

STATE OF NEW HAMPSHIRE

SUPREME COURT

2017 TERM

Case No. 2017-0187

THE MARIST BROTHERS OF NEW HAMPSHIRE

V.

TOWN OF EFFINGHAM

APPEAL FROM THE DECISIONS OF THE
CARROLL COUNTY SUPERIOR COURT

BRIEF OF APPELLEE/DEFENDANT
TOWN OF EFFINGHAM

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Table of Contents

TABLE OF AUTHORITIES	iii
STANDARD OF REVIEW	1
STATEMENT OF THE CASE.....	1
STATEMENT OF FACTS	2
I. MBNH is a religious organization that seeks to spread the gospel message to youth.....	3
II. Camp Marist.....	3
A. Staffing.....	4
B. Tuition & Fees	5
C. Although its bylaws do not require it to do so, MBNH does provide a small number of scholarships to needy campers.	6
D. Rentals.....	8
III. MBNH’s relationship with The Marist Brothers of the Schools.	8
SUMMARY OF ARGUMENT	10
A. The Motion in Limine.....	10
B. The Merits.....	10
ARGUMENT	11
I. The Superior Court’s decision to grant the Town’s motion in limine to preclude the introduction of evidence of the tax treatment of unrelated camps in other municipalities should be affirmed because the Plaintiff failed to properly preserve the argument on appeal, and the evidence is otherwise irrelevant.....	11
A. The Plaintiff failed to properly preserve the issue of whether the Superior Court erred in granting the Town’s motion in limine.....	11
B. The Superior Court properly excluded the Plaintiff’s proffered evidence because it is not relevant to whether MBNH is entitled to a charitable tax exemption in the Town of Effingham.....	12
II. The Superior Court’s order denying the Plaintiff a charitable tax exemption should be affirmed because the court could reasonably conclude that the Plaintiff failed to carry its burden of proving it was entitled to the exemption.	13
A. Providing religious and educational services to campers does not automatically entitle an organization to a charitable tax exemption.....	14

- B. The Superior Court correctly ruled that the Plaintiff failed to satisfy its burden of proving that it met all of the ElderTrust factors, and thus was not entitled to a charitable tax exemption. 17
 - 1) MBNH's income and profits are used for purposes other than the purpose for which the organization was established. 18
 - a) The Superior Court correctly found that the Plaintiff presented insufficient evidence to support a finding that the amount of the assessment is related to the value of the benefit Plaintiff receives from the U.S. Province..... 19
 - b) The Superior Court correctly concluded that the Plaintiff failed to establish that its income or profits are not used for any other purpose other than the purpose for which it was established. 21
 - 2) The Superior Court correctly concluded that the Plaintiff failed to satisfy its burden of proof that Camp Marist was established and is administered for a charitable purpose, and that it has an obligation to perform its stated purpose to the public. ... 22
 - a) The Plaintiff waived any argument that it provides an indirect benefit to the general public. 24
 - b) The Superior Court correctly ruled that Plaintiff failed to meet burden of proving it is a public charity because it does not, in fact, benefit the public..... 25
 - i. The Plaintiff's mission is not charitable in nature. 26
 - ii. The scholarships provided are de minimis in light of the Plaintiff's overall attendance and revenue. 27
 - iii. The Plaintiff's high tuition charges exclude a large segment of society from attending..... 28
 - iv. The Plaintiff is, essentially, just another for-profit summer camp. 30
 - 3) The Superior Court correctly concluded that the Plaintiff failed to satisfy its burden of proof that the Camp property is occupied by it and used directly for the stated charitable purpose(s). 31

CONCLUSION..... 34

TABLE OF AUTHORITIES

Cases: New Hampshire **Page**

Alton Bay Camp Meeting Asso. v. Alton, 109 N.H. 44 (1968).....32

Appeal of City of Franklin, 137 N.H. 622 (1993)15

Appeal of Kiwanis Club of Hudson, Inc., 140 N.H. 92 (1995)32, 33, 34

Appeal of Wilson, 161 N.H. 659 (2011).....16

East Coast Conference of Evangelical Covenant Church of America, Inc. v. Town of Swanzey,
146 N.H. 658 (2001)17, 25

Eldertrust of Florida, Inc. v. Town of Epsom, 154 N.H. 693 (2007).....1, 12, 14, 16,
.....17, 18, 20, 21, 22, 23, 24, 31

Elwood v. Bolte, 119 N.H. 508 (1979).....1

Granite State Management & Resources v. City of Concord, 165 N.H. 277 (2013)...14, 15, 18, 31

Housing Partnership v. Town of Rollinsford, 141 N.H. 239 (1996).32

In re City of Concord, 161 N.H. 344 (2011).....23

Institute for Trend Research v. Brown, 100 N.H. 286 (1956)21

Nature Conservancy v. Nelson, 107 N.H. 316 (1966).....15, 25

St. Paul’s School v. City of Concord, 117 N.H. 243 (1977).....15, 16

Sprague Energy Corp. v. Town of Newington, 142 N.H. 804 (1998).....16

Town of Peterborough v. MacDowell Colony, Inc., 157 N.H. 1 (2008)15, 24, 25, 26

Webster v. Town of Candia, 146 N.H. 430 (2001).....12

Cases: Out of State

Western Mass. Lifecare v. Bd. of Assessors, 747 N.E.2d 97 (Mass. 2001)29

Statutes: New Hampshire

RSA 72:23.....10, 12, 13, 15, 16

RSA 72:23, III.....16

RSA 72:23, IV16

RSA 72:23, V.....1, 2, 13, 16, 24, 34

RSA 72:23-1.....2, 13

RSA 72:23-m.....1, 14

Court Rules: New Hampshire

N.H. R. Ev. 401.....12

STANDARD OF REVIEW

An applicant for a tax exemption bears the burden of proof. RSA 72:23-m. This Court reviews a trial court's interpretation and application of RSA 72:23, *V de novo*. Eldertrust of Florida, Inc. v. Town of Epsom, 154 N.H. 693, 696 (2007). In conducting its review, this Court "accord[s] deference to the trial court's findings of historical fact, where those findings are supported by evidence in the record." Id. (citation omitted). This Court will "uphold the findings and rulings of the trial court unless they are lacking in evidential support or tainted by error of law." Eldertrust, 154 N.H. at 705 (citation omitted). This is because "[a] factual finding by the trial court supported by evidence in the record is binding upon the reviewing court." Elwood v. Bolte, 119 N.H. 508, 510 (1979) (citation omitted). Ultimately, this Court "accord[s] considerable weight to the trial court's judgments on the credibility of witnesses and the weight to be given testimony." Id.

STATEMENT OF THE CASE

The Marist Brothers of New Hampshire ("MBNH" or "Plaintiff") own 159 acres of land on the shores of Ossipee Lake in Effingham, New Hampshire (the "Property"), on which MBNH operates Camp Marist, a Catholic summer camp, for seven (7) weeks of the year. On or about March 23, 2015, MBNH filed a Claim for Exemption from Taxation with the Town of Effingham (the "Town"). In its Claim, MBNH requested a charitable tax exemption. MBNH did not request a religious or educational tax exemption. After review, the Town Board of Selectmen denied MBNH's request. MBNH appealed the decision to the Carroll County Superior Court pursuant to RSA 72:34-a.

After a two day bench trial, the Superior Court ruled that “MBNH has failed to meet its burden” and therefore found “that MBNH is not entitled to a charitable tax exemption pursuant to RSA 72:23, V and 72:23-1.” ORDER p. 23, MBNH BRIEF p. 61. This appeal followed.

STATEMENT OF FACTS

The following facts are those expressly found or adopted by the superior court as provided in its Order.

MBNH is a New Hampshire non-profit corporation registered with the State of New Hampshire Secretary of State’s office. ORDER p. 1, MBNH BRIEF p. 39. MBNH is affiliated with The Marist Brothers of the Schools, an international Catholic teaching Order and, by extension, the Roman Catholic Church. ORDER pp. 1-2, MBNH BRIEF p. 39. The U.S. Province of The Marist Brothers established MBNH in order to create and operate a residential religious summer camp in New Hampshire called Camp Marist (the “Camp”). ORDER p. 2, MBNH BRIEF p. 40; APPENDIX TO MBNH BRIEF (APP.1) 354-55. In 1949, MBNH purchased 159 acres of land on the shores of Ossipee Lake in Effingham, New Hampshire (the “Property”) on which to operate the Camp. ORDER p. 2, MBNH BRIEF p. 40.

