Approved On:

Minutes of the House Committee on Taxation. The meeting was called to order by E. C. Rolfs, Chairman, at 9:00 a.m. on January 13, 1988 in room 519 South at the Capitol of the State of Kansas.

The following members were absent (excused):

Representatives Aylward

Committee staff present:

Tom Severn, Legislative Research
Chris Courtright, Legislative Research
Don Hayward, Reviser of Statutes
Millie Foose, Committee Secretary

Chairman Rolfs distributed copies of new bills that are to be included in bill books and specified bills that were to be deleted. He then discussed plans for next week's meetings and goals that he wants to achieve.

Mr. James P. Davidson, Attorney for State of Kansas Board of Tax Appeals, discussed the matter of exemption from Ad Valorem Taxation for the Y.M.C.A. (Attachment 1) He explained the reasons for the tax and answered questions from committee members. Mr. Keith Farrar also explained why some associations are not assessed sales tax while others are. He explained that tax is assessed on the total facility and not a small component, such as a vending machine.

Tom Severn discussed five proposals that had been discussed at an interim meeting covering Sales Tax, Statewide Reappraisal, Property Tax Abatements, Corporation Income Tax. and Bond Interest. (Attachment 2)

The minutes of the January 12 meeting were approved.

There being no further business, the meeting was adjourned.

E. C. Rolfs, Chairman

BEFORE THE BOARD OF TAX APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE APPLICATION
OF YOUNG MEN'S CHRISTIAN ASSOCIATION
FOR EXEMPTION FROM AD VALOREM TAXATION
IN SHAWNEE COUNTY, KANSAS.

Docket No. 6285-86-TX

O R D E R

Now, on this 4th day of May, 1987, the above captioned matter comes on for consideration and decision by the Board of Tax Appeals of the State of Kansas.

This Board conducted a hearing in this matter on January 16, 20 and 23, 1987. After considering all of the evidence presented thereat, and being fully advised in the premises, the Board finds and concludes as follows:

The Board has jurisidiction over the parties and the subject matter of this proceeding, pursuant to K.S.A. 79-213.

The subject matter of this tax exemption application is described as: See Attached Exhibit "A"

The Young Men's Christian Association (hereinafter Y) asserts its real and personal property is exempt from ad valorem taxation pursuant to K.S.A. 79-201 Second. K.S.A. 79-201 Second was amended by the 1986 Legislature. The Y does not argue that the 1986 amendments have any impact on this decision. The Y argues that the property is exempt because it is used exclusively for charitable, educational, scientific, religious and benevolent purposes. The Board will examine each theory, both separately and in combination with the other theories for exemption.

FINDINGS OF FACT

The parties do not dispute the nature of the Y's activities. Applicant's 11-17 fairly depict the properties controlled by the Y. Applicant's 22-28 described the programs and charges for use of the facilities. The bound materials (ring binders) contain examples discussed in the transcript as well as some of the Y's argument. We will discuss specific facts or exhibits as they relate to our conclusions. References to the exhibits offered by either side will be referred to as Applicant's ___ or County ___.

The evidence and testimony presented are not entirely consistent. The transcript is replete with "clarifying" statements by both witnesses and counsel. Such statements are offered to "correct" prior testimony which is not, by the parties' own admission, supported by the facts. SCPT pp. 126, 150-152, 156, 158, 181-182, 252, 267-269, etc. The exhibits and testimony frequently conflict with each other. PP. 64, 119-120, 126, 134, 160, 171-172, 181-182, 267-269, 277, 335-342, 347-350, etc.

We must examine the evidence presented to determine whether the Y has proven it is entitled to exemption. This order frequently cites portions of the transcript or refers to exhibits

which illustrate one of the parties' views or that of the Board's. The Board does so with some reservation. Portions of the evidence are characterized as "massaged" pp. 568, 573: "unaudited" p. 164, 356 subject to inaccuracy pp. 356-359, 412-413, 478-484 containing duplication, p. 84; 221 or are the product of unknown calculations. Applicant's 47. Nonetheless, we must consider the evidence as it is the only, and therefore best, available.

The Board notes that the evidence shows the Y conducts a number of activities which improve both the individual's and the community's quality of life. The Y's commitment to serving all segments of the community is admirable. A number of individuals receive free services only because the Y exists. The Y's programs are designed to enhance the physical fitness of the citizenry and are a potential source of information to many who participate in these programs. However, the fact that an organization is operated for "good" or "noble" purposes is not the test for exemption as defined by Kansas statutes or the cases which interpret the words used by the Legislature. Our decision must be based upon the statutes as written and the legal interpretations pronounced by the courts.

CONCLUSIONS OF LAW

In Lutheran Home, Inc. v. Board of County Commissioners, 211 Kan. 270, 505 P.2d 1118 (1973) the Court reiterated the basic rules applied in all exemption cases. The principles are summarized as follows:

> (1) Constitutional and statutory provisions exempting property from taxation are to be strictly construed.
> (2) The burden of establishing exemption from taxation is on the one claiming it.
> (3) The exemption from taxation depends solely upon the exclusive use made of the property and not upon the ownership or the character, charitable or otherwise, of the owner.
> (4) The test of whether an enterprise is charitable for ad valorem tax purposes is whether its property is used exclusively to carry out a purpose recognized in law as charitable.
> (5) The question is not whether the property is used partly or even largely for the purposes stated in the exemption provisions, but whether it is used exclusively for those purposes.
> (6) The phrase "used exclusively" as contained in Section 1, Article 11, of the Kansas Constitution, was intended by the framers in the sense that the use made of the property sought to be exempt from taxation must be only, solely and purely for the purposes stated in the constitution and without admission to

> participation in any other use. (Citations omitted). Lutheran Home, supra, at page 275-276.

