

**THE STATE OF NEW HAMPSHIRE**

**SUPREME COURT**

**CASE NO. 2017-0187**

**THE MARIST BROTHERS OF NEW HAMPSHIRE**

**V.**

**TOWN OF EFFINGHAM**

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**REPLY BRIEF OF APPELLANT  
THE MARIST BROTHERS OF NEW HAMPSHIRE**

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**ON APPEAL FROM FINAL DECISIONS OF THE  
CARROLL COUNTY SUPERIOR COURT**

**Jonathan A. Block  
N.H. Bar No. 10972  
Michele E. Kenney  
N.H. Bar No. 19333  
Pierce Atwood LLP  
Pease International Tradeport  
One New Hampshire Avenue  
Suite 350  
Portsmouth, NH 03801  
(603) 433-6300**

**To Be Argued by:  
Jonathan A. Block or  
Michele E. Kenney**

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## ARGUMENT

The Town of Effingham prevailed upon the trial court to invent a new *ElderTrust* factor — that a “charitable purpose” be carried out in an undefined “charitable manner.”<sup>1</sup> Against this backdrop, the Town crudely and incorrectly portrays MBNH as a “for-profit”<sup>2</sup> corporation that performs no services at Camp Marist that are beneficial to the community, but enriches its founder, the U.S. Province of The Marist Brothers of the Schools, with an annual “kickback,”<sup>3</sup> allowing the U.S. Province to derive “pecuniary profit and benefit”<sup>4</sup> from Camp Marist revenues like a shareholder growing rich on corporate dividends. The Town is mistaken on the law and on the record evidence.

### **I. THERE IS NO “CHARITABLE MANNER” REQUIREMENT.**

The Town does not contest that MBNH “advance[s] education” and “aid[es] religion,” *Granite State Mgmt. Res. v. City of Concord*, 165 N.H. 277, 284 (2013), but asserts that MBNH cannot qualify for a charitable tax exemption under RSA 72:23, V, unless it carries out these charitable purposes “in a charitable manner”<sup>5</sup> — a requirement that appears nowhere in the case law. Not surprisingly, the Town fails to define the meaning of “charitable manner,” but suggests that acting “charitably” would involve performing community service and alleviating poverty or otherwise charging campers less and offering greater scholarships.<sup>6</sup> In muddled analysis of the first and second *ElderTrust* factors, the Town contends that there is a “charitable manner”

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<sup>1</sup> Brief of Appellee/Defendant Town of Effingham, dated Oct. 13, 2017 (“Town Br.”), at 15, 25, 26.

<sup>2</sup> Town Br. at 30.

<sup>3</sup> Town Br. at 31.

<sup>4</sup> Town Br. at 18.

<sup>5</sup> Town Br. at 15.

<sup>6</sup> See Town Br. at 26 (noting that Camp Marist does not deploy campers “out into the community” to pick up trash); Town Br. 27-30 (discussing scholarships and tuition/activity fees).

overlay to RSA 72:23, V, and argues that because MBNH does not act “charitably,”<sup>7</sup> it serves no public benefit.<sup>8</sup>

The law imposes no “charitable manner” requirement. The performance of a charitable purpose is, in itself, a charitable act recognized under RSA 72:23, V, and there is no further requirement that MBNH’s charitable missions be performed in a manner that involves community service or alleviates poverty, as the Town suggests. As this Court has stated, there are five distinct, generally recognized categories of charitable purposes under RSA 72:23, V, including “advancing education” and “aiding religion,” each of which is defined as a “charitable purpose[] . . . that [is] beneficial to the community.” *Granite State Mgmt. & Res.*, 165 N.H. at 284 (enumerating categories of charitable purposes, followed by a catchall category of “*other purposes that are beneficial to the community*”) (emphasis added)).

This Court’s decision in *St. Paul’s School v. City of Concord*, 117 N.H. 243 (1977), does not stretch so far as the Town contends; it does not hold that charitable purposes must be carried out “charitably” in order to qualify for a tax exemption under RSA 72:23, V. Rather, the discussion in *St. Paul’s School* highlighted by the Town simply distinguishes the treatment of schools (under RSA 72:23, IV, which specifically applies to schools) from the treatment of other charitable institutions (under RSA 72:23, V, which does not apply to schools) — a distinction of no relevance here.

