

BEFORE THE STATE TAX APPEAL BOARD
OF THE STATE OF MONTANA

THE SALVATION ARMY, MISSOULA,))	DOCKET NO.: SPT-2000-2
Appellant,))	
-vs-))	
THE DEPARTMENT OF REVENUE))	FACTUAL BACKGROUND,
OF THE STATE OF MONTANA,))	CONCLUSIONS OF LAW,
Respondent.))	ORDER and OPPORTUNITY
)	<u>FOR JUDICIAL REVIEW</u>

The above-entitled appeal was heard on September 15, 2000, in the City of Missoula, Montana, in accordance with an order of the State Tax Appeal Board of the State of Montana (the Board). The notice of the hearing was duly given as required by law.

The taxpayer, The Salvation Army of Missoula, represented by Captain Chris Giffey-Brohaugh and Captain Christine Giffey-Brohaugh, presented testimony in support of the appeal. The Department of Revenue (DOR), represented by Appraisal Specialist Virgil Byford, presented testimony in opposition to the appeal. Testimony was presented and exhibits were received. The duty of this Board is to determine first, whether the appeal was filed in a timely manner, and, second, whether the property qualifies for an exemption, based on a preponderance of the evidence. The

Salvation Army is the appellant in this proceeding and, therefore, has the burden of proof. Based on the evidence and testimony, the Board finds, first, that the appeal was filed in timely fashion and, second, that the decision of the Department of Revenue is reversed.

STATEMENT OF ISSUES

The issues before this Board are 1) the timeliness of the appeal, and 2) the application for property tax exemption on land owned by The Salvation Army of Missoula that is to be used for low-income senior citizen housing.

FACTUAL BACKGROUND

1. Due, proper and sufficient notice was given of this matter, the hearing hereon, and of the time and place of the hearing. All parties were afforded opportunity to present evidence, oral and documentary.

2. The taxpayer is the owner of the property which is the subject of this appeal and which is described as follows:

Land only, described as 3.05 acres in Tract 2, Intermountain-BMC, Tracts 1 and 2, City of Missoula, Missoula County, State of Montana. (Geocode #2200-20-4-24-02; assessor #3507905)

3. On February 28, 2000, the taxpayer applied for a property tax exemption for the subject property, indicating on the application form that the type of property exemption

claimed was "religious" and "charitable." (Application #0401400.) The letter accompanying the application form stated, in pertinent part:

We are requesting a tax exemption for the above reference property. We have acquired this property to build a new church facility and low income senior housing community.

4. On March 14, 2000, a form letter requesting further information was sent to the taxpayer from Virgil F. Byford, Appraisal Specialist, Compliance, Valuation and Resolution Office, Montana Department of Revenue. The information requested, which was to be submitted within thirty days, was as follows:

A letter explaining how your organization specifically uses the real property to be considered. Was there a complete foundation for the building on this property as of January 1, 2000? If so, when do you plan to have the building complete and in use? If the property is used for low-income housing, what standards do you use for selecting the occupants (such as HUD guidelines for low-income)?

5. G. R. Volbright, Administrative Assistant, The Salvation Army, responded to Mr. Byford's letter on March 22, 2000, stating, in pertinent part:

We acquired this property with the intention of constructing a Very Low Income Elderly Housing project. We are currently going forward with a HUD 202 application which will be submitted later this year.

No ground has yet been broken on the new project.

6. On April 3, 2000, the DOR notified The Salvation Army that its request for a tax exemption had been denied. The letter from Mr. Byford stated, in pertinent part:

Reason for Denial: This property is vacant land and therefore, does not meet the use requirements of 15-6-201, MCA.

Processing has been completed on the above referenced application and regretfully exemption is hereby denied. The evidence submitted did not support exemption as outlined in Part 2, Chapter 6, Title 15 M.C.A., as amended. If circumstances change such that you can meet the requirements of the above referenced statute, you are invited to apply again in the future.