The Board will examine each theory advanced by the Y in the context of the above-stated rules.

Exemption for Charitable Use.

The Y states its purpose and operations are charitable in nature and that its property is used exclusively in furtherance of these purposes. Applicant's 37 suggests several definitions which may be applied to the term charitable. (It also contains applicant's proposed definitions for the other statutory terms).

Kansas courts have addressed charitable exemptions many times. We need look no further than the Kansas Reports to find the definition of charitable. Lutheran Home, supra., is neither the first nor last case defining charitable. Lutheran Home is factually similar to the instant case in some respects.

The Lutheran Home plaintiffs operated a nursing home in Dickinson County. The home was incorporated as a not-for-profit institution and was exempt from income taxation. The stated purpose of the corporation was to own, lease, operate and maintain nursing homes on a nonsectarian basis; to provide elderly persons with services to meet thier physical, social and psychological needs; and to contribute to the residents' health and happiness. The corporation charged a fee to its residents sufficient to meet operating expenses and debt service. About half the residents paid their own way and half received welfare assistance. Some patients, unable to pay, received service, while the corporation carried the unpaid fee as a debit. Nothing showed that any resident was admitted for less than the going rate although some did not actually pay.

This case is distinguishable from Lutheran Home in two respects: The Lutheran Home provided nursing home services and the Y, for the most part, provides exercise and physical fitness services; and the Lutheran Home did not regularly admit patients for less than the going rate, the Y does.

The Y testified that their fees were set so that adult members, particularly YAC (Y Athletic Club) members, subsidized the expenses related to youth members and specific programs offered to the citizenry. The Y charges more to non-members than to members for many of its programs. The revenues in excess of expenses from adult members are used to meet the shortage of revenue generated from youth membership and programs fees. Mr. Eastburn testified that a study (Applicant's 47) prepared by Roger Brown showed that the Y generated approximately $380,000 in excess of expenses from adult members. Mr. Daniels, a member of the applicant's Executive Committee and Board of Directors testified that:

> ". . . there are certain things we are willing to pay for with the money from the subsidies that we earn, and there are certain things we are not willing to pay for. For instance, we would not pay a dime to subsidize the Nautilus, but we

> would pay plenty of money to subsidize a youth program ..... The adult programs for the most part, we think they absolutely have to carry their own weight as far as direct expenses." p. 547.

Mr. Daniels also testified that the Y could not raise the amount required to pay taxes from voluntary donations alone. p. 570. He opined that the fees for adult memberships had already reached the point of diminishing returns. This testimony illustrates that the Y is, in many respects, a business operation. Adult members are charged a fee in return for specific services. pp. 128, 159, 175-176, 249, 252. The Y is sophisticated enough to realize that people will pay more if they receive more. Adult membership fees are no more than a bargained exchange between the Y and its members. There is no evidence that adult members consciously apportion the fee charged between services received and a gift to subsidize other programs. Some members might even be offended if they learned that they were charged more than the reasonable cost of the services received. Mr. Eastburn testified that he could not determine for himself what (if any) portion of his membership fee constituted an income tax deductible contribution. pp. 334. The revenues are not devoted exclusively to charitable purposes by the Y. A substantial portion of the membership fees pays the cost for services to paying members. Only the "excess" is "redistributed" to youth and program expenses. The testimony shows the Y commingles all of its revenues into a single fund. pp. 287. Thus, the "redistribution" which allegedly occurs exists as a function of the Y's accounting system.

The North Branch (Kuehne) facility operates in a similar manner as the Downtown facility. The number of adult memberships compared to youth members is smaller, but the practice is the same.

The Camp Hammond facility is used by any member of the public who desires to spend time at the camp. Nominal fees are charged when the camp is used by individuals. We also note that the Y's day camp program generates approximately $9,000 in excess of direct expense.

The definition of charitable adopted in Lutheran Home is ". . . the doing of something generous for other human beings who are unable to provide for themselves. To have charity there must be a gift from one who has to one who has not." Lutheran Home, supra. at page 277 (emphasis supplied). This definition of charity, coupled with the requirement that the property be used only and solely for that purpose, leaves little doubt that the property is used for far more than charitable purposes. In addition, there is no evidence that the group of persons who use the camp are confined only to legitimate objects of charity. In fact, Mr. Brown's report (Applicant's 47) chastises the Y for "underutilizing" Camp Hammond. Mr. Brown recommended that the Y increase "income production" and reduce the "subsidy." If the Y accepts Mr. Brown's recommendations as they indicated they would, the Y would once again depart from its professed 'charitable' purpose.