Relieving poverty is a category of charitable purposes separate and apart from “advancing education” and “aiding religion” — the two charitable purposes that are indisputably carried out by MBNH at Camp Marist. See *Granite State Mgmt. & Res.*, 165 N.H. at 284. These charitable purposes are not undermined by MBNH’s charge of tuition, administrative fees, and

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<sup>7</sup> Town Br. at 17.

<sup>8</sup> Town Br. at 26-30.

fees for activities and field trips. The Town implies that, to qualify for a charitable purpose tax exemption, MBNH would have to charge less (or nothing) for the services and benefits that it provides to hundreds of youth campers each summer — services and benefits that, plainly, involve costs (*e.g.*, payroll, transportation, supplies, insurance, etc.)<sup>9</sup> — the further implication being that MBNH must operate at breakeven (which it nearly does)<sup>10</sup> or a loss. This Court has squarely rejected these implications and should do so again here. *See, e.g., ElderTrust of Florida, Inc. v. Town of Epsom*, 154 N.H. 693, 700 (2007) (quoting *Eden Retirement Center, Inc. v. Dep't of Revenue*, 213 Ill. 2d 273, 821 N.E.2d 240, 251 (2004) (“[C]harging fees and dispensing benefits to other than those who are poverty stricken does not cause an institution to lose its charitable character.”)).

The Town’s preoccupation with tuition, fees, and scholarships is wholly misplaced. MBNH need not have offered *any* scholarships to low-income campers during 2015 to have qualified for a charitable purpose exemption. For example, in *ElderTrust*, this Court rejected the Town of Epsom’s contention that, to qualify for a charitable purpose tax exemption under RSA 72:23, V, the nursing home was required to serve “elderly persons with ‘low and moderate income.’” *ElderTrust of Florida, Inc.*, 154 N.H. at 700. The Court noted that “[a]n organization does not necessarily have to serve the poor or the needy in order to qualify for the charitable exemption,” in upholding a charitable trust exemption for a nursing home that not only charged its residents for its housing and services, but also required them to agree to be tossed from their homes “for failure to pay.” *Id.* (quoting *Western Mass. Lifecare v. Bd. of Assessors*, 434 Mass. 96, 747 N.E. 2d 97, 104 (2001)); *see also id.* at 702.

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<sup>9</sup> *See, e.g., App.* 1122-1125 (financial statement for the year ended December 31, 2015 and 2014).

<sup>10</sup> *See App.* 1122-25; Order at 7.

Furthermore, the Town’s offensive assertion that MBNH lacks “charitable intent”<sup>11</sup> is not only irrelevant, it is also contrary to the undisputed evidence of over \$108,000 in scholarships provided to youth campers during the 2015 Season<sup>12</sup> and, moreover, ignores evidence of the substantial labor, time, and effort of Marist Brothers (who have taken vows of poverty and to whom Camp Marist pays no compensation beyond room and board) dedicated to advancing the religious, spiritual, educational, and cultural development of hundreds youth from around the world each year at Camp Marist.<sup>13</sup>

## **II. MBNH PROVED THAT IT PROVIDES A PUBLIC BENEFIT.**

In an offshoot of its erroneous “charitable manner” arguments, the Town contends that MBNH failed to meet its burden to show an obligation to perform a charitable purpose to the public because it does not deploy campers to perform community service,<sup>14</sup> and it offers “*de minimus*” scholarships<sup>15</sup> and charges tuition in an amount that, based on the Town’s conjecture, “excludes a large segment of society from attending.”<sup>16</sup> Like the Superior Court, the Town narrowly focuses on the number of children who attend Camp Marist, entirely missing the related salient points that:

- “advancing education” and “aiding religion” among members of the public is beneficial to the community (*Granite State Mgmt. Res.*, 165 N.H. at 284); and

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<sup>11</sup> Town Br. at 30.

<sup>12</sup> MBNH does not merely “claim” to have given out these scholarships (*see* Town Br. at 8), it has proven so, without dispute. *See* App. 352 (listing scholarships, excluding scholarships given to children living in the Town of Effingham and children/relatives of staff). The Town’s contention that the scholarship “figure” should be based on “actual expenses” associated with the attendance of each camper, rather than based on the tuition charged to each camper, is frivolous. *See* Town Br. at 8, 30.

<sup>13</sup> *See, e.g.*, App. 177, 320, 506; Tr. 135:14-24 (Marist brothers of the U.S. Province working at Camp Marist receive no compensation beyond room and board).