7. On May 3, 2000, the taxpayer sent a facsimile (fax) addressed to the State Tax Appeal Board but used the fax number 406/444-6642, which belonged to the Department of Revenue. This fax, which had been signed by Commanding Officer Christopher Giffey-Brohaugh, was forwarded to the Board by the Department of Revenue and was received by the Board on May 19, 2000. In pertinent part, the fax states:

We object. We are a non profit organization and ALL our property in Missoula is dedicated to the non profit mission of The Salvation Army. This land is not owned for investment purposes or to be re sold. Our ownership is the first and necessary step in applying for a HUD grant. The grant cannot go forward without the applicant owning or controlling a suitable site.

With that in mind, it seems clear that the land IS BEING USED for a tax exempt purpose, namely, to procure 50 units of housing for very low income seniors in Missoula, Montana.

8. By letter dated May 24, 2000, the Board accepted the taxpayer's appeal and so notified the Department of Revenue.

9. On June 15, 2000, Mr. Byford responded to the Board's letter, stating, in pertinent part:

The Salvation Army applied for exemption on Tract 2, Intermountain-BMC, Tracts 1 and 2, Missoula County, on an application dated February 28, 2000. A letter was submitted with the application that indicated the property would be used to "build a new church facility and low income senior housing community." Since I needed some additional information on the current use of the property, I sent the Salvation Army a letter on March 14, 2000, requesting that information. In the response that I received, the Salvation Army indicated that the property was acquired "with the intention of constructing a Very Low Income Elderly Housing project" and that no construction had been started yet. Also, in talking with The Salvation Army, they indicated that no construction would be started this year.

Low income housing for the elderly must qualify for exemption under 15-6-201(1)(e) or (o)(ii), MCA. 15-6-201(1)(e) states: "subject to subsection (2), property that is owned or property that is leased from a federal, state, or local governmental entity by institutions of purely public charity if the property is directly used for purely public charitable purposes." 15-6-201(1)(o)(ii) states: "property that is owned and used by an organization owning and operating facilities that are for the care of the retired, aged, or chronically ill and that are not operated for gain or profit."

If the property is to be used to build a new church facility, as stated in The Salvation Army's first letter, the property must qualify under 15-6-201(1)(b), MCA, which states: "buildings, with land that they occupy and furnishings in the buildings, that are owned by a church and used for actual religious worship or for residences of the

clergy, together with adjacent land reasonably necessary for convenient use of the buildings."

All of these statutes require that the property meet a use test in order for the property to qualify for an exemption. Since this property is vacant land and is currently not in use, it doesn't meet the use test. Therefore, in the Department of Revenue's opinion, the property doesn't qualify for an exemption from property tax at the present time.

TIMELINESS ISSUE

Mr. Byford entered a motion to dismiss the appeal because it was not submitted in a timely manner. He submitted DOR Exhibit A, the April 3, 2000 letter he had sent to The Salvation Army denying the exemption. The taxpayer's faxed letter of appeal was date stamped as being received by the Board on May 19, 2000. Under §15-2-302(2)(a), MCA, appeals must be submitted within 30 days of receipt of the decision in order to be timely. Therefore, it would appear that the appeal was submitted past the 30-day time limit. Captain Christine Giffey-Brohaugh testified that the fax had been sent on May 3, 2000, because that day was the deadline to appeal. Although it had been addressed to the Board, it was sent to the fax number that appeared on the April 3, 2000 exemption denial letter from Mr. Byford to The Salvation Army. This was not Mr. Byford's fax number, according to his testimony, but it was a fax number within the Department of Revenue. The fax was later forwarded by

the Department of Revenue, via "deadhead" mail, to the Board, and received by the Board on May 19th. After discussion, Mr. Byford withdrew his motion.

TAXPAYER'S CONTENTIONS

Captain Chris Giffey-Brohaugh stated that their argument is not with the law, which is clear on the issue, but with the philosophy of the law. When an agency or other entity applies for a HUD 202 grant to build housing for low-income senior citizens, HUD requires that the land be owned by the agency or entity before the application can be submitted. If the land is not owned, HUD will not accept the grant application.