We note in passing that the Y's theory of exemption is supported by Topeka Presbyterian Manor v. Board of County Commissioners, 195 Kan. 90, 402 P.2d 802 (1965) and Nuns of St. Dominic v. Younkin, 118 Kan. 554, 235 P. 869 (1925), cited by the Y in its Reply Brief. Those cases define charitable as a sweeping, amplitudinous term. All that is required in those cases is that some charity occur to a few recipients (as few as 5%) for the entire property to be exempt so long as the profits do not beat a direct path to the owner's pocket. Those cases were either expressly, or by implication, overruled by the Lutheran Home court. We find no indication that the Supreme Court has abandoned Lutheran Home and the principals enunciated in that case. Seventh Day Adventist v. Board of County Commissioners, 211 Kan. 683, 508 P.2d 911 (1973). Defenders of the Christian Faith v. Board of County Commissioners, 219 Kan. 181, 547 P.2d 706 (1976) Kansas City District Advisory Board v. Board of Johnson County Commissioners, 5 K.A. 2d 538, 620 P.2d 344 (1980) National Collegiate Realty Corp. v. Board of Johnson County Commissioners, 236 Kan. 394, 690 P.2d 1366 (1984).

The Board is likewise not inclined to grant exemption pursuant to the 1986 version of K.S.A. 79-201 Second due to the Y's magnitude of committing resources and providing services to its fee-paying members. The 1986 statute is not, in our opinion, so broad as to encompass the Y's brand of "charity." We believe Mr. Eastburn's testimony, taken at face value, is illustrative of this point. Mr. Eastburn testified that the Y has a total membership of 6,867 members. 1,614 people receive full or partial scholarships. That indicates only 23.5% of the total membership receive any "charity." If adult membership is compared to the number of adults receiving "free or nearly free" services, the percentage is dramatically reduced. See SCPT pp. 346-350 and Applicant's 45. Applicant's 47 shows that the Camp Hammond facility recovers all of the direct expenses associated with its operations. This evidence leads us to the finding that the ultimate purpose of the Y may include charity to some, the Y's property is certainly not exclusively nor even primarily used for such purpose. In our opinion, the charity is incidental to the business purposes of the Y.

The Board concludes the Y's property is not used exclusively for charitable purposes pursuant to K.S.A. 1986 Supp. 79-201 Second.

Exemption for Educational Use

The Y claims that its facilities are used for educational purposes. The Y alleges that all programs sponsored by the Y educate the participants. The Y also acts as an intermediary in distributing handouts either drafted by the National organization or printed by other organizations. Greatly summarized, the information relates to recreational sports, fitness, health, nutrition and social values. See material in ring binders.

The most recent case discussing educational use is National Collegiate Realty Corp., supra., (NCRC). In that case, the Supreme Court held that the NCAA headquarters building was used for educational purposes and exempt from property tax. The purpose and use of the property is to regulate and promote inter-collegiate athletic events. The court repeatedly stated that education encompasses sports in universities or schools. Education has been defined broadly as " . . . the whole course of

training-moral, intellectual, and physical. An educational institution has been defined as one which teaches and improves its pupils, that is, a school, seminary, college, or educational establishment." 71 Am Jr. 2d State and Local Taxation §382 p. 689 (Emphasis supplied). The membership of the NCAA is restricted to schools and colleges. The Y does not limit those eligible for membership. We construe the language of NCRC as exempting property of organizations whose use is to directly or indirectly render services to schools, seminarys, colleges or educational institutions. Further, we cannot agree that the presence of posters, handouts or pamphlets transforms a weight lifting room into an educational establishment. Nearly all property would or could qualify for exemption under such an interpretation.

If the property is qualified for exemption it must be exclusively used for an exempt purpose. All uses of the property must be considered. The Kansas Supreme Court has stated:

> "The plaintiffs' claim that whether the property in question is "used exclusively" for educational purposes, means whether the property is "used primarily" for that purpose, cannot be sustained. The terms are not synonymous, and our decisions so hold . . .
>
> . . . It was held the total use of the property must be measured and that since the headquarters building owned by the association was used in part for individual benefit of the teacher members, the property was not used directly, immediately, solely and exclusively for educational purposes as those terms are defined by the decisions of this court."

Sigma Alpha Epsilon Fraternal Ass'n v. Board of County Comm'rs., 207 Kan. 514, 520, 485 P.2d 1297 (1971) citing Kansas State Teacher's Ass'n v. Cushman, 186 Kan. 489, 351, P.2d 19 (1960). We believe the facts presented through testimony support findings that the property is used for sports, exercise, relaxation, recreation, dining, sale of merchandise and business meetings. These activities are hardly confined to educational pursuits. Here, as in Kansas State Teachers and Sigma Alpha Epsilon the property is used for diverse and personal reasons. It is not used exclusively for educational purposes.

The Board is especially concerned with the implications of a contrary holding in this case. If an organization which puts posters on the wall, hands out flyers and maintains a swimming pool for the public is exclusively educational, then any organization could qualify. Non-profit status or a "mission" statement are not determinative for property tax exemption. Sunday School Board of the Southern Baptist Convention v. McCue, 179 Kan. 1, 293 P.2d 234 (1956); Washburn College v. Commissioners of Shawnee County, 8 Kan. 344 (1971). Our concern is akin to that expressed in St. Mary's College v. Crowl, 10 Kan. 442 (1872) at page 452:

