throw a stone at a railroad car includes an interurban or traction railway car, although such cars were not known or in use at the time the statute was enacted.<sup>117</sup>

The 1990 constitutional amendment exempts the property through the prospective operation of the law of charity. As noted above, the housing amendment significantly alters the policy behind the *Philada* line of cases. Most charitable exemptions are not granted under any strict definition provided in legislation. Occasionally legislators will delineate requirements for certain types of charitable activity, such as homes for the aged or educational institutions, but most charitable organizations fall under the general heading of charity. In this way, much of Ohio's current law reflects the catch-all nature of Lord McNaghten's fourth category of charity.<sup>118</sup> The attitude reflected by the *Philada* line of cases indicates a reluctance on the part of the Ohio supreme court to determine that an unfamiliar activity is a benefit to the community at large. With the 1990 amendment, however, the state has declared that the burden of providing housing is on the government, at least in part. The state constitution declares that providing housing "is determined to be in the public interest and a proper public purpose,"<sup>119</sup> and there is no basis for the court to hold to its own previous declaration that providing low-income housing without profit is not in the public interest. *Philada* is overturned by its own terms.

To rephrase the argument, charitable exemption is granted on the finding that land owned by an institution is used exclusively for charitable purposes. A use is charitable if it does not generate profit and it operates to relieve the poor, improve the state of mankind in general, benefit the community, relieve the government of a burden it would otherwise bear, or any or all of the above. The Ohio Constitution declares housing to be in the public interest and opens the door for the state to take on more of the burden of providing housing, something public authorities have been doing for decades.<sup>120</sup> Therefore, exemption should be granted to property held by a nonprofit organization and used exclusively to provide housing for those who are too poor to afford housing, because it relieves the poor, benefits the public in general, and relieves the government of a burden it otherwise bears.

## VII. CONCLUSION

Methods of charity have evolved a great deal since the early days of Chantries in England.<sup>121</sup> The late twentieth century has seen another in a long line of paradigm

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<sup>116</sup>City of Cleveland v. Curluter, 126 N.E.2d 436 (Ohio 1955).

<sup>117</sup>State v. Cleveland, 93 N.E.2d 467 (Ohio 1910).

<sup>118</sup>See *supra* note 36 and text accompanying.

<sup>119</sup>OHIO CONST. art. VIII, § 16.

<sup>120</sup>*Id.*

<sup>121</sup>GARRETH JONES, HISTORY OF THE LAW OF CHARITY 1532-1827 (1969).

shifts in social concepts of charity, and what it means to benefit society.<sup>122</sup> Current shifts in social conceptions emphasize personal responsibility and self-sufficiency, as reflected by recent reforms to America's welfare system.<sup>123</sup> Each historical shift has been accompanied by a concern that the benefits granted to charitable status actually reach the objects of charity.<sup>124</sup> "Charity law is part facilitation of work for the public benefit and part check on misuse of funds."<sup>125</sup>

The history of charitable exemptions and other charitable privileges is a story of constant shifting from one guiding idea to another, sometimes with emphasis on control of abuse, and sometimes with emphasis on the facilitation of policy. The original proscription in Ohio law against allowing property tax exemption for residences, for instance, was intended to prevent abuse where an officer of a charitable organization or head of a church might receive an undue benefit in the form of living arrangements. This is akin to the idea of inurement. The original proscription against exemption for property used as a residence has been modified, in cases like *Davies*, to keep pace with evolving notions of charitable activity. Sometimes, however, the evolution of charitable notions outpaces the law's conceptual framework. The current scheme of Ohio property tax exemption needs to

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<sup>122</sup>[T]he reformation statutes were the legal culmination of a complex social and religious revolution which affected all aspects of English life. The overthrow of papal supremacy and the decline of the authority of organized religion was paralleled by, what Professor Dickens has called, 'a change of viewpoint concerning the nature and functions of religion, both in the individual and in society.'

One manifestation of such a change was in the character of man's philanthropy. The objects of charity were to become more secular as the majority of Englishmen reflected less on the fate of their souls and became more concerned with the worldly needs of their fellow men.

*Id.* at 10.

<sup>123</sup>The tenor of welfare reform debates and current social concepts of what it means to truly help those in need is, as most political theories, echoed in the past. For instance, in the debates before the enactment of the Mortmain act in 1736, one of the members of parliament warned that the societal obligation of charity should be met with care,

for if we mistake the objects of our charity, if by giving what we call charity we encourage laziness, idleness, and extravagance, in the persons to whom we give it, or in others, the action is so far from being pious, charitable, or commendable, that it becomes impious, ridiculous and injurious, to our native country. . . .

*Id.* at 111.

<sup>124</sup>"[C]omplaints that chantries had been allowed to lapse and that their endowments had been appropriated by the priest, the founder or the founder's heirs were not infrequent, and their maladministration was the principle reason given in the Henrican statute of 1545 for their eventual suppression." *Id.* at 10. Those complaints are echoed in the circumstances surrounding the Ohio Charitable Solicitation Act, *supra* note 27, and the requirements for 501(c)(3) organizations to prove that they are "organized" and "operated" for allowable purposes only. Treas Reg. § 1.501(c)(3)-1.

<sup>125</sup>L.A. SHERIDAN, KEETON & SHERIDAN'S THE MODERN LAW OF CHARITIES, (4th ed 1992).

accept the social reality of the charitable activity embodied in low-income housing development.<sup>126</sup>

CHRISTOPHER P. CONOMY<sup>127</sup>

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<sup>126</sup>For a similar argument regarding the IRS policy toward community economic development, see Gregory G. Maher, *Charitable Economic Development Between Nonprofits and For-profits: It's Time the IRS Took Another Look*, 16 EXEMPT ORG. TAX R. 761 (May 1997).

<sup>127</sup>Community Advocacy Clinic, Cleveland-Marshall College of Law. Author's note: If this work is any good, then credit must be shared with the Community Advocacy Clinic at Cleveland-Marshall College of Law, Alan Weinstein, director, and Kermit Lind and Pamela Daiker-Middaugh, staff attorneys, for inspiration, support, and patience; all the clinicians who helped with editing; the law library staff at Cleveland-Marshall College of Law, for good cheer and great research, including the library's celebrated 400,000th volume, *The Constitutions of Ohio and Allied Documents*, by Isaac Franklin Patterson, A.M., LL.B. (1912); the law library at Case Western Reserve University, for making its resources available to Cleveland-Marshall students while our library was moving to a new building; and Marc L. Breen, for promising to tell me that this note qualifies as "a whirlwind tour-de-force of breathtaking scope and prophetic vision . . . a real 10!"