Captain Christine Giffey-Brohaugh explained that *"The Salvation Army has worked on Silvercrest Projects for HUD 202 grants throughout the western United States for the last 40 years, and part of the regulations...are that we have absolute control of the property at the time we submit the grant. Otherwise, the grant would automatically not be accepted."* At the time of the grant submission, the agency must have a contractual agreement with architects, and the architectural planning must be *"75% complete."* They also must have contractual agreements with a contractor stating that if they receive the grant, there is a formal bid process already in place so construction could begin upon

receipt of the grant. The Salvation Army of Missoula has already invested approximately \$50,000 in the project, for such items as architectural drawings and required land and soil studies.

Taxpayer's Exhibit 1 is a five-page document entitled "Department of Housing and Urban Development, Section 202 Supportive Housing for the Elderly Program." It is a checklist of all items necessary to be submitted with a grant application. Highlighted items included *(d) Evidence of site control and permissive zoning: (i) Site control document(s); (ii) Evidence site is free of limitations, restrictions, or reverters; (vi) Phase I Environmental Site Assessment.* The "site control document" refers to the bill of sale, and the cost to the Salvation Army of the environmental site assessment was \$4,000. Captain Christine Giffey-Brohaugh brought one copy of the completed grant application to show the Board, stating that *"it has everything you can imagine in it..."* She explained that the project is *"geared toward senior citizens that meet the 30 percent median income guidelines,"* and the grant includes letters of support from community organizations and a study indicating the need for this type of housing in Missoula. She testified that *"we would like to ask for an exemption just based on the fact that we would like to see that \$4,000*

(the approximate amount of property tax due) go back into this project rather than to simply pay the taxes, and my understanding is that when this structure is up, there wouldn't be a tax issue. It's only a tax issue as long as it's a vacant piece of land." She explained that they have moved as quickly as possible on the project, but it was unlikely that ground could be broken until the spring of 2001, even if the grant approval is received by the end of September, as anticipated.

Taxpayer's Exhibit 2 is a five-page document entitled "The Salvation Army Silvercrest Residence," which describes the Puyallup Silvercrest Apartments in Puyallup, Washington and includes a sample tenant application form. To qualify for residency in the project, "all household members must (be) 62 years of age or older and must meet the annual Very Low Income limits for Pierce County as determined by HUD." These limits are a 1997 income of \$15,700 for a one-person household and \$17,900 for a two-person household. Taxpayer's Exhibits 3 and 4 are architect's elevations and interior floor plans for the Puyallup Silvercrest project.

Captain Christine Giffey-Brohaugh presented the architect's drawings for the proposed project, stating that the project would provide 50 apartments for senior citizens. She testified that *"this is the actual footprint for that*

piece of property. As you can see, it's very specific for the property." She pointed out Russell Street and Second, showing exactly where the apartment complex would be located. The drawings also depicted the various soil lines and elevations for the property as well as a drainage ditch. She explained that she brought the drawings to show the Board that *"these aren't sort of generalized things that could be put on any piece of property, but we have made a commitment to this specific property; and the architectural things that have been done and the soil studies that have been done to support this grant are specific to this piece of property. They would not be easily transferred to another location."*

In response to questions, Captain Christine Giffey-Brohaugh testified that at some time in the future, a church could be built on the property, but the short-term plan is just to build the senior housing apartments. Her husband explained that when The Salvation Army partners with HUD on a housing project, after 30 years the project is turned over to The Salvation Army. Therefore, they always try to build such projects close to their church, since they look at the projects as a part of their ministry. In this case, since there was no available land near their church, they decided to acquire land, build the housing project, and build a

church on the property at a future date. He added that *"it's proceeding a little bit faster than we thought, because somebody's given us an offer on our church, and if the HUD grant's approved, we'll probably start a capital campaign for the church - it's actually a church-community center, probably next year."*