> "And it seems to be eminently fair that every kind of property protected by the law should contribute its proportionate share. For if any portion of the property of the state should be exempt from taxation, it would necessarily throw an additional burden on the rest of the property. If the rule of taxation contended for by counsel for plaintiffs were adopted, and followed to its legitimate results, it would naturally lead to the most disastrous consequences to this commonwealth. If the employment of Indians on a farm, and teaching them how to cultivate it would exempt all the cultivated land of such farm from taxation,--if it would also exempt all the wild, uncultivated and uninclosed prairie land used for grazing or for cutting hay from taxation,--if it would also exempt all the woodland from which was taken from taxation,--if it would exempt all the horses, neat cattle, and other stock kept on said farm, the pleasure carriages, farming implements, etc.,--then every farmer in the state might obtain an Indian (or indeed he might obtain any other person) and commence teaching him agriculture, and thereby exempt all his property from the burdens of taxation. And also, by analogy, every blacksmith, or other mechanic, might obtain an apprentice and teach him his trade, and thereby exempt his shop and tools from a like burden. And also every householder might teach his own children their alphabet, etc., and thereby relieve his homestead from the burdens of taxation, for his homestead would then, of course, be used partially for purposes of education."

There is little difference between the primary activities on Y property and those at any private health club or camp. We find no distinction between the Y's sale of food, clothing and laundry services on its premises and the sale of books by the Kansas State Teacher's Association. To do otherwise has the effect of either deleting 'exclusive' or redefining 'educational' to include almost any property where some training takes place. Under applicant's theory of educational use, even a for-profit business could qualify if they distributed leaflets or if they trained employees to type. That theory of exempt use was considered and rejected in Lawrence Business College v. Gardner, 145 Kan. 145, 64 P. 2d 63 (1937).

The Board notes with interest the testimony of George Scobas found at pages 171-172 of the partial transcript. Mr. Scobas testified that if a youth disobeyed the house rules (Applicants' 18) that the Y would 'educate' the youth by suspending his membership, thus separating the members from further education. He also testified that the use of Camp Hammond was "tough to supervise" and available for use with little more than cursory supervision. p. 172.

Most 'educational' programs are offered for an additional fee. See Applicant's 24 and 25.

Some of the programs may have educational value to the participants. Some of the handouts or posters may inform members of certain health-related facts. However, the Y did not, and we suspect would not, allege that most of its properties are erected and maintained purely and solely to educate the public or its members. Once again, our interpretation of the facts in this case leads us to find that the educational aspects of the Y's programs are incidental to the Y's business purposes.

The Board concludes that the Y properties are not used exclusively for educational purposes.

Exemption for Religious Use

The Y argues that its property is devoted to religious use pursuant to K.S.A. 79-201 Second and Article 11, Section 1 of the Kansas Constitution.

Our examination of the exclusive use test is just as applicable here. We perceive the Y's argument to be similar to its theory of charitable and educational uses. The property and programs are not exclusively devoted to religious purposes, but the Y argues that some elements of their programs or some parts of the facilities are used for religious purposes from time to time. The list of activities claimed as religious is relatively short. We believe it is unnecessary to reiterate our examination of exclusive use, and will proceed with the Y's claim of religious use for the portion of its activities so designated.

Religion or religious has been defined by Kansas Court as ". . . being an apprehension, awareness or conviction of the existence of a Supreme Being controlling one's destiny." Sunday School Board, supra, at page 6. The Board can see no reason to expand upon that broad definition.

The Y first lists Camp Hammond as property used for religious programs. The postulate here is that Camp Hammond is a site where people are brought face to face with God's creation and may recognize it as such. This property and the testimony relating to it are so similar to Kansas City District Advisory Board v. Board of Johnson County Commissioners, 5 K.A. 2d 538, 619 P.2d 344 (1980) that the language of the decision bears repeating:

> "The remaining church camp and its grounds are not readily characterized as exempt or nonexempt. This camp services a mixed religious, educational and recreational purpose. Testimony indicated that, '[I]t is generally for

> the combination of activities for children and youth, and worship, and instruction, but recreation as well.' The fact that camp participants enjoy recreational activities whether incidental or in addition to religious instruction does not dilute the exclusively religious purpose of the camp.
>
> However, testimony indicated that groups from outside the church use the camp for a nominal fee. There was no evidence that this use was solely for religious purposes rather than secular recreational. Because it was plaintiff's burden to prove that the camp was used exclusively for exempt purposes, we must hold that the trial court erred in abating taxation of the camp." supra. at p. 542.

The evidence in this case shows that Camp Hammond is used by anyone who is willing to pay the nominal fee and sign the use permit, a practice similiar to that described in Kansas City Dist. Advisory Bd., supra. See brown ring binder "Application and Agreement": p. 113, 172. The actual use of Camp Hammond is relatively unsupervised. SCPT pp. 172. No evidence suggests that anyone using the facility was ever made more aware or developed an increased conviction of the existence of a Supreme Being as a result of visiting Camp Hammond. It is certainly not solely owned for that purpose. The practice of allowing any person to use the camp cannot support an argument for exclusive religious use. The policies for Camp Hammond state that the property is intended to be used for recreation. See brown ring binder "Camp Hammond Policies." We find insufficient evidence of any religious component associated with each activity at Camp Hammond. Admittedly, when the camp is used by religious groups for worship, retreats or as the site of religious instruction, the camp is used for religious purposes. There is no evidence as to the proportion of time the camp is used by church groups. There is substantial evidence that the Y uses the facility for the production of revenue. See Applicant's 48.