<sup>14</sup> Town Br. at 26-27.

<sup>15</sup> Town Br. at 27-28.

<sup>16</sup> Town Br. at 28.

- the benefits of “advancing education” and “aiding religion” at Camp Marist reach “a far greater segment of society” than each individual camper. *Town of Peterborough v. MacDowell Colony, Inc.*, 157 N.H. 1, 7 (2008).

The Town’s contention that MBNH failed to preserve the latter point is incorrect.<sup>17</sup> MBNH presented facts and argument to the trial court concerning the societal benefit of its services at Camp Marist,<sup>18</sup> and at the earliest appropriate time, in moving for reconsideration of the Superior Court’s finding that too few individuals benefited from the performance of MBNH’s charitable purposes, MBNH expressly argued that “*society* (read: the general public) is the beneficiary”<sup>19</sup> of MBNH’s “square aim, for almost seventy (70) years, at advancing the educational and spiritual development of youth of differing socio-economic, ethnic and religious backgrounds . . . .”<sup>20</sup> MBNH argued to the Superior Court, as it does now, that the Superior Court’s finding cannot be squared with *MacDowell Colony, Inc.*, in which this Court held that, although the artist-in-residence program at The MacDowell Colony benefited only a limited group of 246 uncommonly talented artists, “[t]he provision of that service benefits a far greater segment of society than the artists who actually use MacDowell’s property and, in so doing, serves the ‘general public’ as that term is used in RSA 72:23-1.” *MacDowell Colony, Inc.*, 157 N.H. at 7.<sup>21</sup> Accordingly, the argument is preserved for this Court’s review, and should prevail.

As this Court has instructed, the relevant inquiry is “whether the public, or a substantial and indefinite segment thereof, benefits from the organization’s *performance of its stated purpose*.” *Id.* (emphasis in original). On the record before the Superior Court, the answer to this question here is undoubtedly, yes. And as noted above, MBNH does not lose its charitable

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<sup>17</sup> See Town Br. at 24-25.

<sup>18</sup> See, e.g., App. 101, 103, 110-12, 117-19 (Requests for Findings of Fact and Rulings of Law ¶¶ 18, 20, 40-46, 59-62-65, 68-69).

<sup>19</sup> App. 131-32 (Pl.’s Mot. for Reconsideration ¶ 4) (emphasis in original).

<sup>20</sup> App. 131 (Pl.’s Mot. for Reconsideration ¶ 4).

<sup>21</sup> See App. 131 (Pl.’s Mot. for Reconsideration ¶ 3 (discussing *MacDowell Colony, Inc.*, 157 N.H. at 7)).



character simply because it charges tuition and fees, which are roughly equivalent to its expenses. *See supra* at 3 (discussing *ElderTrust of Florida, Inc.*, 154 N.H. at 700) & n.10. Contrary to the Town’s contention, *Western Mass. Lifecare* does not point to a different result because the entity in that case *barred* people who could not “pass its stringent health and financial requirements.” 747 N.E.2d at 104. MBNH imposes no such limitations on its geographically, culturally, religiously, and socio-economically diverse youth campers, and, again, provided over \$100,000 in financial need-based scholarships during 2015. Indeed, it has never denied a camper application based on an inability to pay.<sup>22</sup>

**III. MBNH’S INCOME AND PROFITS ARE ONLY USED IN A MANNER CONSISTENT WITH ITS CHARITABLE PURPOSES.**

In keeping with its overly technical and constrained view of the charitable purpose tax exemption, the Town contends, as the Superior Court held, that MBNH fails to qualify for a charitable purpose tax exemption under the fourth *ElderTrust* factor because it pays an annual assessment to the U.S. Province of The Marist Brothers of the Schools. Overlooked by both the Town and Superior Court, the U.S. Province is entirely aligned with MBNH’s charitable purposes. It is an Order of The Marist Brothers of the Schools that has founded and/or staffed and funded Marist educational ministries throughout the United States, and founded MBNH for the very purpose of promoting Marist education at Camp Marist.<sup>23</sup>

The undisputed evidence shows that the annual assessments made by MBNH to the U.S. Province are not made for, or put to, any purpose inconsistent with facilitating the purposes for which MBNH was established — that is, to “provide opportunities to meet primarily the

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<sup>22</sup> App. 1100.

