8-31-2017

In the Matter of the Appeal of the Town of Pine Bluffs for the Decision of the Laramie County Board of Equalization

Wyoming State Board of Equalization

BEFORE THE STATE BOARD OF EQUALIZATION

FOR THE STATE OF WYOMING

IN THE MATTER OF THE APPEAL OF THE **TOWN OF PINE BLUFFS**, FROM A DECISION OF THE LARAMIE COUNTY BOARD OF EQUAIZATION (2016 Property Tax Assessment)	)))))	Docket No. **2016-46**

DECISION AND ORDER

APPEARANCES

Caleb C. Wilkins, Patton & Davison, appeared on behalf of the Town of Pine Bluffs (Appellant or Town).

Mark T. Voss, Laramie County Attorney, appeared on behalf of Kenneth Guille, Laramie County Assessor (Respondent or Assessor).

DIGEST - PROCEEDINGS BEFORE THE COUNTY BOARD

This case deals with 2016 property tax assessments of government property. The Town owns and operates a daycare facility. The Town purchased and renovated the facility at least in part with 1% sales tax monies and employs workers to operate the facility. (Town Ex. B, R. at 28). In its exemption request, the Town asserted the daycare "was started to allow parents to work while providing a safe place for childcare. Thus, the government purpose was to stimulate growth in the economy by allowing more residents of the Town of Pine Bluffs to work." (R. at 36, 166). In its appeal of the Assessor's exemption denial, the Town asserted the daycare was created for the purpose of public safety and economic development. (Appeal of Assessor's Denial of Tax Exemption, Feb. 6, 2016, R. at 5-6). The Town maintained the daycare has never operated at a profit nor did it intend a profitable business. It would require annual government subsidies.

The Assessor denied the exemption and assessed the three real property parcels and associated personal property owned by the Town. (R. at 39-40). The Laramie County

Board of Equalization (County Board) upheld the assessment. (R. at 392-403). The Town appealed to the Wyoming State Board of Equalization (State Board).[1]

ISSUE

In its opening brief, the Town presented the issue as follows:

> Is a municipality owned daycare "primarily used for a governmental purpose" when it was built with 1% Specific Purpose funds and operated at a loss in order to serve a public interest and safety need that cannot be met by the public sector?

(Town Br. 1).

Including the standard of review in his statement of the issue, the County Assessor phrases the issue as follows:

> Was the County Board's Decision and Order, which affirmed the Assessor's denial of a request for exemption from taxation, in accordance with law, arbitrary, capricious, an abuse of discretion, and supported by substantial evidence in the record?

(Assessor Br. 6).

The State Board consolidates the two statements and incorporates what both parties acknowledge to be the law in regard to property owned by a governmental entity, i.e., the presumption that the property is taxable is inapplicable, rather the presumption is the property is exempt. *Infra* ¶ 8.

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[1] In regard to the 2015 assessment of the same properties, the Town sued directly in District Court, alleging an "illegal" assessment. The District Court dismissed the Town's suit for failure to exhaust administrative remedies, and the Town appealed the dismissal to the Wyoming Supreme Court, S. Ct. Docket No. 2017-0027. There the Town asserted that Wyoming statutes provide a separate remedy allowing direct recourse to district court to enjoin an "illegal" assessment, in addition to the remedy pursued in this case of appeal of an "incorrect" assessment to the county and then State boards of equalization. The first arises under Wyoming Statutes section 39-13-109(c)(i) (2017), the second under Wyoming Statutes section 39-13-109(b) (2017). The Town's motion to stay proceedings in this case, based upon the other action, was opposed by the County Assessor and denied by the State Board. The 2015 assessment case has been argued and awaits an opinion.

The Board restates the issues as:

> Was the County Board's Decision and Order, which affirmed the Assessor's denial of a request for exemption from taxation, in accordance with law, supported by substantial evidence in the record and not otherwise arbitrary, capricious or an abuse of discretion, in light of the burden upon the Assessor to establish the Town property is taxable because it is not primarily used for a governmental purpose?

The State Board finds the case presents a close call, with the facts supporting different conclusions, and the statutes, case law, and administrative rules being somewhat in conflict and also supporting different conclusions. The State Board affirms the County Board decision primarily based upon three considerations. First, Wyoming Supreme Court cases state that the determination of whether a use is primarily for a governmental purpose is a question of fact which depends on the circumstances. While the question might well be characterized as a mixed question of law and fact, or an ultimate question of fact, in recognition of the Wyoming Supreme Court's characterization, the State Board defers to the County Board's determination. Second, the Wyoming Department of Revenue (Department) guidelines support the Assessor's and County Board's determination. On this point, however, there is some question as to how accurately the guidelines implement the statutes as interpreted by the Wyoming Supreme Court. Finally, the reasoning underlying exempting property owned by a governmental entity and used primarily for a governmental purpose does not support a conclusion that the operation of a daycare is primarily for a governmental purpose. A purpose of the exemption is to prevent one governmental entity from taxing another to avoid the spiral of taxation at a cost to taxpayers. That is not the case if costs related to taxation are reflected in daycare service fees, rather than an increase in general fund subsidization of the daycare services. By passing the tax to the daycare users, the Town daycare is on more of an even footing with private providers in terms of carrying the daycare users' fair burden of property taxes.