In 2015, the Property had an assessed value of \$4,710,000. ORDER p. 2, MBNH BRIEF p. 40. From 1988-2014, MBNH allowed up to thirty (30) children per year from the Town of Effingham to attend the Camp for free as a result of an out-of-court settlement agreement between MBNH and the Town in prior litigation over property taxes. ORDER p. 9, MBNH BRIEF p. 47; Trial Transcript (“Tr.”) 130:22-131:4. In 2015, the settlement agreement expired and MBNH applied for a charitable property tax exemption under RSA 72:23, V. ORDER p. 11, MBNH BRIEF p. 49; APP.1 141-75. The Town denied MBNH’s request. Id.

I. MBNH is a religious organization that seeks to spread the gospel message to youth.

The “mission of all Marist ministries is to work with youth to spread the gospel message to youth.” Tr. 13:1-3. The corporate membership of MBNH, as required by its bylaws, is made up entirely of avowed Marist Brothers. ORDER p. 3, MBNH BRIEF p. 41. These members are all full “Marist Brothers;” there are no lay, unaffiliated members of the corporation. Id. The MBNH board of directors consists of twelve people, a minimum of two of whom are required to be Marist Brothers. Id.

MBNH’s present mission, as set forth in its own Articles of Agreement, is as follows:

The object for which this Corporation is established is to offer recreational and educational services to persons of whatever race, nationality, ethnic background, state or nation of residence. The corporation recognizes and affirms its traditional affiliation and faith in the Roman Catholic Church. In furtherance of the object, this corporation shall provide opportunities to meet primarily the spiritual, cultural and physical needs of youth.

ORDER p. 4, MBNH BRIEF p. 42. MBNH’s bylaws set forth a nearly identical mission, but with the addition of “charitable” services to the list of *offered* services. Id. MBNH’s Articles of Agreement and bylaws do not require it to provide these services for free. Id. MBNH’s Articles of Agreement and bylaws do not require it to take into account the youth’s ability to pay or need when determining what to charge for its services. Id.¹

II. Camp Marist.

The Property on which the Camp operates contains all the hallmarks of a typical religious summer camp, including camper cabins, a chapel and religious “mound,” dining hall, health facility, recreational facilities, and offices. ORDER p. 2, MBNH BRIEF p. 40; APP.1 185-86. These facilities include archery and rifle ranges, a go-kart track, and a horse barn. Id. In addition, the

¹ Interestingly, MBNH’s previous Articles of Agreement had a different mission statement, which included providing education, support and maintenance to underprivileged children. App. 354.

property has a “Log Cabin” or “Retreat Center” which is rented to third parties during the off season. Id.

When MBNH began operating the Camp in 1950, it limited attendance to boys, but it later allowed girls to attend and the Camp became coeducational. ORDER p. 2, n. 1, MBNH BRIEF p. 40; Tr. 147:14-20. The Camp draws youth (about 500 each year) from the United States and other developed countries such as Canada, China, Mexico, England, and Spain. ORDER pp. 2-3, MBNH BRIEF p. 40; Tr. 124:18-19, 126:14-127:18, Tr. 175:23-24; APP.1 681-878. The Camp’s Director of Mission, Brother James Halliday (“Brother Jim”) explained that the Camp’s present mission is to “work with youth to spread the gospel message to youth.” ORDER p. 4, MBNH BRIEF p. 42. When asked whether campers engage in any community service activities while at the Camp, Brother Jim was clear that community service was “not the nature of the summer camp.” Tr. 81:2-5. According to Brother Jim, the “nature of Camp Marist [is] the camp activities and being part of the Christian community. That would be [the] reason why parents would send their kids [to the Camp].” Id. at 81:6-11.

The Camp is therefore “Christian-centric,” and focuses on the teachings of the Catholic Church, and as such there are regular church services conducted in the Lady of Fatima Chapel, as well as daily camp gatherings in the morning and evening at a place called the Mound. It is here where the campers engage in prayer and other related activities. Most Camp buildings contain one or more references to the Christian faith, such as crucifixes, posters with religious messages, and depictions of the founder of the Marist Brothers, Marcellin Champagnat. APP.1 964-1077.

A. Staffing

Marist Brothers originally staffed the camp, working without compensation. ORDER p. 3, MBNH BRIEF p. 41; Tr. 114:19-115:9, 146:6-11. Decades later, the Camp began hiring paid

staff, and now pays third-party contractors to help recruit paid staff from both the United States and other parts of the world. Tr. 146:22-147:13. While some Marist Brothers are present during the camping season, the Camp is now primarily staffed by paid employees. This includes Mr. Bouchard, the Executive Director of the Camp. Tr. 145:4-146:5. Mr. Bouchard is a former Marist Brother who had previously performed uncompensated service at the Camp, but later withdrew from the brotherhood and took a paid position at the Camp. Id.

B. Tuition & Fees

The Camp operates for a total of seven (7) weeks over six (6) different sessions from late June to mid-August each year. ORDER p. 6, MBNH BRIEF p. 44; Tr. 158:4-13; APP.1 318-24. Sessions vary in length from 2-3 weeks, and campers may attend multiple – or all – sessions in any given summer. Id. Campers must apply for the privilege of attending the Camp. See generally Tr. 151. In order to apply, every camper must pay a non-refundable application fee of \$175, which is not credited against the tuition cost. ORDER p. 6, MBNH BRIEF p. 44; Tr. 151:1-9; APP.1 323. This non-refundable application fee is paid even if the camper is applying for a “scholarship.” Tr. 151:1-11.

For the 2016 Camp season, tuition varied in price from \$1,900 for the first two-week session to \$5,900 for the entire seven-week season. Id. Usually the Camp’s “lowest enrollment is the first session,” and therefore MBNH prices tuition for that session lower than the rest of the summer. Id.; Tr. 149:2-17. The Camp also charges additional fees for certain activities typically included in summer camp tuition, including air rifles, archery, ceramics and sculptures, cycling, fishing, go-karts, watersports, and horseback riding. ORDER p. 6, MBNH BRIEF p. 44; Tr. 155:1-157:17; APP.1 238-39. These fees vary from \$50 to \$100 per activity per camp session. Id. A

camper who receives a scholarship is only entitled to two free activities, and must pay additional fees to participate in any others. ORDER p. 8, MBNH BRIEF p. 46; Tr. 178:14-18.

Campers can also pay additional fees to go on various daytrips, such as Deep Sea Fishing (\$125.00); Sea Dogs Party Day (\$65.00); White Water Rafting (\$300.00); “The Blast” (\$100.00); Ice Skating (\$35.00); Day in Boston (\$200.00); Zip Line Tour (\$200.00); Indoor Rock Climbing (\$95). ORDER p. 6, MBNH BRIEF p. 44; Tr. 85:21-86:9, 178:24-179:8; APP.1 248-49. A camper who receives a scholarship must still pay these fees to participate in any day trip. ORDER p. 8, MBNH BRIEF p. 46; Tr. 178:24-179:8. Additionally, in order to go on a daytrip a camper must purchase a special camp t-shirt from the camp store, or borrow one from another camper. Tr. 96:8-97:2.

While the Camp offers educational classes during most session, such as remedial math, tutoring, digital photography, and English as a Second Language, these courses cost an additional \$50-\$100 per session. ORDER p. 5, MBNH BRIEF p. 43; Tr. 155:11-157:11; APP.1 248-49. Therefore, foreign students who wish to take English as a Second Language, must pay this extra fee. Id.

In 2015, of MBNH’s \$1,363,200 in total revenues, \$1,239,565 was earned by charging campers tuition and fees, including fees for educational classes. ORDER p. 7, MBNH BRIEF p. 45; Tr. 238:4-10; APP.1 1111.

