

PT 14-04
Tax Type: Property Tax
Tax Issue: Charitable Ownership/Use

**STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS**

**WHEATON DRAMA, INC.,
APPLICANT**

v.

**THE DEPARTMENT OF REVENUE
OF THE STATE OF ILLINOIS**

**No. 12-PT-0047 (12-22-33)
Real Estate Tax Exemption
For 2012 Tax Year
P.I.N. 05-16-302-070**

DuPage County Parcel

**Kenneth J. Galvin
Administrative Law Judge**

RECOMMENDATION FOR DISPOSITION

APPEARANCES: Mr. Gary Taylor, Rathje & Woodward, LLC, on behalf of Wheaton Drama, Inc; Ms. Paula Hunter, Special Assistant Attorney General, on behalf of The Department of Revenue of the State of Illinois.

SYNOPSIS: This proceeding raises the issue of whether DuPage County Parcel, identified by property index number 05-16-302-070 (hereinafter the “subject property”) qualifies from exemption from 2012 real estate taxes under 35 ILCS 200/15-65 of the Property Tax Code, which exempts all property actually and exclusively used for charitable or beneficent purposes, and not leased or otherwise used with a view to profit.

This controversy arose as follows: On June 7, 2012, Wheaton Drama, Inc. (hereinafter “Wheaton” or “applicant”) filed a Property Tax Exemption Complaint with the DuPage County Board of Review seeking exemption from 2012 real estate taxes for the subject property. The Board reviewed Wheaton’s Complaint and recommended that the exemption be denied. The Department of Revenue of the State of Illinois (hereinafter

the “Department”) affirmed the Board’s recommendation in a determination dated September 20, 2012, finding that the subject property was not in exempt ownership or exempt use in 2012. Dept. Ex. No. 1. Wheaton filed a timely appeal of the Department’s exemption denial. On December 17, 2013, a formal administrative hearing was held with James Van De Velde, Former President of Wheaton, and Eileen Gilligan, Treasurer, testifying. Following a careful review of the testimony and evidence, it is recommended that the Department’s determination be affirmed.

FINDINGS OF FACT:

1. Dept. Ex. No. 1 establishes the Department’s jurisdiction over this matter and its position that the subject property was not in exempt ownership or use during 2012. Tr. p. 8; Dept. Ex. No. 1.
2. Wheaton acquired the subject property, located at 111 North Hale Street in Wheaton, on December 26, 1996. The main floor of the building contains a lobby, restrooms and a theater which seats 174 people. The lower level contains restrooms, a storage area and a makeup room. Tr. pp. 14-16; App. Ex. No. 4.
3. Wheaton is exempt from income tax under Section 501(c)(3) of the Internal Revenue Code. Wheaton is exempt from sales tax in the State of Illinois. Tr. p. 75; App. Ex. No. 7.
4. “Wheaton Drama Club” was incorporated under the “General Not For Profit Corporation Act” on December 3, 1965 with the following purpose as stated in its Articles of Incorporation: “to cultivate an interest in dramatic literature and dramatic technique by the presentation of informal readings of plays at regular or special meetings of the Club, and by the production of memorized and fully-staged theatricals for the public at such times as the Board of Directors, with the

consent of the majority of the members, may deem feasible. The organization is not for individual pecuniary profit.” On March 17, 1967, the purpose was amended to add “and is formed exclusively for literary purposes within the meaning of section 501(c)(3) of the Internal Revenue Code of 1954.” On September 11, 1991, the name of the organization was changed to “Wheaton Drama, Inc.” Tr. pp. 17-21; App. Ex. No. 5.

5. Wheaton does not have shareholders and does not issue capital stock. No officers are compensated. No part of the subject property is leased. Tr. pp. 21, 37, 46-49; App. Ex. No. 13.
6. Wheaton operates under a set of Bylaws that were in existence in 2012. Article II of the Bylaws is entitled “Membership.” There are three classes of membership. Persons 18 years of age or over, willing to participate in the activities of the corporation, are admitted as General Members upon payment of annual membership fees as determined by the Board of Governors. Any General Members, upon passing the 25th anniversary of consecutive General Membership, shall be eligible for “Life Membership.” Life Members shall not be required to pay membership fees but shall in all other respects be deemed General Members. The Board of Governors, upon its discretion, may confer “Honorary Membership” upon persons of local or national renown who are not General Members or Life Members. Honorary Members shall not be required to pay membership fees unless they subsequently become a General Member. Membership is open to the public and the fee is currently \$20/year. There is a monthly General Membership meeting at Wheaton. Tr. pp. 21-25; App. Ex. No. 6.