JURISDICTION

The State Board is required to "hear appeals from county boards of equalization." Wyo. Stat. Ann. § 39-11-102.1(c) (2017). The County Board decision and order was entered and mailed September 30, 2016. (R. at 392-404). The Town filed its notice of appeal from the County Board Findings of Fact, Conclusions of Law and Order on October 11, 2016. The appeal was timely filed from a final action of the County Board. Rules, Wyo. State Bd. of Equalization, ch. 3 § 2 (2006). The State Board has jurisdiction to consider the appeal. Wyo. Stat. Ann. § 39-11-102.1(c) (2017).[2]

[2] None of the governing statutes have been amended since the claim for the exemption was filed, thus for convenience the most recent publication of Wyoming Statutes will be referenced.

STANDARD OF REVIEW

1. When the State Board hears appeals from a county board of equalization, it acts as an intermediate level of appellate review. *Laramie Cty. Bd of Equalization v. Wyo. State Bd. of Equalization*, 915 P.2d 1184, 1188 (Wyo. 1996). In its appellate capacity, the State Board treats a county board as the finder of fact. *Id.*

2. The State Board's standards for review of a county board decision are, by rule, nearly identical to the Wyoming Administrative Procedure Act standards a district court must apply in reviewing an agency action. State Board review is limited to a determination of whether a county board's action is:

> (a) Arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;
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> (b) In excess of statutory jurisdiction, authority or limitations or lacking statutory right;
>
> (c) Without observance of procedure required by law; or
>
> (d) Unsupported by substantial evidence.

Rules, Wyo. State Bd. of Equalization, ch. 3 § 9(a)-(d) (2006).

3. The State Board Rules are patterned on the judicial review provision of the Wyoming Administrative Procedure Act. Wyo. Stat. Ann. § 16-3-114 (2017). Judicial rulings interpreting that section offer guidance:

> When an appellant challenges an agency's findings of fact and both parties submitted evidence at the contested case hearing, we examine the entire record to determine if the agency's findings are supported by substantial evidence. If the agency's findings of fact are supported by substantial evidence, we will not substitute our judgment for that of the agency and will uphold the factual findings on appeal. "Substantial evidence is more than a scintilla of evidence; it is evidence that a reasonable mind might accept in support of the conclusions of the agency."

Chevron U.S.A., Inc. v. Dep't of Revenue, 2007 WY 79, ¶ 9, 158 P.3d 131, 134 (Wyo. 2007) (citations omitted).

4. In conjunction with the substantial evidence standard, we apply the "arbitrary and capricious" standard.

> Even if sufficient evidence is found to support the agency's decision under the substantial evidence test, this [Board] is also required to apply the arbitrary-and-capricious standard as a "safety net" to catch other agency action which might have violated the Wyoming Administrative Procedures Act. *Decker v. Wyoming Medical Comm'n*, 2005 WY 160, ¶ 24, 124 P.3d 686, 694 (Wyo. 2005). "Under the umbrella of arbitrary and capricious actions would fall potential mistakes such as inconsistent or incomplete findings of fact or any violation of due process." *Id.* (quoting *Padilla v. State ex rel. Wyoming Workers' Safety and Comp. Div.*, 2004 WY 10, ¶ 6, 84 P.3d 960, 962 (Wyo. 2004)).

State, ex rel., Wyo. Workers' Safety & Comp. Div. v. Madeley, 2006 WY 63, ¶ 8, 134 P.3d 281, 284 (Wyo. 2006).

5. "Questions of law are reviewed *de novo*, and '[c]onclusions of law made by an administrative agency are affirmed only if they are in accord with the law. We do not afford any deference to the agency's determination, and we will correct any error made by the agency in either interpreting or applying the law.'" *Maverick Motorsports Grp., LLC v. Dep't of Revenue*, 2011 WY 76, ¶ 12, 253 P.3d 125, 128 (Wyo. 2011) (citations omitted).

6. Likewise, we review the findings of ultimate fact of a county board *de novo*.

> When an agency's determinations contain elements of law and fact, we do not treat them with the deference we reserve for findings of basic fact. When reviewing an "ultimate fact," we separate the factual and legal aspects of the finding to determine whether the correct rule of law has been properly applied to the facts. We do not defer to the agency's ultimate factual finding if there is an error in either stating or applying the law.

RT Commc'ns, Inc. v. State Bd. of Equalization, 11 P.3d 915, 920 (Wyo. 2000) (citations omitted).

7. "The party challenging the sufficiency of the evidence has the burden of demonstrating the agency's decision is not supported by substantial evidence." *Laramie Cty. Bd. of Equalization v. Wyo. State Bd. of Equalization,* 915 P.2d 1184, 1188 (Wyo. 1996) (citations omitted).

8. Where the established policy of the state is to exempt publicly owned property, the burden is placed on the taxing authority to establish taxability. *City of Cheyenne v. Bd. of Cty. Comm'rs of the Cty. of Laramie*, 484 P.2d 706, 708-09 (Wyo. 1971); Rules, Wyo. Dep't of Revenue, ch. 14 § 4(a)-(b) (2014); *see also* Rules, Wyo. State Bd. of Equalization, ch. 7 § 15(d) (2015) (Assessor has ultimate burden of persuasion to establish taxability of publicly owned property.).