The Y sponsors athletic leagues open to church teams. The Y's participation in this program consists of securing playing field(s), hiring and paying umpires and ballfield operators. The Y's real property is not used as a site for all games, but its offices are used to administer the program. SCPT p. 254. The Y charges a fee for its services. The Y offers no evidence that a single person developed a greater awareness or conviction of a Supreme Being as a result of playing softball, volley ball or basketball, in these programs. Nor does the Y demonstrate that administering this program is distinguishable from private entrepreneurship. The religious element attributable to the Y's administration of church athletic leagues is incidental to the Y's production of revenue from these programs.

The Y maintains a chapel which is used by various groups. Some church groups use the chapel for meetings and a Bible is available. Mr. Scobas testified that the room is used by other groups. SCPT pp. 255, 275-276. The Board recognizes that when

used by religious groups, the chapel is temporarily devoted to religious use. However, the Y failed to quantify the amount of religious use for the chapel. The Board concludes that the Y failed to sustain its burden of proving that this portion of the facility is used exclusively for religious purposes.

The Y displays two works of art in the downtown facility. Both depict 'religious' subjects. A thought for the day is allegedly uttered at the commencement of each class. pp. 169.

If the display of religious art is a religious use then a large number of homes and offices are unjustly taxed. We find the argument offered by the Y in support of its religious use of this property is similar to contending that hotel rooms are being used for religious purposes when they contain a Gideon Bible. Under that theory, every property would or could be exempt. See Sunday School Board, supra. There is no evidence that anyone viewing those artworks acquired a greater conviction of the existence of a Supreme Being.

The Y states that its facilities are operated in such a fashion as to create ". . . an intangible but nonetheless real 'Christian' atmosphere." At the hearing, the witnesses described the nature of that 'Christian' atmosphere. p. 164-165. We find little, if any, evidence that the 'Christian' atmosphere allegedly created is any more than the promotion of principals common to an organized society. The substance of the Y's 'atmosphere' is to encourage individuals to recognize the worth of themselves and others, achieve physical fitness and to describe the affect of certain foods on a person's behavior--concepts hardly unique to Christianity. To adopt the argument of the Y may be tantamount to pantheism. Again, the religious aspects of the Y's use of the facility is incidental to the delivery of services to its members and not vice-versa.

The Board concludes the Y is neither exclusively nor even primarily devoted to religious use.

Exemption for Scientific Use

The Y professes to engage in scientific pursuits. In support of its thesis, the Y offers testimony describing its various health and fitness programs. The Y offers a variety of services designed to enhance its member's physical condition. See program materials in ring binders.

Our review of K.S.A. 79-201 and the cases interpreting it does not reveal a decision which defines scientific. We must therefore determine what the Legislature intended when it declared 'scientific' uses to be exempt.

Tax exemptions are granted because the Legislature or the Constitution's draftsmen perceived that the public would receive a benefit greater than or equal to the taxes which the owner would otherwise pay. The State encourages certain activities by eliminating the tax burden typically imposed. State ex rel. Tomasic v. City of Kansas City, 237 Kan. 572, 701 P.2d 1314 (1985); State ex rel. v. Board of Regents, 167 Kan. 587, 207 P.2d 373 (1949). The Board concludes that the Legislature intended to exempt property used for scientific purposes that results in a benefit to the public at large. We are obligated to construe the exemption narrowly, consistent with Legislative intent. Farmers

Coop v. Kansas Board of Tax Appeals, 236 Kan. 632, 694 P.2d 462 (1985). The Y suggests that science is properly defined as ". . . knowledge obtained through study or practice." The Board concludes that property used for scientific purposes is that property devoted to expanding or adding to the body of knowledge then existing. If the organization's purpose is to discover that which has not been known and, in turn, inform the general public of the discovery, the public is benefitted and the policy is satisfied. On the other hand, an organization, which only conducts established tests or assessments, benefits an individual and not the public at large.

The Y only provides services to individuals, and, in most cases, only for a fee. The evidence shows that the Y only conducts tests which assess the physical condition of an individual. See Applicant's 2 and program descriptions in ring binders. We find nothing in the testimony which shows the Y's course of dealing satisfies the public purpose justifying exemption. Nothing in the testimony proffered by the Y shows that the tests add to or enhance the store of scientific knowledge known to man. The Y does not collectively analyze the test results. We suspect the Y would not disclose the results of the tests it conducts to anyone other than the individual. Were we to adopt the Y's argument here, every physician's office would soon be exempt.

The Board concludes the Y is not exempt as a scientific organization and that its property is not used exclusively for scientific purposes.

Multiple Uses of the Property

Unquestionably the Y provides valuable services to its members. A significant number of people, primarily youth, use the facility without charge. Applicant's 45. A significant number are better informed about fitness, exercise, nutrition and recreation because the Y exists. But that is not the standard to be applied when considering whether to exempt the property.

The Y argues that only the Y's purpose and use are proper considerations in this case. In support of its argument, the Y cites Topeka Presbyterian Manor, supra and Nuns of St. Dominic, supra. Those cases, and the principals they espouse, have been rejected by the courts. Lutheran Home, supra. The standard recognized and applied by Kansas courts narrowly construes 'exclusive' use. Further, it is not enough that the organization be primarily engaged in exempt pursuits. Kansas State Teachers Ass'n, supra, Sigma Alpha Epsilon, supra, Sunday School Board, supra.