<sup>23</sup> *See, e.g.*, App. 41-42 (Stipulation of Admitted Facts for Trial ¶¶ 3-4, 8-9); App. 320 (Camp Marist Brochure); App. 556-643 (MARCELLIN CHAMPAGNAT’S DISCIPLES, CONSTITUTIONS AND STATUTES OF THE MARIST BROTHERS OF THE SCHOOLS OR LITTLE BROTHERS OF MARY, 59-159).

spiritual, cultural, and physical needs of youth.”<sup>24</sup> The Chief Financial Officer of the U.S. Province testified that the annual assessment paid by MBNH to the U.S. Province is not only insurance against hard times (for example, for repairs when Camp Marist suffered serious weather-related damage in 2008),<sup>25</sup> but also reflects the benefits that the U.S. Province provides to MBNH, including (a) the health insurance provided by the Province for Marist brothers who serve as Camp Marist staff;<sup>26</sup> (b) the group vehicle, property, and liability insurance premiums paid for by the Province for all Marist Brothers ministries in the United States — premium payments that, if underwritten on a standalone basis for Camp Marist, would have well exceeded \$100,000;<sup>27</sup> and (c) accounting services.<sup>28</sup> Simple math shows that the U.S. Province provides benefits to MBNH *far greater than* the amount contributed to it by MBNH (\$106,000 in 2015).

Thus, the annual assessment paid by MBNH to the U.S. Province is no dividend or “kickback,”<sup>29</sup> and it is certainly not a means of enriching or benefiting the U.S. Province. *Cf. ElderTrust of Florida, Inc.*, 154 N.H. at 703 (upholding charitable purpose tax exemption although the entity “pays a substantial amount of its earnings to . . . two for-profit entities” in which two of its board members held stock, where there was no evidence of excessive salaries or profits to members or officers of the entity).

The Town’s contention that free Camp attendance offered to children or relatives of staff is a disqualifying “pecuniary benefit to members of the organization”<sup>30</sup> is hardly worthy of response beyond noting reasonable compensation and incidental benefits provided to staff do not reflect the sort of impermissible self-interest that would preclude a charitable purpose tax

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<sup>24</sup> App. 44 (MBNH Articles of Agreement).

<sup>25</sup> *See* Tr. 210:9-14; *see also* Tr. 135-37.

<sup>26</sup> *See* Tr. 209:15-21; Tr. 210:9-14.

<sup>27</sup> *See, e.g.* Tr. 208:3-4.

<sup>28</sup> *See* Tr. 195:14-24; 200:16-25; 201:1-4.

<sup>29</sup> Town. Br. at 31.

<sup>30</sup> Town Br. at 22.

exemption. *See, e.g., Young Women's Christian Ass'n v. Portsmouth*, 89 N.H. 40, 42 (1937); *see also Salvation Army v. Town of Standish*, 709 A.2d 727, 729 (Me. 1998) (“the incidental use of buildings [to provide inexpensive vacation lodgings for its officers] constitutes nothing more than ‘compensation’ for the services the officers perform on behalf of the charitable organization”).

Further, contrary to the Town’s suggestion, MBNH is not disqualified from receiving a charitable purpose tax exemption because it (a) does not operate at a loss and (b) has assets that the Town characterizes, without factual basis, as “surplus liquidity.”<sup>31</sup> *See, e.g., Granite State Mgmt. Res.*, 165 N.H. at 281 (the charitable purpose entity “serviced approximately \$2.5 billion in loans, earned a substantial net profit, maintained investments, and retained a surplus”). Of relevance, rather, is the undisputed evidence that MBNH’s members, officers, and directors, as well as the U.S. Province, have not enriched themselves with income or profits from Camp Marist.

**IV. MBNH’S INCIDENTAL USE OF CAMP MARIST FOR OFF-SEASON RENTALS NEED NOT (BUT LARGELY DOES) DIRECTLY RELATE TO ITS CHARITABLE PURPOSE.**

MBNH satisfied the third *ElderTrust* factor because the undisputed evidence shows that it uses the land embraced by Camp Marist “directly . . . for its charitable purposes.” *ElderTrust of Florida, Inc.*, 154 N.H. at 701. Camp Marist was founded and built for the *very purpose of — and no other purpose than — “advancing education” and “aiding religion” among youth*, and this has been the dominant use of the Camp Marist property for nearly seventy (70) years. Off-season rentals of the Camp property to institutions that may, or may not, share MBNH’s twin

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<sup>31</sup> Town Br. at 31 (citing App. 1109).