FINDINGS OF FACT

9. Most of the pertinent facts are undisputed. As the facts are important to the ultimate conclusion of whether the use of the property is primarily for a governmental purpose, they are set forth at some length.[3]

10. Funding for the property upon which the Town operates the daycare was provided in part through a 1% sales tax voted upon by the electors of Laramie County. (Town Ex. B, R. at 28; Tr. 89-90, R. at 346-47).

11. The Town operated a daycare as early as sometime in the 1970's (Tr. 70, 87, R at 329, 344). The Town moved its daycare operation from a town community center to the current property in 2009. (Tr. 70, R. at 329).

12. The County Board found the Town daycare operates at a loss and requires a subsidy from the general fund to continue operations. (R. at 398). Substantial evidence in the record supports this finding. (Tr. 70, 73, 75, 92, R. at 329, 332, 334, 349; Town Exhibit A, R. at 15-26). The Town increased its daycare rates effective January 1, 2016 to reduce the Town's subsidy and make the daycare's rates comparable to the rates charged by the private facility. (Town's Ex. F, R. at 41; Tr. 76, 79, R. at 335, 338). At the new rates, the Town's daycare still operates at a deficit. (Tr. 85, R. at 343(b)). If the Town facility were to raise its rates to a "break-even" point, the Town's Mayor "didn't think we'd have anybody there." (Tr. 95, R. at 352).

13. At least one other licensed commercial daycare facility operates in the Town on a private basis. (Tr. 70, R. at 329). Until the January 1, 2016, rate increase, this facility charged more for daycare services than the Town. (Tr. 76, 96, R. at 335, 353).

[3] Although the facts are stated in the present tense, they refer to evidence of events and property use during the 2015 calendar year for determination of the tax exempt status of the properties for 2016.

14. The County Board found the Town daycare is open to anyone and provides "drop-in services." (County Board Findings of Fact ¶ 8, R. at 398). Substantial evidence in the record supports this finding; included within "anyone" are employees of the Town with children. (Tr. 70, 73, 79, R. at 329, 332, 338).

15. There were instances during the operation of the Town daycare when no other licensed daycare centers operated in the Town. (Tr. 70, 97, R. at 329, 354). The County Board found the Town provided the community with a service by providing daycare services which are needed. (County Board Findings of Fact ¶ 7, R. at 398). The State Board supplements the finding that a service is provided by noting the "community" serviced includes those living beyond the Town boundaries.

16. The County Board found that "the fact that the same services are offered as private enterprise means the [Town] daycare center competes with private industry." (County Board Findings of Fact, ¶ 9, R. at 398). The Town facility provides services that at least overlap services provided by the privately operated daycare in Town. While there was evidence that the Town provided "walk-in" services which were not provided by the private operation, the evidence was not conclusive. ("As far as I know, they [private operation] don't [allow "walk-ins."]. (Tr. 73, R. at 332). Although the Town presented testimony that rates were set in order "not to compete with the private facility," the Mayor acknowledged that offering the same services is a form of competition, and the State Board finds substantial evidence supports the County Board finding on this point. (Tr. 96, R. at 353).

17. The Town facility provides "pre-school" educational services" which includes Kindergarten preparation, Spanish and sign language. (Tr. 73-74, R. at 332-33). The pre-school services benefit daycare children as well as children not attending daycare. (Tr. 74, R. at 333).

18. The Town requested exemptions from property taxes for the parcels of real property upon which the daycare is operated. In a letter, the Town stated the daycare "was started to allow parents to work while providing a safe place for childcare. Thus, the government purposes was to stimulate growth in the economy by allowing more residents of the Town of Pine Bluffs to work." (Assessor Ex. 1-2, R. at 73 (labeled "CBOE DOCKET 2016-01 Exhibit A Page 9."). In a subsequent letter seeking the exemption, the Town re-characterized its purpose as "public safety, likely the most well established public purpose in law." (Town Ex. D, R. at 38). The provision of pre-school services was not disclosed in either application for an exemption. (Town Ex. D, R. at 38).

19. Although the Town attempted to elicit testimony that "public safety" was the underlying governmental purpose, both Town witnesses equivocated as to whether public safety would be affected if the Town daycare were not operated. The County Board made no finding of fact on this point. The State Board finds the Town did not establish public safety would be affected if the Town did not operate a daycare. (Tr. 71, 73-74, 89, R. at 330, 332-33, 346).

20. The State Board finds that the primary purpose of the daycare is to ensure there would be at least one daycare in the Town providing reliable, safe, daycare to community members and others in order to allow persons using the services to work. It is noted that providing safe daycare services does not equate to establishing that public safety would be affected if the Town failed to operate a daycare. (Tr. 88-89, 93, R. at 345-46, 350).

21. The letter denying the exemptions stated the request was denied "[b]ased on the information provided on the returned Tax Exemption Application[.]" (Assessor Ex. 1 & 2, R. at 75). Included within the application were assertions that all employees were Town employees and the daycare was not designed to and had never operated at a profit. (Town Ex. D, Town of Pine Bluffs Property Tax Exemption Application, Jan. 14, 2016, R. at 36, 73). From the Assessor's testimony, he considered statutes and rules governing exemption standards. He was also aware of a proposal to raise rates to be comparable with the private facility. The Assessor knew the Town daycare accepted children from Town residents, but did not know whether the Town daycare accepted others. The Assessor did not seek additional information beyond that provided in the exemption application and information, if any, previously on file for the parcels. (Tr. 45-46, 49, 57, R. at 304-05, 308, 316). Although the Assessor believed there was additional information regarding the property and its use as a daycare in those files, he offered no evidence of what that additional information might be. (Tr. 56-57, R. at 315-16).