Captain Christine Giffey-Brohaugh testified that they are fairly certain the grant will be approved, because The Salvation Army always does *"a lot of preliminary work"* on grant applications. They don't want to spend a large amount of money on preliminary studies, only to lose it if a grant is not approved. She said that it was very helpful that the community had done the research for the CDBG (Community Development Block Grant) study, because that *"documented the need in the community for additional single-unit senior housing in the 30 percent median income."* Although other grant applications have been submitted in the region, it is her understanding that there are no other applications within Montana. If the grant were not approved, The Salvation Army would go through an appeal process, asking HUD *"what weaknesses they saw in the grant,"* and would then resubmit the grant application in 2001 unless HUD made it clear that there was no chance for its approval.

In HUD-funded projects operated by The Salvation Army, a third-party, independent management firm is hired to actually manage the projects, and that would be done in the case of this apartment complex. *"The management firm acts as an advocate for both concerns, both HUD and The Salvation Army, and in that way it's just a smoother working relationship and nobody has a vested interest,"* according to Captain Christine Giffey-Brohaugh.

In her closing remarks, she summarized that *"as a non-profit, we work very hard to serve the people of this community... We've already made a significant financial investment in making this project happen. The architects have been paid; contractual agreements have been put together; the property has been paid for. I would just state that if the government would want to encourage private non-profits to continue investing that way, finding a way for them to do that would be probably advantageous."* Captain Chris Giffey-Brohaugh added that, *"I see the Montana Department of Revenue sort of changing their philosophy. Where they're not requiring a full building to be built right now, they're looking at just a foundation, so I see them drifting in a direction that's trying to correct this situation... I'd like to request that they would consider possibly looking at this issue to where, if an organization*

does not get the grant and they do have to sell the land, put it back on the market, at that point to look at it as a tax issue. In other words, to leave it alone until it is determined one way or the other whether it's going to be used for its intended purpose, of if that fails and it has to be resold."

DOR'S CONTENTIONS

Mr. Byford introduced and discussed five DOR exhibits that delineated the history of this appeal. Exhibit B is a copy of The Salvation Army's application for exemption for the subject land, dated February 28, 2000, and received by the Missoula County DOR office on May 3, 2000. The appraisal/assessment section of the application, which was completed by the local DOR office, indicated that the property was currently vacant land. Exhibit C is a copy of The Salvation Army's letter that was submitted with the application. The letter indicated that the property would be used to build a new church building and low-income senior housing community. Exhibit D is a copy of a letter, dated May 14, 2000, that was sent by Mr. Byford to The Salvation Army, asking for additional information on the property. Exhibit E is a copy of a letter, dated March 22, 2000, from The Salvation Army to Mr. Byford, responding to his request for additional information and indicating that "*The property*

was acquired with the intention of constructing a very low-income, elderly housing project." The letter also indicated that no construction had been started as of that time.

Mr. Byford testified that "Since the indication from the Department of Revenue office in Missoula and from The Salvation Army was that the property was vacant land and, therefore, we feel did not meet the use requirements of §15-6-201, I issued a letter denying the request for a property tax exemption, dated April 3, 2000." This letter had previously been introduced as DOR Exhibit A. The appeal of the exemption denial was received by the Board on May 19, the Board issued an acceptance letter for the appeal on May 24, and Mr. Byford filed a response to that letter in a letter dated June 15, according to his testimony.

Mr. Byford testified that "the proposed use of the property for elderly, low-income housing would need to qualify for exemption under 15-6-201(1)(e) or (o)(ii). 15-6-201(1)(e) states 'subject to subsection (2), property that is owned or property that is leased from a federal, state, or local governmental entity by institutions of purely public charity of the property is directly used for purely public charitable purposes;' (o)(ii) says, 'property that is owned and used by an organization owning and operating facilities that are for the care of the retired, aged, or