C. Although its bylaws do not require it to do so, MBNH does provide a small number of scholarships to needy campers.

On its application for the tax exemption, MBNH claimed that “[i]n 2014, 97 campers received full or partial scholarships totaling \$232,852.” ORDER p. 11, MBNH BRIEF p. 49; APP.1 141-175. At trial, Mr. Bouchard admitted that the figures submitted on the exemption application included the 30 children from the Town of Effingham who attended in the final year of the

settlement agreement, as well as staff members' children who attended for free irrespective of need. Tr. 184:6-185:20. As many as fifty (50) to sixty (60) staff children and relatives attend the Camp for free each year. ORDER p. 8, MBNH BRIEF p. 46; Tr. 191:4-23. The Camp is not obligated under its Articles of Agreement or bylaws to provide any scholarships and could change its practice at any time. ORDER p. 7, MBNH BRIEF p. 45; APP.1 141-75. The Camp brochure makes no mention of offering scholarships, and the scholarship application is only available online. ORDER p. 7, MBNH BRIEF p. 45; Tr. 153:15-23; APP.1 318-24.

At trial, MBNH submitted evidence that in 2015 it granted forty-seven (47) full or partial scholarships to campers. ORDER p. 7, MBNH BRIEF p. 45; APP.1 352. This number, unlike that submitted on its exemption application, excluded staff children and relatives. Additionally, because the settlement agreement with the Town ended in 2014, Town of Effingham children were no longer allowed to attend the Camp for free unless they applied for and received a scholarship. ORDER p. 9, MBNH BRIEF p. 47; Tr. 169:19-24. As a result, no Effingham children attended the Camp in 2015. Id.

Of the forty-seven (47) scholarships awarded in 2015, ten (10) of those scholarships were provided to the Guadalupe School of Brownsville, Texas, a tuition-free Catholic school affiliated with the Marist Brothers organization, a practice which began as far back as 2006. ORDER p. 7, MBNH BRIEF p. 45; Tr.179:11-180:6; APP.1 352. MBNH gave twenty-three (23) more of those scholarships to other organizations, such as the Boys & Girls Club of Lawrence, MA and the Rotary Club, and those organizations auctioned or otherwise assigned the scholarships to campers. Id. Ultimately, in 2015, MBNH awarded only 14 "general" scholarships to campers whose parents had applied for a scholarship based on economic need. ORDER p. 7, MBNH BRIEF p. 45; Tr. 133:14-134:17, 189:9-190:5; APP.1 352.

Finally, although MBNH claimed it gave out scholarships totaling \$108,739, MBNH does not base this figure on actual expenses but rather tuition rates; scholarship expenses are not actually tracked by MBNH. ORDER p. 7, MBNH BRIEF p. 45; Tr. 241:15-25. MBNH presented no evidence as to its actual cost of providing any of these scholarships. ORDER p. 7, MBNH BRIEF p. 45. Additionally, campers applying for scholarships must still pay a non-refundable application fee of \$175, which is not credited against any expenses. ORDER p. 6, MBNH BRIEF p. 44; Tr. 151:1-9. Then, a camper who receives a scholarship must still pay activities fees to participate in any day trip or participate in additional activities beyond the two allotted them. ORDER p. 8, MBNH BRIEF p. 46; Tr. 178:24-179:8. MBNH presented no evidence as to how much additional money is recouped from scholarship campers in this fashion.

D. Rentals

When the Camp is not operating, MBNH rents the Property to various organizations and groups for different uses. ORDER p. 9, MBNH BRIEF p. 47; Tr. 137:21-140:21, 159:14-165:25. There are no restrictions on who can rent the Property and no restrictions on how the Property is used by the renter. ORDER p. 9, MBNH BRIEF p. 47; Tr. 159:18-22, 160:11-23. In 2015, MBNH earned \$92,854 from rentals. ORDER p. 9, MBNH BRIEF p. 47; Tr. 154:16-166:1. While Mr. Bouchard claimed that MBNH “attribute[s] it to some of [the Camp’s] scholarships,” the money is actually deposited into the general fund and scholarship expenditures are not tracked. ORDER p. 9, MBNH BRIEF p. 47; Tr. 140:22-141:1; Tr. 241:15-25.

III. MBNH’s relationship with The Marist Brothers of the Schools.

Unlike scholarships, MBNH’s bylaws require it to send money to the United States Province of The Marist Brothers each year. Specifically, the bylaws provide that “[t]he Corporation will make contributions to the United States Province...to provide support to the

religious works and health and well-being of the Marist Brothers...” ORDER pp. 9-10, MBNH BRIEF p. 47; APP.1 146. In 2013, MBNH paid \$100,000 to the U.S. Province. ORDER p. 9, MBNH BRIEF p. 47; Tr. 244:1-7. This amount has increased approximately 3% each year. Id. As a result, in 2014 MBNH paid \$103,000 to the U.S. Province. Id.; Tr. 243-244. And in 2015 MBNH paid \$106,000 to the U.S. Province. Id. At the time of trial in 2016, MBNH expected to pay \$109,000 to the U.S. Province. Id.

In 2013, MBNH listed the \$100,000 payment to the U.S. Province under the “Taxes and Assessments” section of its yearly financial statement. Tr. 212:6-14. In 2014, MBNH listed the \$103,000 payment to the U.S. Province under the same section. Tr. 213:14-214:5. In 2015, however, MBNH moved the now \$106,000 payment to a new section titled “Contributions.” Tr. 215:20-25. Frank Pellegrino (“Mr. Pellegrino”), the CFO of MBNH, made this change at the specific request of the MBNH Board of Directors. Id. Although labeled a “contribution,” Mr. Pellegrino was clear that the payment was not a donation; he testified that MBNH lists donations to other organizations under a different section of the financial statement. Tr. 238:15-239:16.

When MBNH makes its yearly payments to the U.S. Province, it deposits the money into the U.S. Province’s general operating fund. ORDER pp. 22, MBNH BRIEF p. 60; Tr. 218:8-23. The money is not segregated in anyway. Id. The U.S. Province’s general operating fund is used for such varied endeavors as providing health insurance and living expenses for Marist Brothers, purchasing insurance policies, and supporting numerous other Marist ministries, including the Camp. ORDER pp. 10-11, MBNH BRIEF p. 48; Tr. 209:20-210:18, 218:8-220:17.

SUMMARY OF ARGUMENT

A. The Motion in Limine

MBNH claims that the superior court erred in not admitting evidence regarding the tax treatment of unaffiliated summer camps in municipalities other than the Town of Effingham. MBNH's argument for introducing this evidence was premised upon an equal protection claim that it did not raise in its petition. Consequently, the superior court would not consider that argument since it was not preserved. MBNH did not challenge that aspect of the superior court's decision and, therefore, did not preserve the issue for this Court's review. Regardless, the superior court properly excluded the proffered evidence since it was not relevant to MBNH's exemption claim.

B. The Merits

The superior court correctly denied MBNH's claim because MBNH failed to meet its burden of proving that it was entitled to a charitable tax exemption under RSA 72:23. The superior court carefully reviewed the evidence (both documentary and testimonial) and made factual findings that support its conclusion that MBNH did not satisfy any of the elements that this Court has cited as being necessary to receive a charitable tax exemption. Specifically, MBNH's exemption claim failed because, among other reasons, its camp operation does not provide any charitable service to the general public or an indefinite segment thereof; it rents the Property to multiple outside organizations each year that use the facilities for purposes unrelated to MBNH's claimed charitable mission; and MBNH is obligated under its bylaws to pay its parent organization a yearly assessment or tax of more than \$100,000.

ARGUMENT

I. The Superior Court’s decision to grant the Town’s motion in limine to preclude the introduction of evidence of the tax treatment of unrelated camps in other municipalities should be affirmed because the Plaintiff failed to properly preserve the argument on appeal, and the evidence is otherwise irrelevant.

Prior to trial, the Defendant filed a motion in limine to exclude evidence proffered by the Plaintiff regarding the tax treatment of other unrelated organizations and properties, such as YMCA and Boys and Girls Scout camps, in municipalities other than the Town of Effingham. On appeal, the Plaintiff claims that the superior court erred in granting the Defendant’s motion in limine. NOTICE OF APPEAL; MBNH BRIEF pp. 31-32. Because the Plaintiff failed to preserve its equal protection argument, and the Plaintiff advances no other argument for the relevance of the proffered evidence, the superior court’s order should be affirmed. See MBNH BRIEF pp. 31-32.

A. The Plaintiff failed to properly preserve the issue of whether the Superior Court erred in granting the Town’s motion in limine.