22. Referencing the Department's exemption guidelines, *infra* ¶ 43, the County Board found that the services were not gratuitous, as a fee was charged. (County Board Findings of Fact ¶¶ 12-13, R. at 399-400).

23. Wyoming statutes do not provide a mandate for a municipality to operate a daycare. Nor do Wyoming statutes explicitly exempt municipally owned property used as a daycare. Likewise, the operation of daycares is not within the list of fifty enumerated powers authorized to all cities and towns, nor within any other statute addressing powers of cities and towns. Wyo. Stat. Ann. § 15-1-103 (2017).

24. Wyoming statutes do provide for operation and/or funding of a day care center by a board of county commissioners in order to provide care for children from families with special needs during normal working hours to enable a parent to pursue employment. Wyo. Stat. Ann. § 18-13-101 (2017). The absence of an explicit statutory provision authorizing municipalities to operate day cares was relied upon by the county attorney in support of the Assessor's position. (Tr. 115-117, R. at 372-74).

SUMMARY OF PERTINENT CASES

25. A number of Wyoming Supreme Court cases address the Constitutional and statutory provisions at issue. We summarize those here and further discuss key portions of their holdings in the next section.

26. In 1958, the production of water, gas or electricity for a municipal purpose was held to be within the scope of governmental function, but where the municipality engaged in the business of furnishing these commodities for a fee, it was held to act in a private capacity. The portion of the property generating fees from the sale of electricity was taxable while that which provided street lights, etc., to the general public for free was exempt. The Court quoted with approval the following:

> [T]he doubt should be resolved in favor of its being governmental rather than proprietary, for the reason that the usual function of government is to act in the interest of the public as a whole. In such a case, *where no profit to the municipality is involved, its acts are governmental.* Generally speaking, it is only where it steps aside, and, in a sence [sic], enters a zone of private business, or into activities which may be and frequently are carried on through private enterprises, that its activities become proprietary.

Town of Pine Bluffs v. State Bd. of Equalization, 79 Wyo. 262, 288, 333 P.2d 700, 711 (1958), *quoting Hayes, v. Town of Cedar Grove*, 126 W.Va. 828, 30 S.E.2d 726, 730 (1944). In approving this view, the Court said: "Instead of the phrase 'where no profit to the municipality is involved, its acts are governmental', we should substitute the phrase that where a service is rendered by a municipality gratuitously and for the public welfare generally, such service should be considered governmental." *Id.* at 712. Thus, it was not the lack of profit which negated a proprietary activity, it was instead the charging of a fee which was important to the Court in 1958.

27. In 1971, the Court addressed whether the use of buildings on city property and leased in conjunction with the operation of an airport met the exemption. Those buildings necessary to support the governmental function of operating an airport were exempt, those which were not necessary to that function were not exempt. *City of Cheyenne v. Bd. of*

Cty. Comm'rs of the Cty. of Laramie, 484 P.2d 706 (Wyo. 1971). The Court stated that "'governmental purpose' is not readily amenable to precise definition and such determination is largely dependent upon the circumstances presented in each case." *Id.* at 708. The Court also stated that "the mere renting of the buildings to a lessee engaged in a profit-making venture was not of itself a use for nongovernmental purposes. It depends upon the circumstances." *Id.* at 709.

For purposes of the instant case, one of the buildings which did not meet the test of "necessary" to support the airport, housed an ambulance service, which charged fees but was also subsidized by the city and county. The Court stated: "While it is true that the public no doubt did receive a benefit by the respective governments making such a service possible, a matter worthy of consideration, the fact remains that the service did not meet the test we have prescribed to bring it within the 'airport' exemption **and, of course, the service was not gratuitous**." *Id.* at 710 (emphasis added).

28. In 1974, the question was whether a declaratory judgment action could be maintained to contest the assessment and taxation of airport property. The Court held the question was not for the courts initially but for administrative authorities. Further, "the exemption of such [municipal] property is solely dependent upon its use and is therefore solely a question of fact and not of law[.]" *City of Cheyenne v. Sims,* 521 P.2d 1347, 1349 (Wyo. 1974).

29. In 1994, the Court held that where nearly one-half of a city hall was leased to the State DEQ, the building was still exempt. *State Bd. of Equalization v. City of Lander*, 882 P.2d 844 (1994). Stating the term "primarily" meant "principally" or of first importance, the Court held the reason for the City to own and use the City Hall property was "principally" or "of first importance" to house municipal government functions. "Where the primary and principal use to which property is put is public, the mere fact that an income is incidentally derived from it does not affect its character as property devoted to a public use, so as to prevent its being exempt from taxation." *Id.* at 850, *quoting* 2 Cooley, The Law of Taxation, § 640 at 1343 (4th ed. 1924).