The Y chastises the county because they failed to list one activity or facility that is not used for exempt purposes. We have little difficulty in doing so. The YAC locker room is off limits to a majority of the Y's members. p. 277. The testimony indicates that the whirlpool and sauna are occasionally available to one 'scholarship' member. p. 64. The balance of the area designated as "Athletic Center" on Applicant's 16 is exclusively used by YAC members who pay at or above market rates for the use of those premises. See SCPT p. 571. The individual exercise room and the 'nap room' are available only to YAC members. SCPT p. 277. Applicant's 47 shows that that portion of the facility is used by the Y to generate $96.00 per member in

excess of the cost of services. The Y expected to accrue a total of $ 67,117.00 in excess of expenses from the sale of YAC memberships in 1986, assuming the data presented by the Y is reliable. A cursory examination of Applicant's 16 shows that the YAC occupies approximately 15% of the lower floor in the Downtown Branch.

Mr. Scobas also testified that the chapel and conference room are available to any group without charge. pp. 252, 255 and 276-277. His testimony established that both for-profit and not-for-profit organizations could use the facility so long as they did not attempt to sell merchandise or proselytize people not associated with the organization.

The North Branch 'business men's' lockeroom is only used by an exclusive group who pay more than the cost of providing services to them. See Applicant's 47.

The Y charges fees which are about the same amount as for-profit entities. SCPT p. 571.

We find nothing religious, educational, scientific or charitable in the sale of food, beverages or gym shorts. Those services are not essential or even incidental to the Y's self-professed mission.

K.S.A. 79-201 Second specifically prohibits owning property for investment purposes regardless of how profits are distributed. The adult membership fees are structured so as to return a substantial amount of revenue over and above direct and indirect expenses associated with the delivery of services to that class of members. The Y's use of Camp Hammond, indeed all their facilities, is so factually similar to the mixed use described in Kansas City District Advisory Board, supra., that it warrants little further discussion. The evidence in Advisory Board,supra., is nearly identical to the evidence presented here. The 'exclusive use' component for exemption is the same whether the theory is religious, educational, charitable or scientific.

The Y presented no evidence describing the actual use of its personal property other than that it was devoted to the same general purposes as the real estate. The decisions in Sigma Alpha Epsilon, supra, and Alpha Tau Omega v. Douglas County Commissioners, 136 Kan. 675, 18 P.2d 573 (1933) indicate that where the use of personal property is devoted to the same non-exempt purpose as the organization who owns it, the personal property is not exempt. We conclude the personal property is used for the same purpose and its exemption must rise and fall with that of the organization.

Exempt Status For Each Year

Our decision is based upon the evidence submitted for consideration. Though the Y stated that their 'mission' had not changed, our decision must consider the use of the property in each year. The use of any property may change from time to time. Our review of the evidence shows that the Y presented evidence describing the current use of its facilities, its programs, finances and operations. See pp. 340, 355 and Applicant's 45. Some testimony suggests that the actual use may have changed over a period of time. SCPT pp. 140-141.

We are not prepared to expand the effect of today's decision beyond the evidence before us. Nor are we prepared to overrule this Board's previous orders in years past. Just as the Board is convinced that the current use is not entitled to exemption, we are unable to determine whether or when the use changed from prior years. Conversely, we would not hesitate to grant exemption if the Y limited its activities to exempt purposes. We therefore conclude that our decision to place the Y's property on the tax rolls should commence with the 1986 tax year. The parties are free to present additional evidence in support of their respective positions on rehearing.

The Board concludes that the Y failed to sustain its burden of proving its property is used exclusively for charitable, educational, religious or scientific purposes. We draw the same conclusion whether the theories of exemption are viewed singly or in combination.

IT IS, THEREFORE, BY THE BOARD OF TAX APPEALS OF THE STATE OF KANSAS, CONSIDERED AND ORDERED that, for the reasons more fully set forth herein, the application must be, and the same is hereby, denied.

If any party to this appeal feels aggrieved by this decision, they may file a written request for a re-hearing with this Board. The written request for rehearing shall set forth specifically and in adequate detail the particular and specific respects in which it is alleged that the Board's order is unlawful, unreasonable, capricious, improper or unfair. The written request must be received within thirty (30) days of the certification date of this Order. If, at the end of thirty days the Board has not received a written request for a re-hearing, this Order will become a final Order from which no further appeal is available.

IT IS SO ORDERED.

BOARD OF TAX APPEALS
SEAL
ATTEST
STATE OF KANSAS

Fred L Weaver
FRED L. WEAVER, CHAIRMAN

Dallas E. Crable
DALLAS E. CRABLE, MEMBER

CONCURRING AND DISSENTING
JOHN P. BENNETT, MEMBER

David C Cunningham
DAVID C. CUNNINGHAM, SECRETARY

DISSENTING OPINION
ROBERT C. HENRY, MEMBER

James P Davidson
JAMES P. DAVIDSON, ATTORNEY

Keith Farrar
KEITH FARRAR, MEMBER

DISSENTING OPINION

The case under consideration concerns the Topeka Young Men's Christian Association (hereafter the YMCA or the Y) and their request for tax exemption of their real and personal property located in Shawnee County, Kansas. The majority found that the Topeka YMCA fails to meet the "exclusive use" test of the Kansas Constitution and K.S.A. 79-201 Second.