chronically ill and that are not operated for gain or profit;'" Mr. Byford stated that these statutes require that an applicant meet both an ownership test and a use test. The DOR agrees that the property meets the ownership test, but, *"since the property is vacant land, we don't feel it meets the required use test."* Mr. Byford cited **Cruse v. Fischl**, 55 Mont. at 267, wherein the Montana Supreme Court ruled that *"tax exemptions must be construed strictly for taxation against exemption."* In **Steer Inc. v. Department of Revenue**, 245 Mont. 470, 803 P.2d 601 (1990), the Montana Supreme Court ruled that *"the use of the property is determinant rather than the ownership of the property."* The applicable Administrative Rule, according to Mr. Byford, is **42.20.106**, the definition of "use," which says that *"when the statute requires a use test, this rule requires that there be at least a complete foundation on the property as of January 1st of the year for which you're seeking exemption, and the applicant provide an affidavit to the Department specifying that the property will be placed in the qualifying use as of the end of the year in order to qualify for that tax year."*

Mr. Byford cited two relevant State Tax Appeal Board decisions. The first one is **Fellowship Baptist Church of Bozeman vs. Department of Revenue**, SPT-1987-15. He explained that this is a case in Gallatin County where a church

purchased a tract of vacant land and applied for an exemption on it. The DOR denied the exemption and the Board upheld the denial. The second case, which Mr. Byford felt was "on point for this particular issue," is **HRDC** (Human Resource Development Council) **of District IX vs. Department of Revenue**, SPT-1996-11, another case in Gallatin County. In this case, the HRDC had purchased two ten-acre tracts of land. One tract was vacant land, on which they intended to build elderly housing, following receipt of a grant. The exemption they sought on this land was denied by the DOR, and the denial was upheld by the Board. In response to questioning, Mr. Byford testified that there was a case in Missoula in which the local HRDC appealed the DOR's denial of an exemption for low-income housing that was already constructed. The Board ruled against the DOR in that case. In that case, unlike in the present appeal, the housing had already been constructed.

Mr. Byford explained that in the past the DOR would not have granted an exemption even if a foundation had been built as of January 1 of the tax year. The building would have had to be complete and in use in order to get the exemption. A previous DOR director did not like that, so had an administrative rule drafted which would allow the organization to receive the exemption if they had at least a

complete foundation on the property. That would indicate that the group actually intended to build. The organization then must send the DOR a letter indicating that *"they will have it complete and in use for that qualifying purpose by the end of the year in order to get the exemption for that tax year."*

Mr. Byford concluded his testimony by stating that *"as an employee of the state, it's my job to handle the laws as strictly as they're written. I have to follow a strict interpretation of the law, and I believe that's what we did in this case."*

BOARD'S DISCUSSION

On the taxpayer's original request for exemption, The Salvation Army of Missoula had indicated that the type of exemption sought was both "religious" and "charitable," by checking both boxes on the exemption request form. This resulted in three different sections of law being applied by the Department of Revenue to the exemption request: **§15-6-201(1)(b)**, relating to church property, **§15-6-201(1)(e)**, relating to property used by institutions of purely public charity for public charitable purposes, and **§15-6-201(1)(o)(ii)**, relating to facilities for the care of the elderly. Captain Christine Giffey-Brohaugh testified that the short-term plan for the property was to build apartments

for low-income senior citizens and "at some time in the future, a church could be built on the property." This property is not adjacent to, or even near, The Salvation Army's existing church building. Future plans for the building of a new church on the subject property are indefinite. The Board, therefore, chose to consider the request for exemption under §15-6-201(1)(e), the public charities section, and §15-6-201(1)(o)(ii), the elderly facilities section. These state, in pertinent part: "15-6-201 (1) The following categories of property are exempt from taxation: (e) subject to subsection (2), property that is owned or property that is leased from a federal, state, or local governmental entity by institutions of purely public charity if the property is directly used for purely public charitable purposes; (o)(ii) property that is owned and used by an organization owning and operating facilities that are for the care of the retired, aged, or chronically ill and that are not operated for gain or profit."