7. The Bylaws state that membership fees and dues shall be those adopted from time to time by the Board of Directors. The Board shall have the discretion to vary fees for individuals, family groups, residents, youth and other categories, as it deems appropriate. “The Membership Governor can, at his/her discretion, waive the membership dues of any members for financial reasons.” Tr. pp. 21-24; App. Ex. No. 6.
8. Wheaton puts on 5 major productions each year, either dramas or musicals, in September, November, January, March and May. Auditions are open to the public. The productions also require set designers and constructors, costumers and sound and lighting technicians. The actors and workers are not compensated but they “have to be a member [of Wheaton] to be able to participate in a production because of insurance reasons.” Tr. pp. 25-26, 36-37, 58.
9. Each play is staged over four weekends on Thursday, Friday and Saturday evenings and Sunday afternoon. The Thursday evening performance on the opening weekend is the last dress rehearsal. Letters inviting guests to attend this Thursday performance are sent to “Belmont Village” and “The Meadows of Glen Ellyn” (both retirement homes), “DuPage Convalescent Center” and the “Midwest Shelter for Homeless Veterans.” In 2012, 329 guests from these four facilities attended performances on the first Thursday night of the production, at a cost to Wheaton (at \$16 to \$21/ticket) of \$6,132. Tr. pp. 27-31, 58; App. Ex. Nos. 10 and 11.
10. Ticket prices are \$20 for a drama and \$22 for a musical. The admission price is determined by how much it costs Wheaton to put on the production including

costs for set construction, costume construction and rental, royalties paid to authors and heating and general operating costs. Tr. pp. 31-32, 65-66.

11. Wheaton's year-end June 30, 2012, Form 990, "Return of Organization Exempt from Income Tax," shows total revenue of \$150,520, of which 83% is "Program Service Revenue," and 15% is "Contributions and Grants." The Program Service Revenue is derived 88% from "Productions," 6% from "Children's Workshop," 3% from "Playbill Advertising," and 3% from "Membership." Wheaton had an excess of expenses over revenue for the time period of \$53,916. The Form 990 states that the "organization's mission or most significant activities" is/are "[D]edicated to the study and promotion of the theatrical arts." "Wheaton Drama is a not-for-profit, volunteer organization dedicated to the study and promotion of the theatrical arts for the benefit of the local community." Tr. pp. 59-65, 78-79; App. Ex. No. 8.
12. Wheaton's year-end June 30, 2013, Form 990, shows total revenue of \$249,099, of which 87% is "Program Service Revenue," and 10% is "Contributions and Grants." The Program Service Revenue is derived 86% from "Productions," 7% from "Children's Workshop," 3% from "Playbill Advertising," 2% from "Membership" and 2% from "Education." Wheaton had an excess of revenue over expenses for the time period of \$16,594. When Wheaton has an excess of revenue over expenses, the funds are used to repair the theater or make an additional mortgage payment. Tr. pp. 59-65, 78-79; App. Ex. No. 9.
13. Wheaton offers classes for high school students in the Summer. Five high school students worked as teaching assistants for the summer children's workshop. They were then given a reduced tuition (\$25 compared to the \$95

rate) to attend the high school classes. The children's workshop is for 1 week with attendance of over 90 children. A fee of \$95 is charged. Children learn beginning skills in acting, dance routines, voice and self-confidence. Tr. pp. 34-37, 40, 70-72; App. Ex. No. 12.

14. In 2012, Wheaton donated tickets totaling \$1,128 to community organizations for their fund-raising events. Tr. pp. 49-52; App. Ex. No. 14.

15. Wheaton provides a Santa and Mrs. Claus for Wheaton's annual Christmas parade. Wheaton lends props, costumes and technical equipment to area schools and community organizations. Wheaton participates in "Halloween Trick or Treat" and Downtown Wheaton Sidewalk Days. Wheaton awards two scholarships each year, for \$1,000 and \$500. Costumes and props that can no longer be used are donated to Wise Penny Resale Shop, owned by Central DuPage Hospital, and all proceeds are used for philanthropic causes. Tr. pp. 52-55, 73-74; App. Ex. No. 15.