The Plaintiff argues that the Town, “as a political subdivision of the State of New Hampshire, has a constitutional duty to avoid discrimination by treating similarly situated taxpayers in the same manner.” MBNH BRIEF p. 32. The Plaintiff then claims that its proffered evidence would have shown that the Camp is “the only religiously-affiliated [sic] summer youth camp required...to pay property taxes.” Id. This, according to the Plaintiff, “reflects unconstitutional unequal treatment,” and therefore was “a relevant fact” at trial. Id. However, in resolving the motion in limine, the superior court found that the Plaintiffs had not “properly pled” an equal protection claim and rejected this basis for relevance. ORDER p. 5, MBNH BRIEF p. 38. After the superior court issued its order, the Plaintiff did not seek to amend its pleadings to assert any constitutional claims. The Plaintiff also did not challenge the superior court’s ruling

and did not raise the ruling in its notice of appeal. See NOTICE OF APPEAL. The issue is therefore waived. See Webster v. Town of Candia, 146 N.H. 430, 440 (2001).

B. The Superior Court properly excluded the Plaintiff's proffered evidence because it is not relevant to whether MBNH is entitled to a charitable tax exemption in the Town of Effingham.

Although the Plaintiff advances no basis for relevance other than its equal protection claim, a cursory review demonstrates that the superior court properly excluded the evidence of the tax treatment of unrelated camps in other municipalities. Rule 401 of the New Hampshire Rules of Evidence defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Here, the fundamental issue is whether or not the Plaintiff is entitled to a charitable tax exemption for its property in Effingham. Whether or not a party is entitled to a charitable tax exemption is a determination of law and “[t]he tax treatment of other properties in the State is not a factor to be considered.” ORDER p. 4, MBNH BRIEF p. 37; see ElderTrust of Florida, Inc. v. Town of Epsom, 154 N.H. 693 (2007) (setting forth four factors that the court considers to analyze whether a charitable tax exemption is warranted). As the superior court correctly noted, “the focus is on the specific organization seeking the exemption and the property it seeks to exempt.” ORDER p. 4, MBNH BRIEF p. 37.

Whether or not other organizations operating camps in other municipalities have received a tax exemption is not relevant because the tax treatment of other properties does not make it any more or less probable that the Plaintiff itself is charitable; i.e., has satisfied the ElderTrust analysis. Moreover, the introduction of such evidence would have made a trial extraordinarily onerous since it necessarily relies upon the premise that those municipalities’ determinations of the charitable status of the subject properties were legally proper under RSA

72:23. The superior court agreed that if such evidence were admitted it would almost certainly lead to a trial within a trial “because for each property the court will need to determine when the municipality granted the exemption, why the municipality granted the exemption, what evidence was presented by the property owner in support of the exemption, and whether the granted exemption was legally proper under the statute.” ORDER p. 3 (adopting Defendant’s argument), MBNH BRIEF p. 36. For all of the reasons set forth above, the Court should affirm the superior court’s decision granting the Town’s motion in limine.

II. The Superior Court’s order denying the Plaintiff a charitable tax exemption should be affirmed because the court could reasonably conclude that the Plaintiff failed to carry its burden of proving it was entitled to the exemption.

The Plaintiff sought an exemption from property tax from the Town pursuant to RSA 72:23, V, which, in pertinent part, provides:

The following real estate and personal property shall, unless otherwise provided by statute, be exempt from taxation:

The buildings, lands and personal property of charitable organizations and societies organized, incorporated, or legally doing business in this state, owned, used and occupied by them directly for the purposes for which they are established, provided that none of the income or profits thereof is used for any other purpose than the purpose for which they are established.

For purposes of the property tax exemption statute, RSA 72:23-1 defines the word “charitable” as follows:

The term ‘charitable’ as used to describe a corporation, society or other organization within the scope of this chapter, including RSA 72:23 and 72:23-k, shall mean a corporation, society or organization established and administered for the purpose of performing, and obligated, by its charter or otherwise, to perform some service of public good or welfare advancing the spiritual, physical, intellectual, social or economic well-being of the general public or a substantial and indefinite segment of the general public that includes residents of the state of New Hampshire, with no pecuniary profit or benefit to its officers or members, or any restrictions which confine its benefits or services to such officers or members,

or those of any related organization. The fact that an organization's activities are not conducted for profit shall not in itself be sufficient to render the organization 'charitable' for purposes of this chapter, nor shall the organization's treatment under the United States Internal Revenue Code of 1986, as amended. This section is not intended to abrogate the meaning of 'charitable' under the common law of New Hampshire.

This Court has set forth "a discrete set of factors against which a charitable tax exemption application must be evaluated":

- (1) [whether] the institution or organization was established and is administered for a charitable purpose;
- (2) [whether] an obligation exists to perform the organization's stated purpose to the public rather than simply to members of the organization;
- (3) [whether] the land, in addition to being owned by the organization, is occupied by it and used directly for the stated charitable purposes; and
- (4) [whether] any of the organization's income or profits are used for any purpose other than the purpose for which the organization was established. Under the fourth factor, the organization's officers or members may not derive any pecuniary profit or benefit.

ElderTrust of Florida, Inc., 154 N.H. at 697-98. "The burden of demonstrating the applicability of any exemption shall be upon the claimant." RSA 72:23-m. Failure to meet any one of the factors is fatal to an applicant's claim. See ElderTrust of Florida, Inc, 154 N.H. at 697-98.

Because the Plaintiff failed to meet its burden with respect to each of the factors, the superior court's order should be affirmed.

A. Providing religious and educational services to campers does not automatically entitle an organization to a charitable tax exemption.

The Plaintiff devotes much of its brief and appendix to establishing facts that are not disputed – namely, that Camp Marist is a religious camp, and that some educational services are provided, for a fee, to campers. APP.1 41-45. Citing Granite State Management & Resources v. City of Concord, 165 N.H. 277 (2013), the Plaintiff claims that because these activities arguably

“advance[e] education” and “aid[] religion,” they constitute “charitable purposes” under the tax exemption statute. MARIST BRIEF p. 23; Granite State Management & Resources, 165 N.H. at 284 (stating that “charitable purposes fall into the following categories: (1) relieving poverty; (2) promoting health; (3) advancing education; (4) aiding religion; (5) providing governmental or municipal facilities and services; and (6) other purposes that are beneficial to the community.”).² Plaintiff then argues that so long as it has this “charitable purpose, and exists to perform [it] to others beyond members of its organization, [it] is not required to demonstrate the benefit to the general public of its charitable work.” MBNH BRIEF p. 21. In other words, under the Plaintiff’s theory, so long as an applicant advances education or aids religion, it is entitled to a charitable tax exemption whether or not the applicant actually performs those activities in a charitable manner. Id. Plaintiff reaches this conclusion by assuming that merely having the “charitable purpose,” means it is performing “charitable work.” Id. This is simply inconsistent with the plain language of the statute and existing precedent. See RSA 72:23 (defining charitable to include only those organizations which “perform some service of public good or welfare”); Appeal of City of Franklin, 137 N.H. 622, 626 (1993) (“the purpose of the ‘obligation’ requirement is to prevent purely private organizations, albeit with charitable purposes, from benefiting by a tax exemption without, in turn, providing some service of public good.”) (emphasis added).

This Court has previously addressed and rejected a similar argument. See St. Paul’s School v. City of Concord, 117 N.H. 243, 248 (1977). This is because not all organizations that advance education or aid religion do so charitably, and an applicant for charitable tax exemption

² This statement is nothing novel, and is consistent with existing tax exemption precedent. Indeed, the Court’s statement in Granite State Management & Resources is derived from the law on charitable trusts, which has been cited previously by the Court. See Town of Peterborough v. MacDowell Colony, Inc., 157 N.H. 1, 12 (2008); see also Nature Conservancy v. Nelson, 107 N.H. 316, 317 (1966) (citing Restatement (Second) Trusts to define meaning of “charitable”). But Granite State Management & Resources did nothing more than identify **categories** of potentially charitable purposes; it did not eliminate the requirement that activity be performed in a charitable manner.

must prove its benefit to the general public. See ElderTrust of Florida, Inc, 154 N.H. at 697-98. In St. Paul's School, that taxpayer argued that it was entitled to a property tax exemption under both RSA 72:23, IV (educational exemption) and 72:23, V (charitable exemption). St. Paul's School, 117 N.H. at 247-48. In denying the taxpayer's argument for a charitable exemption, the Court stated

Following the school's reasoning, most schools could claim to be charitable corporations, operated for charitable purposes, and therefore entitled to both categories of exemptions. This is inconsistent with the obvious intent of the legislature. By treating schools, seminaries of learning, colleges, academies and universities under a separate paragraph from charitable organizations and societies, the legislature manifested its view that these are distinct categories of taxpayers. If the legislature had considered schools to be charitable organizations for purposes of tax treatment, the separate paragraph covering schools would have been surplusage. Even though the school may be considered a charitable corporation for some purposes, such as a charitable trust it does not qualify for tax exemption treatment under RSA 72:23 V.