30. In 2002, the Court addressed a museum owned by Thermopolis and operated by a for-profit corporation under contract with the town. *In re Deromedi*, 2002 WY 69, 45 P.3d 1150 (Wyo. 2002). The Court determined the property was tax-exempt. This was so even though the museum was operated by a for-profit entity which charged an admission fee. In concluding the property was used primarily for a governmental purpose, the Court noted towns were authorized by a number of statutes to establish and maintain public museums, even though the statutory provision exempting municipal property did not list property used for museums as exempt. *Id.* ¶ 13, 45 P.3d at 1154-55. The Court noted the role

museums serve in communities, providing scientific, educational and cultural activities that improve the quality of life of a community's citizenry. The Court disagreed with the contention that the museum was proprietary because it enhanced economic growth or could be deemed to compete against private forms of entertainment. *Id.* ¶¶ 14-15, 45 P.3d at 1155.

31. The companion case addressed the next tax year in which the museum was then operating. The Court held substantial evidence supported the county board of equalization's finding the property was operated primarily for a governmental purpose. The primary purpose of the museum was to provide educational and recreational benefit to the citizenry and to economically benefit the local economy in general, although its purpose also included enhancing sales tax revenues and promoting tourism. *In re Town of Thermopolis*, 2002 WY 70, 45 P.3d 1155, 1157-58 (Wyo. 2002). Noteworthy for present purposes is that the county board of equalization applied the Department of Revenue rule set forth in full below (*infra* ¶ 41) that states in part that if a service is rendered gratuitously, supported by taxes, and rendered for the public welfare or enjoyment generally, the property associated with providing such service is exempt. Based on the museum's financial condition, the county board concluded the Town was gratuitously providing the public with museum services and benefits and not acting for a commercial purpose. Those circumstances included providing part of the museum for public meetings for free. The Town subsidized the museum with funds for water and sewer, assumed some financial obligations until the museum was profitable, and received $1,000.00 per year in rent.

The county board of equalization also examined the Department rule which states: "where a city enters the field of private competitive business for profit or into activities which may be and frequently are carried on through private enterprises," the property would not be exempt. The county board found, generally public museums serve a governmental purpose and concluded that, because the museums were different in nature and purpose, the town-owned museum did not compete with the same operator's privately owned and operated museum in the town. The Court determined the county board's determination was supported by substantial evidence and correct. *Id.* ¶ 15, 45 P.3d at 1160.

32. In 2010, the Wyoming Supreme Court held a community college district's lease of district properties to private entities for use as a business park was not a use exempting the property. *Oakley v. Fremont Cty. Cmty. Coll. Dist.*, 2010 WY 106, 236 P.3d 1004 (Wyo. 2010). The Court rejected the argument that the leased properties in question served a governmental purpose because lease revenues funded community college scholarships and educational programs. The for-profit tenants' use of CWC's business park property was clearly non-governmental and not necessary or essential to facilitate the efficient operation

and maintenance of the college. The Court decided, "[e]ven if there is some tangential use of the property by CWC faculty, staff, or students of which we are unaware, it has not been demonstrated that such use is primarily governmental." *Id.*, ¶ 16, 236 P.3d at 1008. Recognizing the underlying policy of avoiding a tax spiral where the government is taxing itself to pay itself, the Court said that would be true if the property were being used primarily for a governmental purpose. "In this case, however, the for-profit tenants will likely have the tax assessment passed on to them. This will avoid the tax spiral and result in the tenants being placed on equal footing with the competitor businesses who don't lease from government entities." *Id.*, ¶ 18, 236 P. 3d at 1008.

33. A case not often cited on this issue is *Uhls v. State ex rel. City of Cheyenne*, 429 P.2d 74 (Wyo. 1967). The case involved the issuance of industrial development revenue bonds by the city, which in turn would purchase the refinery and lease it, using the lease payments to pay off the bonds. While dealing with larger issues, we discuss it here because the stated public purpose was promoting the economic welfare of Cheyenne by increasing employment, stimulating industrial activity, augmenting sources of tax revenues, fostering economic stability, and improving the balance in the City's economy. The Court held when the City of Cheyenne acquired and leased the private entity industrial development project property, it exercised a proprietary and not a governmental function and thus the property was quite properly subject to taxation. *Id.* at 88.

CONCLUSIONS OF LAW

34. The Wyoming Constitution, article 15, section 12, was amended in 1956 to limit the property tax exemption for governmental property by adding the phrase "when used primarily for a governmental purpose," which is most significant to this case. As amended it now provides:

> The property of the United States, the state, counties, cities, towns, school districts and municipal corporations, **when used primarily for a governmental purpose,** and public libraries, lots with the buildings thereon used exclusively for religious worship, church parsonages, church schools and public cemeteries, shall be exempt from taxation, and such other property as the legislature may by general law provide.

35. The Constitutional provision is implemented by Wyoming Statutes section 39-11-105 (2017), which provides in pertinent part:

> (a) The following property is exempt from property taxation:
>
> (v) Property of Wyoming cities and towns owned and used primarily for a governmental purpose **including**:

(A) Streets and alleys and property used for the construction, reconstruction, maintenance and repair of streets and alleys;

(B) Property used to furnish sewer and water services;

(C) City or town halls, police stations and equipment, traffic control equipment, garbage collection and disposal equipment and lands and buildings used to service and repair the halls, stations or equipment;

(D) Parks, airports, auditoriums, cemeteries, golf courses, playgrounds and recreational facilities. Any charges for the use of the facilities shall not exceed the cost of operation and maintenance to qualify for the exemption;

(E) Personal property used exclusively for the care, preservation and administration of city or town property;

(F) Parking lots operated on a nonprofit basis.