16. Wheaton does not have an advertised fee waiver policy or ticket waiver policy. Tr. pp. 79-80.

CONCLUSIONS OF LAW:

An examination of the record establishes that Wheaton has not demonstrated, by the presentation of testimony or through exhibits or argument, evidence sufficient to warrant exempting the property from 2012 real estate taxes. In support thereof, I make the following conclusions:

Article IX, Section 6 of the Illinois Constitution of 1970 limits the General Assembly's power to exempt property from taxation as follows:

The General Assembly by law may exempt from taxation only the property of the State, units of local government and school districts and property used exclusively for agricultural and horticultural societies, and for school, religious, cemetery and charitable purposes.

The General Assembly may not broaden or enlarge the tax exemptions permitted by the constitution or grant exemptions other than those authorized by the constitution. Board of Certified Safety Professionals v. Johnson, 112 Ill. 2d 542 (1986). Furthermore, Article IX, Section 6 does not, in and of itself, grant any exemptions. Rather, it merely authorizes the General Assembly to confer tax exemptions within the limitations imposed by the constitution. Locust Grove Cemetery v. Rose, 16 Ill. 2d 132 (1959). Thus, the General Assembly is not constitutionally required to exempt any property from taxation and may place restrictions or limitations on those exemptions it chooses to grant. Village of Oak Park v. Rosewell, 115 Ill. App. 3d 497 (1st Dist. 1983).

In accordance with its constitutional authority, the General Assembly enacted section 15-65 of the Property Tax Code, which exempts all property which is both owned by “institutions of public charity” and “actually and exclusively used for charitable or beneficent purposes” provided that the property is not leased or used with a view to profit. 35 ILCS 200/15-65. In Methodist Old Peoples Home v. Korzen, 39 Ill. 2d 149 (1968) (hereinafter "Korzen"), the Illinois Supreme Court outlined the following “distinctive characteristics” of a charitable institution: (1) the benefits derived are for an indefinite number of persons [for their general welfare or in some way reducing the burdens on government]; (2) the organization has no capital, capital stock or shareholders; (3) funds are derived mainly from private and public charity, and the funds are held in trust for the objects and purposes expressed in the charter; (4) the charity is dispensed to all who need and apply for it, and does not provide gain or profit in a private

sense to any person connected with it; and (5) the organization does not appear to place obstacles of any character in the way of those who need and would avail themselves of the charitable benefits it dispenses. Korzen at 157. Wheaton must also show that the exclusive and primary use of the subject property is for charitable purposes. 35 ILCS 200/15-65.

The Illinois Supreme Court articulated the criteria in Korzen “to resolve the constitutional issue of charitable use.” Eden Retirement Center v. Dept. of Revenue, 213 Ill. 2d 273 (2004). Courts consider and balance the criteria by examining the facts of each case and focusing on whether and how the institution serves the public interest and lessens the State’s burden. DuPage County Board of Review v. Joint Com’n on Accreditation of Healthcare Organizations, 274 Ill. App. 3d 461, 469 (2d Dist. 1965).

Wheaton acquired the subject property, located at 111 North Hale Street in Wheaton, on December 26, 1996. The main floor of the building contains a lobby, restrooms and a theater which seats 174 people. The lower level contains restrooms, a storage area and a makeup room. Tr. pp. 14-16; App. Ex. No. 4. No part of the subject property is leased. Tr. p. 37. Wheaton is exempt from income tax under Section 501(c)(3) of the Internal Revenue Code and is exempt from sales tax in the State of Illinois. Tr. p. 75; App. Ex. No. 7. The issue to be decided is whether Wheaton qualifies as an “institution of public charity” under the terms of Korzen and whether the subject property was used for charitable purposes in 2012.

In exemption cases, the applicant bears the burden of proving by “clear and convincing” evidence that the exemption applies. Evangelical Hospitals Corp. v. Department of Revenue, 223 Ill. App. 3d 225 (2d Dist. 1991). Any and all doubts that arise in an exemption proceeding, if attributable to evidentiary deficiencies, must be

resolved in favor of taxation. Gas Research Institute v. Department of Revenue, 154 Ill. App. 3d 430 (1st Dist. 1987).

In determining whether an organization is exclusively charitable in its purpose, it is proper to consider provisions of its charter. Rotary International v. Paschen, 14 Ill. 2d 387 (1987). “Wheaton Drama Club” was incorporated under the “General Not For Profit Corporation Act” on December 3, 1965 with the following purpose as stated in its Articles of Incorporation: “to cultivate an interest in dramatic literature and dramatic technique by the presentation of informal readings of plays at regular or special meetings of the Club, and by the production of memorized and fully-staged theatricals for the public at such times as the Board of Directors, with the consent of the majority of the members, may deem feasible. The organization is not for individual pecuniary profit.” On March 17, 1967, the purpose was amended to add “and is formed exclusively for literary purposes within the meaning of section 501(c)(3) of the Internal Revenue Code of 1954.” Tr. pp. 17-21; App. Ex. No. 5.