This case is the most recent in a long and previously uninterrupted line of orders by this Board granting exemption to the Topeka YMCA. Other orders by this Board have uniformly granted exemption to YMCAs across Kansas. Thus it is this member's opinion that all of the properties owned by all of the YMCAs, and by inference all of the YWCAs, across the state are effected by today's decision.

In a masterful opinion the majority appears effectively to destroy all claims by the applicant for charitable, benevolent, educational, scientific, or religious exemption. They meticulously analyze each of the claimed categories found in K.S.A. 79-201 Second as the basis for exemption and found each wanting.

After hearing the evidence, reading the briefs, and surveying the exhibits this member admits to agreeing with much of the majority's argument. Not infrequently applicants for tax exemption tend to make what appear to be excessive claims in an effort to come within the purview of the exemption framework. This does little more than to divert the attention away from what might actually be a valid argument. In the instant case this member is of the opinion that this is what did happen. Consequently I would agree with the majority that the Topeka YMCA does not qualify as a religious, educational, or scientific organization for exemption purposes under K.S.A. 79-201 Second, as those terms are commonly understood. This is not to deny that an element of the "educational" and "religious" may be present but the evidence presented was not persuasive. Admitting this, however, does not mean that the applicant's organization may not qualify under the "charitable and benevolent" provisions of the Kansas Constitution and statutes. Trustees of the United Methodist Church v. Cogswell, 205 Kan. 847, 473 P.2d 1 (1970).

There is no argument concerning the fact that the Topeka YMCA serves large numbers of young people in the area in a beneficial manner. Transposed across the state that number multiplies. Nor is there any evidence that a young person desireous of participating in one or more of the Y's many programs is excluded because he or she lacks the resources or finances usually charged to those with adequate means. So "charity" or "benevolence" is present and exists in a not insignificant amount. The question is whether the charity involved is sufficient to warrant an exemption from property taxes in this instance. This is a difficult question!

The meaning of "charity" or "charitable" in the modern context has admittedly become more intricate and difficult. Much of today's "charity" is on a graduated basis such as rent subsidies or food stamps, the amount of aid being determined by income and family size. This is basically the applicant's approach to its fee structure. In the instant case we have a situation where those with sufficient financial resources who choose to utilize the services which the applicant offers are charged the maximum rate. These members, paying the maximum charge, allow the organization to support programs and provide memberships to those less able or unable to pay. To this Board member this approach seems eminently rational. Apparently the Kansas Legislature saw some merit in this approach for in 1986 it added the following amendment to K.S.A. 79-201 Second:

> "This exemption shall not be deemed inapplicable to property which would otherwise be exempt pursuant to this paragraph because an agency or organization: (a) Is reimbursed for the provision of services accomplishing the purposes enumerated in this paragraph based upon the ability to pay by the recipient of such services. . ."

We are still faced with the question as to the amount of "charity" involved in the YMCA's operation. But we are faced with another question as well, namely, whether the functions performed by the applicant's organization merit consideration for exemption. While arguably involving many elements, the function which stands out predominantly for this member, and I think for the majority as well, is "recreational". "Recreation" as such is not an exemptible category found in the Kansas Constitution or in K.S.A. 79-201 Second. To be more precise, recreation of the type offered by the applicant is neither offered exclusively for literary, educational, scientific, nor religious purposes. How then can it be argued that the applicant's real and personal property is exclusively used for such purposes as is required by K.S.A. 79-201 Second?

While agreeing with the above rationale concerning the "literary", "educational", "scientific", and "religious" bases for exemption, this member is of the opinion that "charitable and benevolent" constitute a different genre. For who is to say that the giving or providing of something worthwhile to others, including recreational facilities, cannot be considered charitable or benevolent? In such a case what is required is that there be a recognized public benefit flowing from the exemption. The Board's majority in today's order states the case very well.

> "Tax exemptions are granted because the Legislature or the Constitution's draftmen perceived that the public would receive a benefit greater than or equal to the taxes which the owner would otherwise pay. The State encourages certain activities by eliminating the tax burden typically imposed".
>
> (Page 10 of today's Order)

The Board in today's order also makes a statement concerning the public benefit as follows:

> "The Board notes that the evidence shows the Y conducts a number of activities which improve both the individual's and the community's qualify of life. The Y'c commitment to serving all segments of the community is admirable. A number of individuals receive free services only because the Y exists."
>
> (Page 2 of today's Order)

I would only add for emphasis that the applicant before us today makes a special effort to serve the youth of the Topeka area in a wide variety of ways and gives special attention to disadvantaged youth through its scholarship program.

Thus this member is convinced that the answer to the second question posed above is that the applicant's organization does merit consideration for exemption even though it is engaged in a wide variety of recreational pursuits. The first question remains. Is the charitable aspect of the Topeka YMCA sufficient to meet the statutory requirements?

It is generally agreed that constitutions and legislative statutes cannot effectively cover all the possible situations which may arise in the future. Hence, interpretation is required. Ultimately, to be sure, the Courts decide. But the Kansas Legislature, in its wisdom, decided to partially relieve the courts of its burden in the area of tax exemptions by creating an administrative, quasi-judicial body known as the Board of Tax Appeals. This body is also required to interpret the constitution and statutes. There are parameters to be observed, but interpret it must. And that interpretation extends also to past court decisions related but factually distinct from the issues at hand.