Id. at 248 (citations and quotations omitted) (emphasis added). By extension, the same logic holds true for churches or other organizations providing direct religious services, for which the legislature has provided a separate avenue for tax exemption. See RSA 72:23, III (providing tax exemption for property used and occupied for religious purposes).

As the Court stated in St. Paul's School, RSA 72:23 has three separate classifications for tax exempt property: religious; educational; and charitable. The legislature purposefully segregated these uses of property for tax exemption purposes, and it would not only be inconsistent with the plain language of RSA 72:23 to treat them interchangeably, it would render the entire classification of uses meaningless and "the statute a virtual nullity." Appeal of Wilson, 161 N.H. 659, 664 (2011). Rather, each section of RSA 72:23 must be interpreted together to effectuate the statute's purpose. See Sprague Energy Corp. v. Town of Newington, 142 N.H. 804, 806 (1998) ("all sections of a statute must be construed together").

As a result, that the Plaintiff conducts religious services and educates individuals on the Property does not, on its own, meet the requirements of a charitable tax exemption. Rather, it was the Plaintiff's burden to show that it engaged in these activities charitably or that it provided some other charitable service through its Camp activities that met the four ElderTrust factors set forth above. The superior court ruled, correctly, that the Plaintiff failed to meet that burden.

B. The Superior Court correctly ruled that the Plaintiff failed to satisfy its burden of proving that it met all of the ElderTrust factors, and thus was not entitled to a charitable tax exemption.

For each of the ElderTrust factors, the Plaintiff argues that “according to the [trial court],” the Plaintiff “would have satisfied” that particular factor “but for” some particular adverse factual finding. See MBNH BRIEF pp. 21, 26, 29. However, the superior court did not so find. Instead, the court made factual findings based upon the evidence presented by the Plaintiff, and, to a lesser extent the Town, before ultimately determining that the “[Plaintiff] has failed to meet its burden with respect to each of the four ElderTrust factors.” ORDER p. 23, MBNH BRIEF p. 61. The phrase “but for” does not appear even once in the superior court's order. See ORDER pp. 1-23, MBNH BRIEF p. 39-61.

That the superior court identified particular facts which demonstrated that the Plaintiff did not meet its burden – i.e., is not charitable - does not mean that the superior court found or “observed” that the Plaintiff, but for those facts, would have been entitled to the exemption in the first place. Instead, having found that the Plaintiff failed to meet its burden for any one particular reason, the superior court was not obligated to go further. See e.g. East Coast Conference of Evangelical Covenant Church of America, Inc. v. Town of Swanzey, 146 N.H. 658 (2001) (Agreeing with trial court ruling that “the facilities at issue should not be entitled to a charitable exemption because the Church failed to offer their use to an indefinite number of the public,” but

one factor). Ultimately, the superior court correctly identified a myriad of factual findings, any one of which support its denial of the Plaintiff's request for a tax exemption and therefore the superior court's decision should be affirmed.

1) MBNH's income and profits are used for purposes other than the purpose for which the organization was established.

This Court need look no further than the fourth ElderTrust factor to affirm the superior court's decision. This factor, whether "any of the organization's income or profits are used for any purpose other than the purpose for which the organization was established," requires the taxpayer to prove that the amount and use of its income "is consistent with its stated charitable purpose." ElderTrust of Florida, Inc, 154 N.H. at 697-98; Granite State Management & Resources, 165 N.H. at 292. "Under the fourth factor, the organization's officers or members may not derive any pecuniary profit or benefit." ElderTrust of Florida, Inc, 154 N.H. at 697-98.

Contrary to Plaintiff's assertion, the superior court did not find that the "fourth ElderTrust factor would have been met but for the fact that there is an annual contribution...paid [to] the [U.S.] Province of the Marist Brothers," but instead simply, and correctly, ruled that the Plaintiff did not satisfy its burden of proving that "its income or profits are not 'used for any purpose other than the purpose for which [it] was established.'" Compare MBNH BRIEF p.29 with ORDER pp. 22-23, MBNH BRIEF pp. 60-61. This includes, but is not limited to, diverting pecuniary profit and benefit to its "officers or members" via the mandatory tax or assessment levied by the U.S. Province. Id.

Based upon the evidence presented at trial, the superior court found that the Plaintiff's bylaws require it to send money to the U.S. Province of The Marist Brothers each year without control or restriction of the use of funds. ORDER pp. 9-10, 20-23, MBNH BRIEF p. 47; APP.1 141-

75, 921-42, 1106. In particular, the superior court found that in 2015, MBNH paid \$106,000 to the U.S. Province. Id.; Tr. 243-244.

Interestingly, the Plaintiff listed these transfers under the “Tax and Assessments” section of its financial statements, for years 2013 and 2014, with the payments labeled as “Province Marist Brothers” on a line above “Real Estate Taxes.” APP.1 141, 921. In 2015, however, after this litigation was pending, the Plaintiff modified its financial reporting practices, and moved this payment to the “Contribution” section of its financial statement to suggest the payment was voluntary. Tr. 215:20-25. Mr. Pellegrino, made this change at the specific request of the MBNH Board of Directors. Id. Perhaps more concerning is the fact that MBNH removed the label “Province Marist Brothers,” so that upon review of the financial statement it would not be readily apparent that it was \$106,000 payment to the U.S. Province. APP.1 1106. However, Mr. Pellegrino agreed that the language in the bylaws requiring payments to the U.S. Province is mandatory, not discretionary, and that the payment has continued to increase at a rate of approximately three percent (3%) each year. Tr. 238:15-239:16, 243-244.

a) The superior court correctly found that the Plaintiff presented insufficient evidence to support a finding that the amount of the assessment is related to the value of the benefit Plaintiff receives from the U.S. Province.

In an attempt to justify these annual payments, the Plaintiff elicited testimony that the U.S. Province provides support services to the camp, such as insurance coverage, has helped out the Plaintiff with large purchases or disaster relief in the past, and that the Marist Brothers helped build the Camp into what it is today. See generally ORDER pp. 10-11, MBNH BRIEF pp. 48. The superior court found the evidence “murky at best,” and explained;

Although [the Plaintiff] offered general testimony regarding stabilization and the benefits it receives as the result of its affiliation with the U.S. Province, it does not appear that the amount of the assessment is directly tied to the value of these

benefits, but it instead, according to Mr. Pellegrino's testimony, is determined based upon the financial health of [the Plaintiff]. Mr. Pellegrino testified that he calculates the amount of the assessment on a yearly basis by reviewing the Camp's expenses and projected income with the Camp's executive director and then they 'see how much these the [sic] assessments can be for Camp Marist. The Court notes that, in recent years, the assessment has been \$100,000 escalated by \$3,000 each year, thus undercutting Mr. Pellegrino's testimony that the assessment is calculated based on the particular revenues and expenses of the Camp. The Court heard no evidence to support a finding that the amount of the assessment is related to the value of the benefit [the Plaintiff] receives as a result of its affiliation with the U.S. Province.

ORDER pp. 21-22, MBNH BRIEF pp. 59-60.

The court continued that it

heard no testimony that the U.S. Province uses the money from the assessment to advance [the Plaintiff's] mission of 'advancing education' and 'aiding religion.' Mr. Pellegrino testified that the money from the assessment is deposited in the U.S. Province's general operating fund, along with the U.S. Province's other revenue. He explained that this money is used, generally, to support all of the U.S. Marist ministries when needed; to provide health insurance for the Brothers, both active and retired; and to support the living expenses of retired Brothers. While this support may be admirable, it does little to aid the stated purpose of [the Plaintiff].

Id.