36. The statutory exemptions provided in Wyoming Statutes section 39-11-105(a)(v) are not limited to those explicitly stated. By the use of the term "including" the legislature intends to include other purposes even though not specifically enumerated. *In re Deromedi*, ¶ 13, 45 P.3d at 1154-55, *supra* ¶ 30.

37. The term "governmental purpose" is not readily amenable to precise definition. The determination is largely dependent upon the circumstances presented in each case. *City of Cheyenne v. Bd. of Cty Comm'rs of the Cty. of Laramie*, 484 P.2d at 708, *supra* ¶ 27.

38. The term "primarily" as used in the Constitution means "of first importance" or "principally." *Wyo. State Bd. of Equalization v. City of Lander*, 882 P.2d at 850, *supra* ¶ 29.

39. The taxable status of property owned by a governmental entity "is solely dependent upon its use and is therefore solely a question of fact and not of law[.]" *City of Cheyenne v. Sims*, 521 P.2d at 1349, *supra* ¶ 28; *see also In re Deromedi*, ¶ 10, 45 P.3d at 1154, *supra* ¶ 30 ("The taxable status of property owned by a governmental entity must be determined as a question of fact by the use made of the property.").

40. A county assessor is required to faithfully and diligently follow and apply orders, procedures and formulae of the Department of Revenue in appraising and assessing all taxable property. Wyo. Stat. Ann. § 18-3-204(a)(ix) (2007).

41. The Department of Revenue is required to confer with, advise and give necessary instructions and directions to the county assessors as to their duties, and to promulgate rules and regulations necessary for the enforcement of all tax measures. Wyo. Stat. Ann. § 39-11-102(c) (xvi), (xix) (2017).

42. The Department of Revenue has adopted rules, providing "considerations" relating to the exemption of government property from taxation:

> (c) Three considerations are typically involved in determining whether a property should be exempt:
>
> (i) Ownership of the property;
>
> (ii) Use of the property; and
>
> (iii) Type of property.

Rules, Wyo. Dep't of Revenue, ch. 14 § 3(c) (2014).

43. The Department of Revenue has cross-referenced its rules governing specific exemptions with their statutory counterpart:

> Section 5. Publicly owned property - W.S. 39-1 l-105(a)(i)-(vi).
>
> (a) Publicly owned property is not, per se, exempt from taxation. The property is exempt only "when used primarily for a governmental purpose."
>
> (b) The phrase "governmental purpose" cannot be precisely defined. The following considerations should be evaluated:
>
> (i) If a service or function is obligatory (one the governmental entity must perform as a legal duty imposed by statute), the function is governmental and the associated property is exempt.
>
> (ii) If a service is rendered gratuitously, supported by taxes, and for the public welfare or enjoyment generally, the property associated with providing such service is exempt.
>
> (iii) Property owned by a governmental entity acting in its proprietary capacity is not exempt, (e.g. where a city enters the field of private competitive business for profit or into activities which may be and frequently are carried on through private enterprises).
>
> (iv) Governmental property subject to the payment of service (user) fees is not exempt unless the specific use is provided by statute (e.g., public sewer and water services).
>
> (A) Municipally-owned electric utility plants are proprietary functions supported by service fees. The function is not specifically recognized a (sic) exempt by statute.

(B) Limited property associated with a municipally-owned utility used to light streets, direct traffic and light city offices, is exempt as a service for the public welfare generally. Such property of the municipal plants is exempt.

(v) Vacant land is not recognized as a governmental purpose, except where statutory authority exists requiring the entity to acquire and hold lands for future governmental use.

Rules, Wyo. Dep't of Revenue, ch. 14 § 5 (2014).

44. Applying the guidelines:

(i) The County Board was correct that the property is not exempt under (b)(i) as the provision of day care services by the Town was not obligatory. There is no legal duty to provide the service.

(ii) The property is not exempt under (b)(ii). The guideline requires the rendering of a gratuitous service, supported by taxes, and for the public welfare or enjoyment generally.

a. The County Board found the service was not rendered gratuitously because the Town charged a fee for the service. The law on this issue is not clear cut. Services can be gratuitous even when fees are charged. *In Re Town of Thermopolis, supra* ¶ 31. At the same time, the charging of fees for ambulance services meant the service were "of course" not gratuitous, even though subsidized. *City of Cheyenne v. Bd. of Cty. Com'rs of the Cty. of Laramie, supra* ¶ 27. Although the facts of the instant case on this specific question align very closely with *In Re Town of Thermopolis, supra* ¶ 31, the State Board concludes that the more usual dictionary definition of gratuitous, "given without recompense," was applied by the County Board. *Merriam-Webster's Collegiate Dictionary* 546 (11th ed. 2014). Applying this definition also appears consistent with *City of Cheyenne v. Board of Cty. Comm'rs of the Cty. of Laramie, supra* ¶ 27. As so defined, substantial evidence supports the County Board's conclusion that the Town's daycare services were not "gratuitous."

b. Acknowledging that a question regarding the gratuitous nature of the services exists, the State Board goes beyond the County Board application of the rule to conclude the services were clearly supported by taxes. The County Board so found and all evidence supports that conclusion. *Supra* ¶¶ 10, 12.

c. The Department rule also requires the services be for the public welfare or enjoyment *generally*. The County Board found the Town daycare provided a service to the community that is needed. *Supra* ¶ 14. But providing a service to the community is not the same as providing a service for the public welfare or even for public enjoyment.