Wheaton’s Form 990 for June 30, 2012 and 2013 states that the “organization’s mission or most significant activities” is/are “[D]edicated to the study and promotion of the theatrical arts.” “Wheaton Drama is a not-for-profit, volunteer organization dedicated to the study and promotion of the theatrical arts for the benefit of the local community.” Tr. pp. 59-65, 78-79; App. Ex. No. 8.

The study and promotion of theatrical arts and cultivating an interest in dramatic literature and dramatic technique by the presentation of informal readings of plays at meetings of the Club are not endeavors recognized by Illinois courts as inherently “charitable.” Moreover, the word “charity” or “charitable” does not appear in the “Purpose” as stated in the Articles, nor does it appear in Wheaton’s “mission or most

significant activities,” as described in Wheaton’s Form 990. 35 ILCS 200/15-65 requires that property be “exclusively” used for charitable purposes in order to qualify for an exemption. An “exclusively” charitable purpose need not be interpreted literally as the entity’s sole purpose; it should be interpreted to mean the primary purpose, but not a merely incidental or secondary purpose or effect. Gas Research Institute v. Department of Revenue, 154 Ill. App. 3d 430, 436 (1st Dist. 1987). Without the mention of “charity” in Wheaton’s Articles or Form 990, it would be impossible to conclude that Wheaton’s primary purpose is to dispense charity or that the primary use of its property is for charitable purposes, as required under the Property Tax Code. Although Wheaton may have provided some charity in 2012, the provision of this charity appears to be “secondary” and “incidental” to Wheaton’s main purpose which is the study and promotion of theatrical arts.

Furthermore, Wheaton is a membership based organization with its members apparently joining the organization, not to assist in the dispensation of charity, but because of their mutual interest in the theater. Wheaton operates under a set of Bylaws that were in existence in 2012. Article II of the Bylaws, entitled “Membership” states that there are three classes of membership. Persons 18 years of age or over willing to participate in the activities of the corporation shall be admitted as a General Member upon payment of annual membership fees and as determined by the Board of Governors. Any General Members, upon passing the 25th anniversary of consecutive General Membership, shall be eligible for “Life Membership.” Life Members shall not be required to pay membership fees but shall in all other respects be deemed General Members. The Board of Governors, upon its discretion, may confer “Honorary Membership” upon persons of local or national renown who are not General Members or

Life Members. Honorary Members shall not be required to pay membership fees unless they subsequently become a General Member. Membership is open to the public and the fee is currently \$20/year. There is a monthly General Membership meeting on the subject property. Tr. pp. 21-25; App. Ex. No. 6.

When the primary benefit of an organization flows to its members and not the public, then an exemption will be denied. Chicago Bar Association v. Department of Revenue, 177 Ill. App. 3d 896 (2d Dist. 1988). Fraternal and social organizations do not qualify for exempt status because they operate primarily for the benefit of a limited class of persons who maintain membership therein. In Rogers Park Post No. 108 v. Brenza, 8 Ill. 2d 286, 291 (1956), the Court found that one of the primary purposes of the organization was “to benefit and afford comradeship to its members.” “Affording comradeship to its members” is similar to one of Wheaton’s purposes, as stated in its Articles, *i.e.*, “to cultivate an interest in dramatic literature and dramatic technique by the presentation of informal readings of plays at regular or special meetings of the Club.” According to the Court in Rogers Park, the organization’s purposes were “laudable.” “Nonetheless, they do not constitute charitable purposes, however desirable or however beneficial.” The Court found that the dominant use of the subject property was as a “private club rather than as a headquarters for the dispensation of charitable relief.” *Id.* at 290-291.

Similarly, in Albion Ruritan Club v. Department of Revenue, 209 Ill. App. 3d 914 (5th Dist. 1991), the court found that a community service organization’s property did not warrant a tax exemption. In denying a property tax exemption to Albion, the court noted that “it must be shown that the benefits accrue to mankind directly; it is not sufficient that incidental benefits accrue to the public as a result of the property’s use.” *Id.* at 918.