Mr. Byford cited two previous State Tax Appeal Board decisions as being relevant to this appeal. The first, **Fellowship Baptist Church of Bozeman vs. Department of Revenue**, SPT-1987-15, related to vacant land owned by a church and used for recreational activities. This is not the case in the present appeal. However, the Board does take

note of the following language in the decision cited: "We also agree that precedents are not always correct and that conventional wisdom on tax matters is subject to change and improvement..."

The second State Tax Appeal Board case cited by Mr. Byford is ***Human Resource Development Council of District IX, Inc. v. Department of Revenue***, SPT-1996-11. In this case, the HRDC had purchased vacant land in Gallatin County on which it intended to "*construct an assisted living facility on the property someday.*" (Findings of Fact, #8, SPT-1996-11) The Board notes that in this case, the HRDC had no specific, immediate plans to build a project. No grant applications had yet been submitted, no architectural plans had been prepared, and the land was merely being held for possible future use as a site for "*an assisted living facility.*"

The Board notes a distinction between the request for exemption in SPT-1996-11 and that of the current appeal. In the present case, The Salvation Army of Missoula, prior to applying for the tax exemption, had already submitted the grant application to HUD for funding to build 50 apartments for low-income senior citizens on the subject property. HUD required that The Salvation Army have "absolute control of the property" at the time the application was submitted or

they would not accept it, according to Captain Christine Giffey-Brohaugh's testimony. She stated that, in addition to purchasing the land, The Salvation Army of Missoula has invested approximately \$50,000 in the project to date, for architectural drawings, land and soil studies, and other requirements. The Salvation Army has contractual agreements with architects and with a contractor, hence construction will begin immediately upon receipt of the grant. It would not be realistic or financially feasible, however, to begin construction of such a project, or to attempt to complete a foundation, as set forth in **ARM 42.20.106**, until the grant has actually been approved.

In this case, there is no question about the proposed use of the subject land. It will not be used for purposes that fall outside the scope of the exemption statute. It will be the site of needed housing for low-income elderly persons. The project has been designed specifically to fit the subject property, and, as Captain Christine Giffey-Brohaugh testified, "*The architectural things that have been done and the soil studies that have been done to support this grant are specific to this piece of property. They would not be easily transferred to another location.*"

(emphasis added) The Giffey-Brohaughs are confident that the HUD grant will be approved, because of the extensive

preliminary work that The Salvation Army nationwide always does on grant applications, resulting in a track record of success; and because of the CDBG (Community Development Block Grant) study that has documented the need for additional housing for low-income senior citizens in Missoula. In the unlikely event that HUD did not initially approve the grant, The Salvation Army would appeal their decision and would resubmit the application.

In his closing remarks, Captain Chris Giffey-Brohaugh suggested that the Department of Revenue may be changing its philosophy, as it originally provided through administrative rule that a building must be on the property to qualify the land for an exemption. It now requires that only a foundation, rather than the entire building, must be on the property as of January 1 of the tax year. He believes that the Department is moving in the correct direction with the rule change, but should also exempt vacant land and then return it to the tax rolls if the grant is not received and the land is not, therefore, able to be used for its intended purpose. A provision for review of exempt land use already exists within the Administrative Rules of Montana. **ARM 40.20.106(2)** states that "The property tax exemption will be reviewed as of January 1 of the next year to determine if the property was placed in the intended use. If it was not

placed in the intended use, the Department of Revenue will rescind the exemption and tax the property for the previous tax year."

Mr. Byford cited **Cruse v. Fischl**, 55 Mont. at 257, wherein the Montana Supreme Court ruled that "tax exemptions must be construed strictly for taxation, against exemption." The Board, in response, cites **Flathead Lake Methodist Camp v. Webb**, 144 Mont. 565, 399 P.2d 90 (1965), in which the Supreme Court, referring to **Cruse v. Fischl** and the exemption statute as quoted above, stated, "We agree with this rule and respect it, but are compelled to view each case from a realistic standpoint..."