Further, the testimony and financial statements demonstrate that the Plaintiff pays a separate premium for the group insurance policies obtained by the U.S. Province, thereby contradicting the argument that these assessments are used for the Camp's benefit. APP.1 146. That the U.S. Province might provide support to the Plaintiff from time to time does not render the mandatory payment to the U.S. Province charitable in nature. The fourth ElderTrust factor prohibits diverting funds in this manner regardless of classification. Importantly, the Plaintiff does not challenge the superior court's particular factual findings, but rather the weight that the superior court chose to give certain evidence with respect to the fourth ElderTrust factor. Because it was the superior court's purview to resolve conflicts in testimony, measure the

credibility of witnesses, and determine the weight to be given evidence, its judgment in that regard should be upheld.

b) The Superior Court correctly concluded that the Plaintiff failed to establish that its income or profits are not used for any other purpose other than the purpose for which [it] was established.

Mr. Pellegrino (who is also the CFO for the U.S. Province), also testified that the U.S. Province deposits the Camp's payments into its general operating fund, that the funds are not segregated, and that they are not otherwise earmarked for any particular use. ORDER pp. 22, MBNH BRIEF p. 60; Tr. 218:8-23. Mr. Pellegrino testified that the U.S. Province uses the funds for its general ministries, as well as for the support and living expenses of the various Marist Brothers, whom number approximately 150 in the United States. ORDER pp. 10-11, MBNH BRIEF p. 48-49; Tr. 209:20-210:18, 218:8-220:17. The superior court noted that it "heard no testimony that the U.S. Province uses the money from the assessment to advance [Plaintiff's] mission of 'advancing education' and 'aiding religion.'" ORDER p. 22, MBNH BRIEF p. 60. "The destination of the income, and not the source of the income, determines the exemption." Institute for Trend Research v. Brown, 100 N.H. 286, 290 (1956) (citations omitted) (analyzing exemption from payment of unemployment contributions). If the Plaintiff's purpose is to "provide opportunities to meet primarily the spiritual, cultural and physical needs of youth," it is difficult to reconcile how making unrestricted payments to the U.S. Province furthers this purpose in any meaningful way.

Here, the destination of this portion of the Plaintiff's income is the U.S. Province, which is made up avowed Marist Brothers, brothers who make up the Plaintiff's corporate membership. The only clear obligation imposed upon the Plaintiff by its Articles of Agreement or bylaws is this mandatory payment to the U.S. Province for the support of the Plaintiff's corporate

membership. Finally, although not cited by the superior court, it is undisputed that the Plaintiff allows up to fifty (50) to sixty (60) children or relatives of camp employees and brothers to attend the camp for free each summer, some for multiple weeks. This provides a further pecuniary benefit to members of the organization.

In conclusion, a reasonable person could have reached the same decision as the superior court based upon the same evidence presented, and thus the superior court's decision that the Appellant failed to satisfy its burden of satisfying the fourth ElderTrust factor should be affirmed.

2) The Superior Court correctly concluded that the Plaintiff failed to satisfy its burden of proof that Camp Marist was established and is administered for a charitable purpose, and that it has an obligation to perform its stated purpose to the public.

As with the fourth ElderTrust factor, the Plaintiff contends that the superior court concluded that it would have satisfied the first two ElderTrust factors, "but for" its factual finding that the Camp "is actually administered, mostly, if not entirely, for the benefit of a limited group of children, rather than for the benefit of the general public or an indefinite segment thereof." MBNH BRIEF p. 21. This again mischaracterizes the superior court's order, and falsely assumes that that the court's identification of specific reasons why the Plaintiff failed to meet its burden was to the exclusion of all others.

More alarmingly, the Plaintiff goes so far as to label the superior court's rulings on the first two ElderTrust factors as the "Benefit of a Few Finding," suggesting, wrongly, that the superior court's ruling "implies a requirement that a threshold number of people must directly benefit from the charitable undertaking." MBNH BRIEF p. 21. This is language that, much like "but for," is not actually found in the superior court's order. The superior court, after examining the tuition rates, attendance figures, fees for education programs, scholarship figures, Eucharist

services, and other evidence related to the Camp's operations, simply found that the Plaintiff "has not met its burden of proving that it is a public charity, that is, that the general public, or a substantial portion of it benefitted from the use of its property." ORDER pp. 14-18 (internal quotation and citation omitted), MBNH BRIEF p. 52. The superior court did not rule that a certain number of people must benefit from the alleged charitable undertaking.

The Plaintiff also attempts to recast the ElderTrust test by suggesting that simply providing religious and educational services to someone other than a member of the organization (the Marist Brothers), is sufficient to meet the first two ElderTrust factors. MBNH BRIEF pp. 20-26. This is wrong. Counter to the Plaintiff's argument, this Court has clearly stated:

We conclude that for an institution or organization to meet the requirement that it was established and is administered for a charitable purpose, that charitable mission must be its dominant or primary purpose; if the dominant or primary purpose of its work is to benefit its members or a limited class of persons, the organization will not meet this requirement even though the public will derive an incidental benefit from such work. As with the obligation requirement, to determine whether an organization meets the established and ... administered requirement, we look to both its charter or organizational statements and its actions taken pursuant to those statements. Thus, notwithstanding that an organization's stated purpose is to primarily benefit the public, if the organization is actually administered so that any public benefit is slight, negligible or insignificant, when compared to the benefit derived by the organization's members, the organization is not entitled to a charitable tax exemption. We note that the principles we enunciate herein are entirely consistent with MacDowell, in which we agreed with the trial court's conclusion that MacDowell's artist-in-residence program did, in fact, primarily benefit society as a whole.

In re City of Concord, 161 N.H. 344, 352 (2011) (citations, quotations and brackets omitted).

This is why, consistent with In re City of Concord, the superior court stated that, even assuming that the Plaintiff's stated purpose was charitable, "that is not the end of the inquiry." ORDER p. 16, MBNH BRIEF p. 54. Rather, the Plaintiff was also required to show how its charitable operation provided a benefit to the general public. ORDER pp. 15-16, MBNH BRIEF p. 53. In other words, even if a taxpayer's stated purpose is charitable, the taxpayer must still

demonstrate an actual public benefit being conferred, and that there is an obligation to provide the charitable service to the public, which is enforceable by law. The Court stated in ElderTrust that:

the public service which [the applicant] is to render must be obligatory so as to enable the Attorney General or other public officer to enforce this right against it if the service is not performed. It follows that if the public benefit is limited to that which the plaintiff sees fit to provide at its option or in its uncontrolled discretion the requirements of RSA 72:23 V are not satisfied.

ElderTrust of Florida, Inc., 154 N.H. at 699 (2007). To determine whether the Plaintiff has an obligation to provide its claimed charitable service, the court must consider the organization's articles of incorporation, and other related documents, as well as the actions taken consistent with those statements. Id.

a) The Plaintiff waived any argument that it provides an indirect benefit to the general public.

The Plaintiff argues that “the relevant inquiry is not whether the public, or a substantial and indefinite segment of it, benefits from the organization’s property, but whether the public or a substantial and indefinite segment thereof, benefits from the organization’s performance of its stated purpose.” MBNH BRIEF at 22. To support its position that it provides a benefit to the general public, the Plaintiff claims that the superior court overlooked the positive individual and societal impacts of the Camp, and argues, for the first time, that the Camp provides an indirect benefit to general public, as in Town of Peterborough v. MacDowell Colony, Inc., 157 N.H. 1 (2008), when the campers return to their communities. MBNH BRIEF p. 22. The Plaintiff’s entire argument concerning it providing a general public benefit should be rejected because it was not preserved on appeal, as evidenced by the following passage from the superior court’s order:

Furthermore, with the exception of the two public Eucharist services offered each week, neither MBNH nor its campers provide any services to the surrounding community or the general public. Finally, MBNH does not argue that in serving

this limited class of youth it somehow provides an indirect benefit to the general public, nor did it introduce any evidence to support such a claim. See MacDowell, 157 N.H. at 6. The Court, therefore, concludes that MBNH has not met its burden of proving that it is ‘a public charity, that is, that the general public, or a substantial portion of it’ benefitted from the use of its property. E. Coast Conf., 146 N.H. at 662 (quoting Nature Conservancy, 107 N.H. at 319).

ORDER p. 18, MBNH BRIEF p. 56.

b) The Superior Court correctly ruled that Plaintiff failed to meet burden of proving it is a public charity because it does not, in fact, benefit the public.