Wheaton's Bylaws require that a membership meeting be held once a month or as deemed advisable by the Board. App. Ex. No. 6. According to Wheaton's Articles, informal readings of plays take place at these meetings which would "cultivate" an interest in dramatic literature and dramatic technique. But the primary benefits from this use of Wheaton's property do not accrue to "mankind directly," and therefore cannot be considered charitable. The meetings are for the benefit of Wheaton's attending members, with benefits accruing to these members. Members are using the property at that time as a "private club" and as a "headquarters" for activities that are of interest to the members, rather than as a headquarters for the dispensation of charitable relief. If Wheaton is truly cultivating an interest in dramatic literature and dramatic technique, it is cultivating this interest in its paying members.

This is further demonstrated by the fact that in order to participate in one of Wheaton's productions, an actor, worker or technician must be a member of Wheaton. According to Mr. Van De Velde's testimony, this is necessary because of "insurance issues." "We have general liability insurance in case someone gets injured on the property – it's supplemental insurance so if somebody does get hurt, and they don't have insurance, our insurance will cover them, if they get hurt building a set or something happens." Tr. p. 26. If acting or working in a play cultivates an interest in the dramatic arts, this cultivation is again fostered only in Wheaton's members. The only benefit for the non-member public, "the local community," that I can discern from Wheaton's activities, is that the public gets to buy a ticket to Wheaton's theater and enjoy the performance, similar to the public purchasing a ticket and enjoying a performance from a for-profit, property tax-paying, theater.

Wheaton's Bylaws state that membership fees and dues shall be those adopted from time to time by the Board of Directors. The Board shall have the discretion to vary fees for individuals, family groups, residents, youth and other categories, as it deems appropriate. "The Membership Governor can, at his/her discretion, waive the membership dues of any members for financial reasons." Tr. pp. 21-24; App. Ex. No. 6.

Mr. Van De Velde testified that he has been to auditions, which are open to the public, where a non-member is offered a part and they'll accept but say that they are not sure they could afford the membership fee. "Someone else will just say ... I'll take care of it." "There's people who would step forward or we would waive it." Tr. p. 58. Similarly, he testified that "there's also been times where if somebody would like to join, and they can't afford it, someone else will pay the membership for them. It's only \$20." If someone else steps forward to pay for another person's membership, I have to attribute this act of charity to the "someone else," rather than to Wheaton. In spite of the provision in Wheaton's Bylaws that membership fees could be waived, Mr. Van De Velde was not aware of any waivers in 2012. Tr. p. 25. Ms. Gilligan was not aware "of anyone who has attempted to become a member who has been denied membership." Tr. pp. 65-66.

In looking at the Korzen factors, Wheaton does not have shareholders and does not issue capital stock. No officers are compensated. Tr. pp. 21, 46-49; App. Ex. No. 13. Wheaton does not provide gain or profit in a private sense to any person connected with it. Tr. p. 81. However, I am unable to conclude that Wheaton possesses the other distinctive characteristics of a charitable organization according to Korzen.

The majority of Wheaton's funds are not derived from public and private charity. Wheaton's year-end June 30, 2012, Form 990, "Return of Organization Exempt from Income Tax," shows total revenue of \$150,520, of which 83% is "Program Service

Revenue,” and 15% is “Contributions and Grants.” The Program Service Revenue is derived 88% from “Productions,” 6% from “Children’s Workshop,” 3% from “Playbill Advertising,” and 3% from “Membership.” Tr. pp. 59-65, 78-79; App. Ex. No. 8. Wheaton’s year-end June 30, 2013, Form 990, shows total revenue of \$249,099, of which 87% is “Program Service Revenue,” and 10% is “Contributions and Grants.” The Program Service Revenue is derived 86% from “Productions,” 7% from “Children’s Workshop,” 3% from “Playbill Advertising,” 2% from “Membership” and 2% from “Education.” Tr. pp. 59-65, 78-79; App. Ex. No. 9.

As the financial data indicates, Wheaton receives the great majority of its funding from people paying for its services. In fact, in 2012, 83% to 87% of Wheaton’s revenues were from customers paying Wheaton for membership in the organization or to attend Wheaton’s theater productions or to enroll in the Children’s Workshop. In Randolph Street Gallery v. Zehnder, 315 Ill. App. 3d 1060 (1st Dist. 2000), where the Department’s denial of a property tax exemption was reversed on appeal, only 3% of Randolph’s income was from “program admissions,” with most of Randolph’s revenue coming from “grants and contributions.” In Riverside Medical Ctr. v. Dept. of Revenue, 324 Ill. App. 3d 603 (3rd Dist. 2003), the court noted that 97% of Riverside’s net revenue of \$10 million came from patient billing. According to the court, “this level of revenue is not consistent with the provision of charity.” *Id.* at 608. Similarly, in Alivio Medical Ctr. v. Department of Revenue, 299 Ill. App. 3d 647 (1st Dist. 1998), Alivio argued that 59% of its revenue was from patient fees and 25% was derived from charitable contributions. The court found that Alivio was not a charitable institution.