charitable missions of advancing education and aiding religion,<sup>32</sup> do not defeat a charitable tax exemption under RSA 72:23, V. The law imposes no requirement that all uses of the land at all times directly serve the charitable purpose. The rental agreements presented in evidence, however, show that off-season rentals were made primarily to Catholic educational institutions.<sup>33</sup>

The Town misreads *Appeal of Kiwanis Club of Hudson, Inc.*, 140 N.H. 92 (1995). In that case, the Kiwanis Club's dominant use of the property as a rental hall to other charitable organizations for fundraisers fulfilled a charitable purpose. To the extent that the Kiwanis Club's *own use* of the hall for functions "would not fulfill this . . . charitable purpose, that use is incidental to Kiwanis' primary use of the hall to provide a fundraising location to other charitable organizations." *Id.* at 95. Thus, the Court concluded that this incidental use "does not act to deny Kiwanis its exemption." *Id.* (citing and quoting *Green Acre Baha'i Inst. v. Town of Eliot*, 150 Me. 350, 110 A.2d 581, 583 (1954) ("[W]here dominant use . . . is for [charitable] purposes, tax exemption will not be defeated by either occasional or purely incidental [use.])). Likewise, *Alton Bay Camp Meeting Ass'n v. Town of Alton*, 109 N.H. 44 (1968), does not support the Superior Court's decision or Town's position. In that case, the land was owned by the Association, but was "occupied and used *principally* by the cottage owners for their own private and secular purposes and not for the statutory exempted religious purposes of the Association." *Id.* at 49 (emphasis added). The same cannot be said here. MBNH's off-season rentals of the Camp Marist property are purely incidental to the dominant use of this property to fulfill its twin charitable missions of "advancing education" and "aiding religion."

Further, the Superior Court acknowledged testimony that the rental income supports the Camp's operations and funds scholarships, *see* Order at 20, but improperly created an additional

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<sup>32</sup> *See* App. 943-55.

<sup>33</sup> *See* App. 943-55 (rental agreements); Tr. 138:4-21; 160:5-15.

hurdle for MBNH in requiring it to prove that rental income is applied to meet “the direct expenses of the operating the [Camp],” or is “otherwise necessary for MBNH to carry out its alleged charitable mission,” a burden the Town asks this Court to impose.<sup>34</sup> To do so would be a significant departure from the jurisprudence under RSA 72:23, V, thwarting “[t]he legislative purpose to encourage charitable institutions” that this Court has warned of in so many cases. *See, e.g., Granite State Mgmt. & Res.*, 165 N.H. at 284; *Peterborough*, 157 N.H. at 5; *Young Women’s Christian Ass’n*, 89 N.H. at 42.

**V. MBNH PRESERVED ITS EVIDENTIARY ARGUMENTS ON APPEAL.**

Contrary to the Town’s assertion, MBNH adequately preserved its argument that the Superior Court erred in excluding evidence of the tax exemptions received by *every other* religiously-affiliated, YMCA-affiliated, and Girl and Boy Scout-affiliated summer youth camp in this State, by presenting this as issue number 10 in its Notice of Appeal. Further, contrary to the Town’s suggestion, there is no requirement under RSA 72:34-a that an appeal from the Board of Selectmen’s denial of a tax exemption by petition lay out all arguments in favor of the appeal. That is, MBNH need not have spelled out its equal protection argument in that pleading.

**CONCLUSION**

For the reasons set forth above and in MBNH’s opening Brief, it has satisfied the requirements of RSA 72:23, V, and RSA 72:23-1, and the four *ElderTrust* factors. Accordingly, the Court should reverse the Order and hold that Camp Marist is exempt from property tax.

**SUPREME COURT RULE 16(10) CERTIFICATION**

The undersigned hereby certifies that on this 6th day of November, 2017, two copies of this Reply Brief were sent by first class mail to counsel of record for the Town of Effingham.

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<sup>34</sup> Town Br. at 33 (quoting Order at 20).

Respectfully submitted,

The Marist Brothers of New Hampshire

By its attorneys,

PIERCE ATWOOD LLP

Dated: November 6, 2017

By: *Michele E. Kenney*  
Jonathan A. Block  
N.H. Bar No. 10972  
Michele E. Kenney  
N.H. Bar No. 19333  
One New Hampshire Avenue, Suite 350  
Portsmouth, NH 03801  
(603) 433-6300