The Plaintiff’s Articles of Agreement, as amended in 1990, provide as its corporate objective:

to offer recreational and educational services to persons of whatever race, nationality, ethnic background, state or nation of residence. The corporation recognizes and affirms its traditional affiliation and faith in the Roman Catholic Church. In furtherance of the object, this corporation shall provide opportunities to meet primarily the spiritual, cultural and physical needs of youth.

ORDER p. 4, MBNH BRIEF p. 42. This objective is extremely broad in scope and does not directly state any charitable intent. However, the superior court noted that these purposes are “arguably public charitable purposes.” ORDER p. 16, MBNH BRIEF p. 54. Therefore, the court examined whether the Plaintiff’s operations “in fact, benefit the general public.” Id. In other words, as discussed above, it is not enough to simply have a charitable purpose, an organization must actually engage in that purpose in a charitable manner. While there is little dispute that the Plaintiff offers recreational and educational services to its paying campers, it does not generally offer those services in a charitable manner. The facts as found by the superior court support its conclusion that the Plaintiff “has not met its burden of proving that it is a public charity.” ORDER p. 18 (quotation omitted), MBNH BRIEF p. 56.

i. The Plaintiff's mission is not charitable in nature.

That the Plaintiff is not, in fact, charitable, is not surprising as nothing in the Plaintiff's Articles of Agreement or bylaws, lends support that the organization has an enforceable obligation to provide charitable services. Unlike the mission statement of the MacDowell Colony, there is nothing in the Plaintiff's mission statement or bylaws that suggest any goal of providing for the general public good and/or welfare, or otherwise conferring any benefit on the public. MacDowell Colony, 157 N.H. at 7 (stated mission of the Colony was, in part, to advance "the intellectual well being of the *general public*."). Rather, the bylaws merely state that the object of the corporation is "to offer religious and education and charitable services to persons..." ORDER p.15, MBNH BRIEF p. 53; APP.1. 146. The Plaintiff does offer these services, but does so at a price, and not in a charitable manner.

Indeed, for the Plaintiff to suggest that the Camp encourages or provides any charitable benefits to the general public is contradicted by the testimony of the Camp's Director of Mission, Brother Jim. At trial, Brother Jim made clear that the purpose of the Camp is not charitable in nature:

Attorney Aspiras: Is it fair to say that there are no formal activities within the Camp program in which campers go out into the community?

Brother Jim: That's right. correct.

Attorney Aspiras: And to there's no formal, for lack of a better term, community service program.

Brother Jim: Not at the summer camp, no.

Attorney Aspiras: Okay. And so the campers do not go to places like soup kitchens and volunteer, they don't help clean up public property or anything like that?

Brother Jim: No. no. Not the nature of the summer camp.

Attorney Aspiras: Okay. Because the nature of the summer camp is essentially the camp activities, right?

Brother Jim: Yeah. The nature of Camp Marist would be the camp activities and being part of the Christian community, that experience there. That would be [the] reason why parents would send their kids.

Attorney Aspiras: Right. They're not sending them there to go out and engage with the outside community?

Brother Jim: That's correct.

Tr. 80-81. That the Camp makes no effort to provide any benefits to the surrounding community where the Camp is located belies any claim that the Camp serves any altruistic purpose for the general public in other parts of the world.

ii. The scholarships provided are de minimis in light of the Plaintiff's overall attendance and revenue.

In addition, the evidence showed that the Camp also does not provide any meaningful charitable service to the campers who attend, and that those benefits are not available to the general public. While the Plaintiff does provide some limited scholarships to campers throughout the years, those scholarships are *de minimis* in light of the financials of the operation, and the volume of attendance from paid campers. ORDER p.17, MBNH BRIEF p. 55; APP.1 141-75, 352, 1106-25. The evidence also demonstrated that the Plaintiff provides more "scholarships" to employees, brothers, and other affiliated persons than it does to the outside campers. ORDER p. 8, MBNH BRIEF p. 46; APP.1 352. In 2015, the Camp provided 47 total partial or full scholarships to outside campers. APP.1 352. Joseph Bouchard, the Camp's executive director, testified that between 50-60 children or relatives of camp employees and brothers attend the camp for free each summer, some for multiple weeks. ORDER p. 8, MBNH BRIEF p. 46; Tr. 191:4-23.

Moreover, any scholarships given are generally provided for the first session only, and do not even cover all of the camp activities offered during the session, as many carry additional costs. ORDER p.17, MBNH BRIEF p. 55. Indeed, while the Camp professes to have an educational component to its program, including providing tutoring, remedial math, and English as a second language, those courses all carry additional charges ranging from \$50 to \$100 per camp session. ORDER p. 6, MBNH BRIEF p. 44. While campers receiving a scholarship get two free activities, Mr. Bouchard confirmed that any additional activities that carry a charge are the camper's responsibility of the camper. ORDER p. 8, MBNH BRIEF p. 46; Tr. 178:14-18. There also are numerous camp trips that are offered each session, which all carry additional charges (some very substantial), and which are not included in any scholarship award. Lastly, Mr. Bouchard confirmed that some "scholarships" are actually donated to third party organizations, such as the Rotary Club, which auctions them off, resulting in situation in which a "scholarship camper" actually paid a fee to attend and the net benefit went to a third party organization. Tr. 180:21-181:4. The superior court properly considered all of this evidence when it concluded that the Plaintiff "has not met its burden of proving that it is a public charity, that is, that the general public, or a substantial portion of it benefitted from the use of its property." ORDER pp. 14-18, MBNH BRIEF p. 52.

iii. The Plaintiff's high tuition charges exclude a large segment of society from attending.

The superior court found that Camp's tuition is "not insignificant." ORDER p. 16, MBNH BRIEF p. 54. Contrary to the Appellant's suggestion, the superior court did not state that the Camp was disqualified from receiving a charitable tax exemption because it charges fees for its services; the superior court expressly noted that the fact "that an organization charges entrance or admission fees does not necessarily preclude a finding that it is administered for a charitable

purpose”. ORDER p. 16, MBNH BRIEF p. 54. Moreover, to the extent the Plaintiff claims the superior court was “without any sort of evidence or context of what similar camps charge,” the Plaintiff bore the burden of presenting that evidence, not the Town and certainly not the superior court. MBNH BRIEF at 25.

Rather, the superior court, after acknowledging that a fee for services can be charged, determined that the Plaintiff does not provide any charitable benefit to the general public, and that only a very small percentage of campers (10%) received legitimate scholarship aid, and that families otherwise paid a significant amount of money to send their children to the camp.

ORDER p. 16-18, MBNH BRIEF p. 54. Consequently, the benefits being conferred were not available to the general public or an indefinite segment thereof. For this reason, the superior court’s citation to Western Mass. Lifecare v. Bd. of Assessors, 747 N.E.2d 97 (Mass. 2001) was appropriate.

As the Court stated in Western Mass. Lifecare,

An organization operated primarily for the benefit of a limited class of persons, such that the public at large benefits only incidentally from its activities, is not charitable. While there is no precise number of persons who must be served in order for an organization to claim charitable status, and at any given moment an organization may serve only a relatively small number of persons, membership in the class served must be fluid and must be drawn from a large segment of society or all walks of life. Thus, selection requirements, financial or otherwise, that limit the potential beneficiaries of a purported charity will defeat the claim for exemption.

Id. at 104. The Plaintiff fails this test because its charges for tuition and expenses necessarily excludes a large segment of society from attending the camp, except for a small group that receive a scholarship for the one-week tuition payment. Thus, this case is not dissimilar from the retirement facility in Western Mass. Lifecare, in that both organizations charge a significant sum for services, which necessarily excludes a large segment of the population from attending.

The Plaintiff's claim that \$108,739 is "devoted...to full and partial scholarships" is not supported by the evidence. MBNH BRIEF at 24. At trial, the Plaintiff's CFO, Mr. Pellegrino, admitted that there is no line item within the financial statements which tracks or records expenses directly related to providing scholarships. Tr. 241:15-25. In other words, the Plaintiff generates the scholarship figure by multiplying the tuition rate it would have charged by the number of scholarships, not by determining its actual expenses. The Plaintiff also admitted that it included staff member's children and relatives, who always attend for free, in the figure included on its original exemption application. Tr. 184:22-24. Finally, the fact that the Plaintiff generally only gives out scholarships for the first session, which is "the least expensive session and the session with the lowest attendance," belies any charitable intent. ORDER p. 17, MBNH BRIEF p. 55.

iv. The Plaintiff is, essentially, just another for-profit summer camp.