As the above cases indicate, the exchange of services for payment at the level enjoyed by Wheaton, whether the payment is for membership, or to attend Wheaton’s

theater productions or Children's Workshop, is not a "use" of property that has been recognized by Illinois courts as "charitable." Charity is an act of kindness or benevolence. "There is nothing particularly kind or benevolent about selling somebody something." Provena Covenant Medical Center v. Department of Revenue, 384 Ill. App. 3d 734, 744 (4th Dist. 2008), aff'd, 236 Ill. 2d 368 (2010). In 2012, 83% to 87% of Wheaton's revenues were from customers paying Wheaton for some service with the majority of the revenue derived from theater admissions. I suggest that there is nothing particularly kind or benevolent about selling somebody a ticket to the theater.

Wheaton had an excess of revenue over expenses for the period year-end June 30, 2013, of \$16,594. Ms. Gilligan testified that when Wheaton has an excess of revenue over expenses, "they go back into anything that needs to be done in the theater. Everything is turned right back in to the theater." At times, Wheaton has made an additional mortgage payment with the excess. Tr. p. 64. Another of the Korzen characteristics is that the organization's funds be held in trust for the objects and purposes expressed in the charter. Wheaton is holding its funds in trust for the purposes expressed in its charter but, as discussed above, these purposes are not charitable. "There is nothing in its [purposes] which requires plaintiff to devote its funds or income to purposes deemed charitable in law." Rotary International v. Paschen, 14 Ill. 2d 480, 488 (1958). Wheaton's excess goes back into theater repair or to pay its mortgage. There is no evidence in the record that Wheaton uses excess funds to provide more charity, as in, for example, allowing attendance of charitable patrons on nights other than the dress rehearsal on the first Thursday night of the production.

It is also clear from the testimony in this case that Wheaton places obstacles in the way of those who need and would avail themselves of the charitable benefits it dispenses

and, additionally, I am unable to conclude that Wheaton dispenses charity to all who need and apply for it. Ms. Gilligan testified succinctly that Wheaton does not have an advertised fee waiver policy or ticket waiver policy. Tr. pp. 79-80. Ms. Gilligan was asked if she was aware of any instances in 2012, where there were waivers of fees for people who “just simply said they couldn’t afford it.” She responded “[N]ot to my knowledge, no.” She later recalled an incident “in the Fall” (without identifying which year), of a student coming to see a play “and asking if we had a student rate, and we didn’t.” When he started to walk out, Ms. Gilligan, who was selling tickets that night, said “why don’t you just go in,” “because it wasn’t a sold out show.” “So we just let him walk in.” Tr. p. 67. Ms. Gilligan was asked how anyone coming to the ticket booth would know that they could get in without paying. She responded: “They would have to ask.” Tr. p. 76. Ms. Gilligan testified further that people often call in for tickets and ask if Wheaton has a lower ticket price. “We would just say, ‘Well, we don’t.’ ” “If they gave us a story and told us why, you know, we would just allow it.” Tr. p. 77.

But “asking” for charity when you do not know or are unsure if there is charity, is an obstacle for many people. The student “in the Fall” asked if there was a “student rate” which was apparently the wrong question to ask in order to get a discounted ticket. People who phone in and ask if Wheaton has less expensive tickets could hang up after the “well, we don’t” comment and before they get a chance to give Wheaton “a story,” as Ms. Gilligan testified. Forcing people to “ask” is an obstacle that could easily be remedied with a sign on the ticket booth or website or a recorded message that states that charity is available. The Korzen criteria that a charitable organization place no obstacles in the way of those needing assistance is “more than a guideline.” It is an “essential criteria” and it “goes to the heart of what it means to be a charitable institution.” Provena

Covenant Medical Center v. Department of Revenue, 384 Ill. App. 3d 734, 750 (4th Dist. 2008), aff'd, 236 Ill. 2d 368 (2010). Moreover, when charity is not advertised, it is impossible to conclude that charity is dispensed to all who need it. Those who need charity may not apply because it is not advertised and they do not know that it is available.