The Board is unable to find judicial precedent in the Montana courts relating to the exact nature of this appeal. However, among other states' decisions, we cite the following four cases and present brief, relevant excerpts from each:

(1) **Grace & Peace Fellowship Church, Inc. v. Cranford Township**, Tax Court of New Jersey, 4 N.J. Tax 391 (1982). "A statute is to receive a reasonable construction, to serve the apparent legislative purpose. The inquiry in the final analysis is the true intention of the law... The language is not to be given a rigid interpretation when it is apparent that such meaning was not intended. The rule of strict construction cannot be allowed to defeat the evident legislative design. [*Alexander v. N.J. Power & Light Co*; 21 N.J. 373, 378, 122 A.2d 339 (1956)].

(2) ***South Iowa Methodist Homes, Inc. v. Board of Review of Cass County***, 257 Iowa 1302; 136 N.W. 2d 488 (1965). "The exemption statutes are a legislative recognition of the benefits received by society as a whole from properties devoted to appropriate objects of exempt institutions and the consequent lessening of burden on the government. They are designed to encourage these institutions to use their funds and property for such projects, ***Carl Zollmann, American Law of Charities 465, paragraph 693***. If this is the legislative intent, we reach an illogical result if we hold the legislature intended property, ultimately exempt, to be subject to taxation during the construction period. Such activities are not encouraged by adding to the building costs. The subjection of this property to taxation during the construction period would tend to defeat the object of the exemption statutes..."

(3) ***Holy Trinity Protestant Episcopal Church of Kenwood v. Bowers, Tax Commissioner, Board of Tax Appeals, et al***, 172 Ohio St. 103; 173 N.E. 2d 682 (1961). "The basis for tax exemption is the public benefit, and the ultimate purpose of tax exemption, whether in relation to public property or nongovernmental property, is to insure that property or funds devoted to one public benefit shall not be diminished by diverting such funds by means of taxation to another public benefit..."

It is a matter of common knowledge that, even though property is acquired for an intended use, actual physical occupancy cannot begin immediately... In instances where a structure must be built before an actual physical use can begin, in addition to the preparation of plans, the letting of bids and the actual construction, quite frequently it is necessary to procure funds... All these matters necessarily consume time during which there can be no actual physical use.

It is unrealistic to differentiate between those instances where the property acquired for an intended public use is under construction and where construction has not yet begun.

It is the purpose and intent of the tax-exemption statutes with which we are concerned that the funds of the exempt entity be devoted

exclusively to the benefit of the public for that particular use, and to so differentiate and deny an exemption to property acquired for such use but not presently so used would defeat the purpose of the exemption statutes.

Thus, where an entity, which under the law is entitled to have its property exempted from taxation, acquires real property with the intention of devoting it to a use exempting it from taxation, such property is entitled to be exempted from taxation, as long as it is not devoted to a nonexempt or commercial use, even though actual physical use of the property for the exempt purpose has not yet begun.

In other words, it is not necessary that actual physical use of property for an exempt purpose be commenced before it is entitled to be exempted from taxation. It is sufficient if it is acquired by the organization entitled to the exemption, with the intention of devoting it to an exempt use.

Necessarily, under ordinary circumstances a period of time must elapse between the time of the acquisition of the land and the actual construction and occupancy of the building. Plans must be prepared, surveys made and, perhaps most important of all, funds raised, all of which, especially as to a nongovernmental entity which does not have access to tax revenues, must necessarily take time. To tax the property during such period prior to actual construction would be to subvert the purpose of the tax exemption.

However so far as nongovernmental entities are concerned, mere ownership, standing alone, is not sufficient to create a right to tax exemption. Such ownership must be coupled with the purpose, supported by tangible evidence, that the property will be devoted to an actual physical use for the public benefit. The intent to use such property for an exempt purpose must be one of substance and not a mere dream that sometime in the future, if funds can be obtained, the entity would so use such property. In other words, it must be shown that the entity, at the time the application for exemption is made, is actively working toward the actual use for the public benefit. Evidence that surveys have been made and plans drawn, or that

active fund-raising campaigns are being carried on is indicative that the exempting use will be made of the property within a reasonable time."