While recognizing *Mountain Vista Ret. Residence v. Fremont Cty. Assessor*, 2015 WY 117, 356 P.3d 269 (Wyo.) was written in the context of a charitable, not governmental, property tax exemption, thus involving different statutory provisions and a presumption of taxability versus non-taxability, the State Board still finds the Court's guidance instructive. "The basis of tax exemptions is the accomplishment of public purpose and not the favoring of particular persons or corporations at the expense of taxpayers generally." *Id.* at ¶ 16, 356 P.3d at 275-76, quoting *Sunset Mem'l Gardens v. Idaho State Tax Comm'n*, 80 Idaho 206, 219, 327 P.2d 766, 774 (1958). Noting the taxpayer provided a discounted service as compared to what would be charged at a nursing home, the Court noted the reduced costs were not targeted to the public generally, nor even to a segment of the public unable to afford nursing home costs. The taxpayer was thus not entitled to the charitable exemption, as no public benefit was provided, nor public burden relieved. *Id.* at ¶ 17.

Considering the application of the Department's public welfare factor in this matter, the same holds true and is supported by the case law. Users of the ambulance services subsidized by governmental entities and purchasers of electricity from the Town's utility to light their individual homes benefitted from the services provided, but the property used to provide those services was not exempt from taxation. The public welfare was not served. *See Town of Pine Bluffs*, *supra* ¶ 26. Here, the daycare services are useful to a fair number of Town residents (and to non-residents), but the services do not apply to the public welfare or public enjoyment generally. The primary or principal purpose is the provision of safe, reliable daycare –a primary benefit only to those persons who have children and a need for those services. If the evidence had established that public safety was the primary purpose, or that education was the primary purpose, the services might be considered like the provision of street lighting from which the public generally benefitted.

(iii) The County Board concluded as a matter of law the daycare operation was a proprietary function, as a service frequently carried on through private enterprise. *Supra* ¶ 16. The Department rule states "[p]roperty owned by a governmental entity acting in its proprietary capacity is not exempt, (e.g. where a city enters the field of private competitive

business for profit or into activities which may be and frequently are carried on through private enterprises)." Rules, Wyo. Dep't of Revenue, ch. 14 § 5(b)(iii) (2014), *supra* ¶ 43. The State Board questions the statutory underpinning of examples given in the rule. Certainly private businesses undertake for profit a number of activities exempted by statute, i.e., cemeteries, golf courses, recreation facilities and parking lots. As noted above, a Town-owned museum which charged fees was exempt from property taxation notwithstanding a private museum in the same Town. *In re Town of Thermopolis, supra* ¶ 31. The County Board's determination that the public museum provided different services than the private museum, was upheld by the Supreme Court. In the instant case, evidence demonstrates the Town daycare provided different services regarding walk-in accommodations and perhaps education, and if the County Board had found the Town daycare was not competing with the private based upon the provision of different services, substantial evidence supporting that conclusion exists. But instead, the County Board found the Town daycare was a "proprietary function" – more generally providing a service frequently carried on through private enterprise. (County Board Conclusions of Law ¶ 10, R. at 402). That the County Board labeled this a "proprietary function" is supported by the holding in *Town of Pine Bluffs v. State Bd. of Equalization, supra* ¶ 26, in that it was not profit motivation, but the failure to provide the service gratuitously and for the public at large which render that portion of the Town's utility property subject to taxation. Subsequent cases, holding that the receipt of monies from municipally owned property does not render what is otherwise property used primarily for a governmental purpose taxable, causes some hesitation in placing too much weight on the *Town of Pine Bluffs* case. *See e.g., State Bd. of Equalization v. City of Lander, supra* ¶ 29. Whether the use is still correctly labeled "proprietary," in light of those cases, the exemption statute and the factual finding that the service has always been provided at rates which are subsidized with general funds, is questionable. But the State Board finds the County Board decision did not depend solely on the application of this finding. (County Board Conclusions of Law ¶¶ 10-11, R. at 402).

(iv) The County Board found the service was provided for a fee and "is not one that is specifically exempt by Wyo. Stat. § 39-11-105[a](v)(sic)." (County Board Conclusions of Law ¶ 10, R. at 402). This application of the Department rule is in error. The rule states "governmental property subject to the payment of service (user) fees is not exempt unless the specific use is provided by statute (e.g., public sewer and water services)." The rule does not require the use be listed in the exemption statute. Nor in light of Wyoming cases, could it. The exemptions provided in Wyo. Stat. Ann. 39-11-105(a)(v) are part of a non-exhaustive list. *In re Deromedi*, ¶ 13, 45 P.3d at 1154-55, *supra* ¶ 30. The *Deromedi* case is an example of this exact proposition, as the Court held property used for museums was exempt even though not listed in the exemption provision; the Court observed that municipalities were generally authorized to establish and maintain museums. That authorization was found in other statutes. *Id.*

(v) Neither party cited authority permitting municipalities to operate a daycare, nor has independent research revealed such. Wyo. Stat. Ann. § 18-13-101 (2017), not cited by the parties, authorizes boards of county commissioners to fund daycare operations for exactly the purpose asserted by the Town in this instance, i.e., in order to provide services for parents with children thus allowing the parents to work during normal working hours. In light of *Deromedi* and arguments by Assessor's counsel emphasizing the lack of legislative authorization, it raises a serious issue as to whether the Legislature has recognized operation of a daycare is a governmental function. (Tr. 115-17, R. at 372-74). The provision, however, is limited to counties.