In Highland Park Hospital v. Department of Revenue, 155 Ill. App. 3d 272 (2d Dist. 1987), the court found that an immediate care center did not qualify for a charitable exemption because, *inter alia*, the advertisements for the facility did not disclose its charitable nature. The court stated that “the fact is that the general public and those who ultimately do not pay for medical services are never made aware that free care may be available to those who need it.” *Id.* at 281. Similarly, in Alivio Medical Ctr. v. Dept. of Revenue, 299 Ill. App. 3d 647 (1st Dist. 1998), where the court denied a charitable exemption for a medical care facility, the court noted, *inter alia*, that “[A]livio does not advertise in any of its brochures that it provides charity care, nor does it post signs stating that it provides such care.” *Id.* at 652. The record in this case does not show that the “general public” knew that charity was available at Wheaton.¹ This is an obstacle to receiving benefits and prevents me from concluding that charity is dispensed to all who need it. A charity dispenses charity and does not obstruct the path to its charitable benefits. Eden Retirement Center v. Dept. of Revenue, 213 Ill. 273, 287 (2004).

Wheaton puts on 5 major productions each year, either dramas or musicals, in September, November, January, March and May. Auditions are open to the public. The

¹ In Randolph Street Gallery v. Zehnder, 315 Ill. App. 3d 1060 (1st Dist. 2000), the Court noted that it had found no Illinois decision that holds that public notice of a fee waiver policy is an indispensable fact for a charitable tax exemption. My decision in the instant case is based on my conclusion that Wheaton does not possess several of the Korzen factors, including the fact that it does not have an advertised fee waiver policy.

productions require set designers and constructors, costumers and sound and lighting technicians. The actors and workers are not compensated but they “have to be a member [of Wheaton] to be able to participate in a production because of insurance reasons.” Tr. pp. 25-26, 36-37, 58. Ticket prices are \$20 or \$22 for a musical. The admission price is determined by how much it costs Wheaton to put on the production including costs for set construction, costume construction and rental, royalties paid to authors, heating and general operating costs. Tr. pp. 31-32, 65-66.

Each play is usually staged over four weekends on Thursday, Friday and Saturday evenings and Sunday afternoon. The Thursday evening performance on the opening weekend is the last dress rehearsal. Letters inviting guests to attend this Thursday performance are sent to “Belmont Village,” “The Meadows of Glen Ellyn” (both retirement homes), “DuPage Convalescent Center” and the “Midwest Shelter for Homeless Veterans.” In 2012, a total of 329 guests from these four organizations attended performances on the first Thursday night of the production, at a cost to Wheaton (at \$16 to \$21/ticket) of \$6,132. Tr. pp. 27-31, 58; App. Ex. Nos. 10 and 11.

This \$6,132, consisting of 329 guests who attended the first Thursday night performance of each play, represents the majority of Wheaton’s charity.² In 2012, Wheaton also donated tickets totaling \$1,128 to community organizations for their fund-raising events. Tr. pp. 49-52; App. Ex. No. 14. The \$7,260 (\$6,132 plus \$1,128) is less

² There was testimony at the hearing that Wheaton provides a Santa and Mrs. Claus for Wheaton’s annual Christmas parade. Wheaton lends props, costumes and technical equipment to area schools and community organizations. Wheaton participates in “Halloween Trick or Treat” and Downtown Wheaton Sidewalk Days. Wheaton awards two scholarships each year, for \$1,000 and \$500, although it is unclear from the testimony whether these scholarships are only for member or their families. Costumes and props that can no longer be used are donated to Wise Penny Resale Shop, owned by Central DuPage Hospital, and all proceeds are used for philanthropic causes. Tr. pp. 52-55, 73-74; App. Ex. No. 15. Wheaton is seeking a property tax exemption for charitable use of its property and it is unclear from the record whether these activities take place on the subject property.

than Wheaton spent on “Advertising and Promotion” as of June 30, 2012 (\$10,941) or June 30, 2013 (\$11,617). Wheaton’s average revenue from “Productions” in calendar year 2012 is \$148,563 (\$110,493 at June 30, 2012 plus \$186,633 at June 30, 2013 divided by 2). The \$7,260 represents 4.9% of Wheaton’s average revenue. Wheaton sponsors 5 plays each year and each play is produced sixteen times (four days on four weekends). The theater has 174 seats. Over the course of the entire year, there are potentially 13,920 seats/tickets available (5 plays times sixteen productions times 174 seats). The 329 people admitted on the first Thursday dress rehearsal represent 2% of the available seats/tickets in the year.