Finally, to the extent the Plaintiff tries to paint itself as a charitable organization simply trying to offset its expenses, the undisputed facts – as adopted by the superior court – demonstrated that the Plaintiff is operating a for-profit summer camp. First, the Plaintiff's claim that the "Camp's 2015 tuition/fee revenue roughly equaled its expenses" is misleading at best. MBNH BRIEF at 24. The superior court found that when all revenue streams are accounted for, in 2015 the Plaintiff "earned \$1,363,200" versus "total expenses...[of] \$1,255,313" for a \$107,907 profit. ORDER p. 7, MBNH BRIEF p. 45. This net profit was after the Plaintiff paid \$106,000 to the U.S. Province. *Id.*; APP.1 1106-25.

Although the superior court rightfully concerned itself primarily with the 2015 finances, the evidence demonstrated that from 2013 through 2015, the Plaintiff increased its contribution to the U.S. Province by \$3,000 year over year, from \$100,000 per year in 2013 to \$106,000 per

year in 2015. ORDER p. 10, MBNH BRIEF p. 48. This resulted in an additional \$18,000 paid to the U.S. Province over that period of time, or, as Mr. Pellegrino conceded, the equivalent of nine (9) full scholarships for campers. Tr. 244:1-244:9. Moreover, despite the increased kickback to the U.S. Province, the Plaintiff still generally turns a profit, as it has historically. This would explain why, despite paying the U.S. Province over \$100,000 every year, as of 2015 the Plaintiff had banked approximately \$773,000 in surplus liquid assets. APP.1 1109.

It is important to note that at trial the Plaintiff did not explain why it did not use those surplus funds, either on a yearly or ongoing basis, for additional scholarships or charitable work. The Plaintiff bore the burden of demonstrating that all of its activities, including its use or, in the case of a surplus, non-use of income was consistent with a charitable purpose. See e.g. Granite State Management & Resources, 165 N.H. at 292 (“It is not apparent from the record whether the amount and purported use of GSMR's surplus to protect itself from future contractual liability is consistent with its stated charitable purpose”).

Ultimately, the superior court’s factual findings, which are not challenged by the Plaintiff, support the court’s conclusion that the Plaintiff failed to meet its burden of proving that the Camp was established and is administered for a charitable purpose, and that it has an obligation to perform its stated purpose to the public, consistent with the first and second ElderTrust factors.

3) The Superior Court correctly concluded that the Plaintiff failed to satisfy its burden of proof that the Camp property is occupied by it and used directly for the stated charitable purpose(s).

An applicant for a charitable tax exemption must prove that “the land, in addition to being owned by the association, would have to be occupied by the association and used directly by the association for its charitable purposes.” ElderTrust, 154 N.H. at 701. The superior court

determined that the Plaintiff failed to satisfy this factor because it annually rents the Property to third parties for private uses unrelated to the Camp. ORDER pp 19-20, MBNH BRIEF p. 57. The Plaintiff, again, mischaracterizes the court's ruling as being a "but for" analysis. The superior court simply concluded that the rentals disqualified the Plaintiff from receiving a charitable tax exemption.

This Court has held, and the superior court acknowledged, that an organization is allowed to rent its property to third parties without necessarily forfeiting its right to a tax exemption. Housing Partnership v. Town of Rollinsford, 141 N.H. 239, 242 (1996). That said, the rental must directly relate, and be used and occupied, in furtherance of the landowner's stated charitable purpose(s). If the property is "owned and rented commercially as an adjunct to a charitable purpose, no tax exemption is allowed...." Id. at 243. The case of Alton Bay Camp Meeting Asso. V. Alton, 109 N.H. 44 (1968) supports the superior court's decision. In that case, this Court held that the plaintiff's property was not entitled to an education or charitable tax exemption because, among other things, those renting the taxpayer's land and buildings "are entitled as of right to use and occupy this land directly for their own purposes. This negatives a use and occupancy directly for charitable purposes by the Association, which are essential requisites for an exemption." Id. at 50. In contrast, the Court held in Appeal of Kiwanis Club of Hudson, Inc., 140 N.H. 92, 94 (1995), that "if the rentals directly fulfill [an] organization's charitable purpose, or are necessary for the organization to accomplish its purpose, an exemption will be allowed." Id. There, the Court held that the Kiwanis Club was entitled to a charitable tax exemption because although it rented its property regularly, the property was rented by other charitable organizations to engage in fund-raising, which the court determined fulfilled the

primary purpose of Kiwanis, which is “the betterment of the community of Hudson.” Id. at 94-95.

The evidence presented here shows that the rentals do not directly fulfill the Plaintiff’s claimed charitable purpose, nor are they necessary for the accomplishment of that purpose. The superior court found that the Plaintiff earned approximately \$93,000 in rental income in 2015, and that the property was rented to a variety of groups for different uses. ORDER p. 19, MBNH BRIEF p. 57. The evidence established that there are no restrictions on who can rent the Camp property, nor are there any restrictions on how the groups use the Property. Id. Thus, the superior court concluded that there was no evidence presented that showed how the use of the Property during these rentals directly fulfilled the asserted goals of “advancing education” and “aiding religion.” In addition, the superior court stated that:

although Mr. Bouchard testified that the proceeds from these rentals ‘either go into the . . . regular Camp fund, the running of the Camp, or [MBNH] attribute[s] it to some of [its] scholarships,’ the Court heard no testimony that rental fees are ‘limited to the direct expenses of operating the [Camp],’ or are otherwise necessary for MBNH to carry out its alleged charitable mission.

The Plaintiff claims that the superior court’s finding is erroneous because the rental income, it claims, is used for the Camp’s operating expenses, but the question was whether the income was necessary for the Camp to carry out its mission. No evidence was presented on this point.

Finally, the Plaintiff argues that its rentals are of no consequence because the rental use is incidental to the primary use of the property – a summer camp. MBNH BRIEF at 28. To support this argument, the Appellant relies upon the final paragraph of Appeal of Kiwanis Club, in which the Court stated:

assuming arguendo that Kiwanis’ use of the hall for its own fund-raising purposes would not fulfill Kiwanis’ charitable purpose, that use is incidental to Kiwanis’ primary use of the hall to provide a fund-raising location to other charitable organizations. It therefore does not act to deny Kiwanis its exemption.

Appeal of Kiwanis Club of Hudson, Inc., 140 N.H. at 95 (citation omitted). The Plaintiff's argument fails for at least two reasons. First, this Court's discussion of dominant versus incidental use was not tied to rentals, but rather whether the property was being used an occupied in furtherance the taxpayer's stated charitable mission. The Court determined that Kiwanis's rental of the property to various groups was directly in furtherance of the charitable mission, so that regardless of whether the property was rented or not, the fact remained that the dominant use and occupancy was for Kiwanis's charitable mission. Id. at 94. Second, the Appellant's rentals, aside from being unrelated to the Camp's charitable mission, are not merely an incidental use of the property. In 2015, the Appellant rented its property to six (6) different organizations for a total of twenty-six (26) days. This is roughly half of the time when the property is devoted to summer camp use, which is approximately 49 days (7 weeks). ORDER p. 19, MBNH BRIEF p. 57.

As a result, the superior court did not err in concluding that the Plaintiff failed to meet its burden of proving that the Camp property is occupied by it and used directly for the stated charitable purposes.

CONCLUSION

For the reasons set forth above, the Court should affirm the superior court's order because MBNH failed to satisfy its burden of proving that it was entitled to a charitable tax exemption under RSA 72:23, V.

Respectfully submitted,

TOWN OF EFFINGHAM

By Its Attorneys,

DRUMMOND WOODSUM & MacMAHON

Date: October 13, 2017

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REQUEST FOR ORAL ARGUMENT

The Appellee respectfully requests the opportunity to present oral argument, not to exceed 15 minutes, to be presented by Matthew R. Serge, Esquire.



Matthew R. Serge

CERTIFICATION

I hereby certify that a copy of the foregoing was this day forwarded to Jonathan A. Block, Esquire, and Michele E. Kenney, Esq., opposing counsel of record.



Matthew R. Serge