The Legislature may have determined that only counties should be so authorized. Or it may have believed that explicit authority need only be provided to counties, which as creatures of the state have only those powers expressly granted by the Constitution or statutory law, or reasonably implied from powers granted. *Dunnegan v. Laramie Cty. Comm'rs*, 852 P.2d 1138, 1142 (Wyo. 1993). Municipalities on the other hand have the benefit of home rule under article 13, section 1 of the Wyoming Constitution. Without the benefit of briefing on the effect of Wyoming Statutes section 18-13-101, including the possible application of related home rule issues (e.g., whether the charging of a fee for daycare falls within the home rule provision's recognition of legislative control over the "levying of taxes, excises, fees or any other charges," *see Coulter v. City of Rawlins*, 662 P.2d 888, 895 (Wyo. 1983)), the State Board will not attempt to divine legislative intent underlying the grant of explicit authority to counties and not municipalities to operate daycares. Instead we note municipalities are not explicitly authorized to operate daycare centers, whereas they are expressly authorized to operate museums, thereby distinguishing *Deromedi* on this aspect of the case. Standing alone, the lack of express statutory authority is not determinative, yet it supports the County Board's overall conclusion that operation of a daycare is not a governmental purpose.

45. There is concern regarding the Department Rules and the County Board's application of those rules as noted above. The State Board also notes some concern with the County Board's lack of a conclusion of law regarding the Assessor's burden and duty to overcome the presumption that government-owned property is not taxable. While the County Board made no explicit finding, there was testimony from the Assessor acknowledging his burden, and the County Board did include the issue in the discussion portion of its decision. (County Board Findings of Fact, Conclusions of Law & Order p. 4, R. at 395). In light of our review of the entire record, the State Board finds no error of law on this issue, as it concludes the County Board appropriately placed the burden on the Assessor to establish taxability of the property used for the Town's daycare.

46. In conjunction with the Assessor's burden, the County Board's stated reason for denying the exemption was the information provided in the application did not qualify the property for such. *Supra* ¶ 21. The hearing disclosed additional information relied upon

by the Assessor, including that the rates had recently been raised. *Supra* ¶¶ 12-13. The County Board recited the Assessor's assertion that "when government operates a business that can be operated privately and done by private organizations, he agrees with the statutes and rules and does not believe they should be exempt from taxation." (County Board Findings of Fact, Conclusions of Law & Order p. 6, R. at 397). This statement is at best an oversimplification of the statutes, Department rules and case law on the issue, which is recited above and need not be repeated. As such, the recital by the Assessor and repetition by the County Board is also concerning. But a reading of the transcript discloses a fuller application of the rules by the Assessor, and by the County Board after the hearing, with full recognition that the rules are guidelines, not a litmus test in which any one factor necessarily determines the issue. In sum, the State Board affirms the decision of the County Board as the Supreme Court has stated that the question of whether property is primarily used for a governmental purpose is one of fact and not of law. *City of Cheyenne v. Sims, supra* ¶ 28; *In re Town of Thermopolis, supra* ¶ 31. Whether this Board would have reached a different conclusion, is not the question. Taken as a whole, substantial evidence supports the County Board's conclusion that the property is not used primarily for a governmental purpose.

47. The State Board finds support for affirming the County Board's determination in the policy underlying the exemption of governmental property from taxation, as explained by the Wyoming Supreme Court on numerous occasions. Most recently and pertinent in this instance is the *Oakley* case cited above. In the words of the Court:

> [W]e want to avoid a tax spiral where the government is taxing itself to pay itself. That certainly would be true if the property were being used primarily for a governmental purpose. In this case, however, the for-profit tenants will likely have the tax assessment passed on to them. This will avoid the tax spiral and result in the tenants being placed on equal footing with the competitor businesses who don't lease from government entities.

Oakley v. Fremont Cty. Cmty. Coll. Dist., ¶ 18, 236 P.3d at 1008, *supra* ¶ 32.

48. Here the Town consistently recited a goal to not compete with the private sector and to reduce the general fund subsidization of its daycare operation. Passing the cost of property taxation to those using the services, rather than to Town residents generally (or to Wyoming taxpayers overall if the exemption were granted), avoids the "tax spiral" and make strides towards both of the Town's stated goals.

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ORDER

IT IS THEREFORE ORDERED that the Laramie County Board of Equalization's Order affirming the County Assessor's denial of the requested property exemption is hereby **affirmed**.

Pursuant to Wyo. Stat. Ann. § 16-3-114 and Rule 12, Wyoming Rules of Appellate Procedure, any person aggrieved or adversely affected in fact by this decision may seek judicial review in the appropriate district court by filing a petition for review within 30 days of the date of this decision.

DATED this 31st day of August, 2017.

STATE BOARD OF EQUALIZATION

Martin L. Hardsocg, Chairman

E. Jayne Mockler, Vice-Chairman

David Gruver, Board Member

ATTEST:

Nadia Broome, Executive Assistant

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of September, 2017, I served the foregoing **DECISION AND ORDER** by placing a true and correct copy thereof in the United States Mail, postage prepaid, and properly addressed to the following:

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