(4) ***Foursquare Tabernacle Church of God in Christ v. State Board of Tax Commissioners***, Cause No. 49T05-8904-TA-00009; 550 N.E. 2d 850 (1990). "Generally, exemptions are granted when there is an expectation of a benefit which will inure to the public by reason of the exemption. 'The rationale justifying a tax exemption is that there is a present benefit to the general public from the operation of the charitable institution sufficient to justify the loss of tax revenue.' White Cross Hospital Ass'n. v. Board of Tax Appeals (1974), 38 Ohio St. 2d 199, 311 N.E. 2d 862, 863.

The land must be used for the eventual construction of a building which will be occupied and used by its owner for exempt purposes. The burden falls upon the taxpayer to establish that this construction will occur."

The Salvation Army of Missoula purchased the subject land prior to submitting the grant application for the elderly housing project because this is a HUD requirement. They have already committed a considerable amount of money to the project, an apartment complex which will provide needed housing for low-income senior citizens. The completed architectural plans and soil studies are specific to the subject property. It is obvious to the Board that this property will be put to no use other than as a site for the elderly housing as proposed. The success of The Salvation Army in acquiring grants and operating similar projects in other areas of the Northwest has convinced the Board of the

feasibility of this project and the likelihood of HUD's approval of the grant. It is the decision of this Board that the requested exemption for the subject property be granted to The Salvation Army of Missoula by the Department of Revenue.

CONCLUSIONS OF LAW

1. The State Tax Appeal Board has jurisdiction over this matter. **§15-2-301, MCA.**

2. **§15-2-302, MCA. Direct appeal from department decision to state tax appeal board - hearing. (2)(a)** Except as provided in subsection (2)(b), the appeal is made by filing a complaint with the board within 30 days following receipt of notice of the department's final decision.

3. **1972 Montana Constitution, Article VIII, Section 5(1)(b).** The legislature may exempt from taxation: institutions of purely public charity,... places for actual religious worship,...

4. **§15-6-201, MCA. Exempt categories. (1)** The following categories of property are exempt from taxation: ... **(e)** subject to subsection (2), property that is owned or property that is leased from a federal, state, or local governmental entity by institutions of purely public charity if the property is directly used for purely public charitable purposes; ... **(o)(ii)** property that is owned and

used by an organization owning and operating facilities that are for the care of the retired, aged, or chronically ill and that are not operated for gain or profit.

5. **§15-2-301(4)**...The state tax appeal board shall give an administrative rule full effect unless the board finds a rule arbitrary, capricious, or otherwise unlawful.

6. The appeal of the taxpayer is hereby granted and the decision of the Department of Revenue is reversed.

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ORDER

IT IS THEREFORE ORDERED by the State Tax Appeal Board of the State of Montana that the subject property shall be exempt from real property taxation pursuant to §15-6-201(1)(e) and (o)(ii), MCA.

Dated this 12th day of October, 2000.

BY ORDER OF THE
STATE TAX APPEAL BOARD

(S E A L)

GREGORY A. THORNQUIST, Chairman

JAN BROWN, Member

JEREANN NELSON, Member

NOTICE: You are entitled to judicial review of this Order in accordance with Section 15-2-303(2), MCA. Judicial review may be obtained by filing a petition in district court within 60 days following the service of this Order.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 12th day of October, 2000, the foregoing Order of the Board was served on the parties hereto by depositing a copy thereof in the U.S. Mails, postage prepaid, addressed to the parties as follows:

Captain Chris Giffey-Brohaugh
Captain Christine Giffey-Brohaugh
The Salvation Army of Missoula
P. O. Box 8123
Missoula, Montana 59807

Virgil F. Byford, Specialist
Compliance, Valuation & Resolution
Department of Revenue
Mitchell Building
Helena, MT 59620

Office of Legal Affairs
Department of Revenue
Mitchell Building
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Missoula County Appraisal Office
Missoula County Courthouse
200 West Broadway
Missoula, Montana 59802

DONNA EUBANK
Paralegal