Mr. Van De Velde was asked if any of the “productions [are] offered to the public free.” He testified that Wheaton does not “charge admission” for the first Thursday night performance of each play. Tr. pp. 27-28. Wheaton then offered into evidence the four letters to the organizations detailed above. However, none of the letters say that admission is “free.” The letters are form letters and all begin as follows: “Once again, we are happy to invite you to our preview night for ‘The Sound of Music’ on Thursday, November 8.” App. Ex. No. 11. Wheaton is asking me to assume that all recipients of the letters know that “happy to invite you” means that admission is free and that the recipients pass this knowledge on to people in their institutions. Moreover, it is not clear from the record that Belmont Village, The Meadows of Glen Ellyn and DuPage Convalescent Center have residents that are in need of charity. Wheaton could be providing “charity” on the first Thursday night performances to people in these institutions who could afford to pay for a full price ticket.

It is also unclear from the record how “the public,” *i.e.* those people needing charity who do not reside in the four organizations invited “for free,” would know that

admission is free on the first Thursday night performance. There was no testimony that any advertisement or letter or notice was distributed to “the public.” And as discussed above, Wheaton does not post a fee-waiver policy. There were five first Thursday night performances in 2012 and that means that approximately 66 “charitable” patrons (329 admissions divided by 5) attended each first Thursday night performance. Wheaton’s theater seats 174 people. It is unclear from the record who is sitting in the other 108 seats (174 minus 66) on the first Thursday night performance and why more charity is not provided on these nights.

Mr. Van De Velde testified on cross-examination that if any of the people in the four organizations came to a performance at a time other than the first Thursday night of the production, they would be charged the regular admission price. Tr. pp. 30, 57. This testimony forces me to conclude that Wheaton’s benefits are not derived for an indefinite number of persons. If admission is truly free for people needing charity at the first Thursday night performance, then Wheaton’s benefits are limited to people who can attend this performance. Wheaton is asking this tribunal to grant it an exemption for the 365 days of 2012 when, at best, it dispenses charity consistently on only five Thursdays of the year to patrons in 66 seats of its 174 seat theater. At this level of charitable use, it would be impossible to conclude that Wheaton’s property is “exclusively” used for charitable purposes, as required by 35 ILCS 200/15-65.

Based on the testimony and evidence presented at the hearing, I am also unable to conclude that Wheaton and the subject property lessen a burden on government, which according to Korzen, is also a “distinctive characteristic” of a charitable organization. The fundamental ground upon which all exemptions in favor of charitable institutions are based is the benefit conferred upon the public by them and a consequent relief, to some

extent, of the burdens upon the state to care for and advance the interests of its citizens. School of Domestic Arts and Sciences v. Carr, 322 Ill. 562 (1926).

Counsel for Wheaton did not refer me to, and my own research does not indicate, any Illinois statute requiring a city or county either to produce plays or promote theatrical arts for the benefit of the public or to teach acting to children, as Wheaton does in its Summer Workshop. Although some cities may sponsor plays and concerts for the public, and some educational curricula may include classes in acting, I am unable to conclude that a city or county has a “burden” to do so. Neither of Wheaton’s witnesses delineated any legal mandate which requires Wheaton or DuPage County to operate a theater or include acting in a school curriculum.

Public education is a governmental “burden” according to the Illinois Constitution because the State “has the primary responsibility for financing the system of public education.” Ill. Const., art. X, § 1. There is no similar provision indicating a burden to operate a theater or to foster an interest in the dramatic arts and I am unable to conclude from the record of this case that Wheaton lessens a burden on government by its use of the subject property.

In summary, I am unable to conclude that Wheaton possesses several of the “distinctive characteristics” of a charitable organization, according to Korzen or that the subject property is used in accordance with these characteristics. The public pays Wheaton \$20 to \$22/ticket for five theatrical productions each year, staged four times on four weekends. Wheaton apparently is able to serve an indefinite number of paying customers. This is the primary use of the subject property and this primary use is not charitable. Wheaton’s charity, at best, is dispensed to patrons in 66 seats who can only attend the first Thursday night dress rehearsal of the five performances. This use must be

considered secondary or incidental and is legally insufficient for me to conclude that the exclusive use of Wheaton's property is for charitable purposes.

For the above stated reasons, it is recommended that the Department's determination which denied the exemption from 2012 real estate taxes on the grounds that the subject property was not owned by an "institution of public charity" or used for charitable purposes should be affirmed, and DuPage County Parcel, Property Index Number 05-16-302-070 should not be exempt from 2012 real estate taxes.

Kenneth J. Galvin
Administrative Law Judge

August 8, 2014