Today's majority opinion engages in such interpretation. They place great reliance on the so-called Lutheran Home Case, referring it to at least eight different times. The criteria for a "charitable" exemption under Lutheran Home are extremely stringent. In fact, one Kansas County has argued repeatedly before this Board that under the Lutheran Home test there is basically no property that qualifies for tax exemption in Kansas under the "charitable and benevolent" clauses. This argument, were it valid, would appear to pit the Kansas Supreme Court at odds with the Kansas Constitution which does allow for "benevolent and charitable" property tax exemptions.

It is this member's opinion that the Kansas Supreme Court did not intend to eliminate the "charitable and benevolent" provisions of the Kansas Constitution and statutes. Indeed the Supreme Court stated clearly in the Cogswell case that "a strict construction of tax exemption provisions in the constitution and statutes does not warrant an unreasonable construction of such laws." (Trustees of the United Methodist Church v. Cogswell, supra, at p. 860.

While, admittedly, the case before us is a difficult one and the majority's opinion is very persuasive, the problem that this member has is that while the technical legal arguments appear sound, the result is faulty.

This Board must interpret statutes so as to avoid an unreasonable result. Trustees, supra. Here we have a well established non-profit institution functioning in the private sector with the cooperation of the citizenry and performing a function, the absence of which undoubtedly would be filled by local units of government. To impair this working situation hardly seems reasonable and there is certainly no guarantee that placing these functions directly under the public sector would increase the efficiency or promote economy. I believe that the majority might well be making a poor trade to substitute direct taxation for indirect tax relief in the present case.

Given my understanding of the structure and administration of the Topeka YMCA (which I consider basically the same as all other YMCAs in kansas) any property tax which would be applied would result in sacrificing some of the youth programs which are now and appear to always have been running at a loss. Yet it is these youth programs that form the basis for the exemption request. Application of the tax, therefore, would be almost like a self-fulfilling prophecy. As the tax is applied, the argument for exemption loses much of its luster. Who will suffer by this Order? It is not the full-paying members who will continue to use the facilities as always. It is the portion of those membership fees that previously have gone to subsidize the youth activities and now will be used to pay taxes that will be lost.

Thus I am faced with the dilemma of having to balance the "strict construction" of the Lutheran Home case with the requirement to avoid an "unreasonable construction" of the Cogswell case.

As pointed out initially, this Board has in the past granted tax exemption to the Topeka YMCA on several occasions apparently for reasons they felt were justified. For the years in question in this appeal the statutes were changed only by liberalizing the exemption categories. The County Appraiser in his testimony agreed that the Topeka YMCA has every reason to believe they were exempt from the property tax. Finally, any one familiar with the performance of the YMCAs throughout the state and throughout the country would acknowledge that they do emphasize their efforts with the young people. Since the first YMCA was founded in Boston in 1851 by a Baptist sea captain, T.V. Sullivan, undoubtedly many changes have taken place. Perhaps the Topeka YMCA is overly involved in fee structures and different membership categories, but their work with youth remains vital and active. The evidence, uncontroverted by the County, links adult membership revenues to the capacity for charity. The 1986 Legislature specifically approved of this approach. See K.S.A. 1986 Supp. 79-201 Second. The Y's witness, Mr. Daniel, testified that if the Y were taxed, its charitable endeavors would be substantially impaired and this was not challenged by the County.

Given the vital significance to our society of caring for our youth, of assisting the disadvantaged children in our cities, or promoting productive activities to keep youngsters off the streets, and to help set the stage for their growth into mature adulthood, activities in which all the YMCAs play a partial but important role, this member feels compelled to support the continuation of the exemptions granted in the past by this Board.

While I might not have been able to agree had I been with the majority in their decision, I commend them for their decision to uphold the previous exemptions granted to the Topeka YMCA and

thereby avoid assessing upon them the heavy burden of over a half a million dollars in back taxes and interest which could conceivably have led to their demise.

Based upon my reading of the Kansas Constitution, my understanding of the statutes involved, and my interpretation of the Court decisions mentioned above, I would continue that exemption for the Topeka Y properties. Since the majority has decided to place the YMCA's property on the tax rolls commencing with the 1986 tax year, this member would also base his decision upon the 1986 amendment to K.S.A. 79-201 Second, and unlike the majority I would argue that this change does reach to the case before us even though the applicant did not specifically raise this issue in the evidentiary hearing before the Board.

I respectfully dissent.

Robert C. Henry
ROBERT C. HENRY, MEMBER

CONCURRING AND DISSENTING OPINION

I concur with the majority of the Board except for that part of the Order which would grant an exemption for prior years on property of the Y for which a tax exemption had never been applied for, and which had never received a tax exemption from the BOTA, when there was no evidence to show the property qualified for exemption in those years. Not to be sycophantic, I must also congratulate Mr. Henry on his dissent. Once again he has found a way around the clear meaning of Lutheran Home.

John P. Bennett
JOHN P. BENNETT, MEMBER

OFFICE OF THE BOARD OF TAX APPEALS OF THE STATE OF KANSAS

BOARD OF TAX APPEALS STATE OF KANSAS

I, David C. Cunningham, Secretary of the Board of Tax Appeals of the State of Kansas, do hereby certify that the above and foregoing is a true and correct copy of Order No. 6285-86-TX made by said Board, as the same appears and is a matter of record in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the official seal of the Board of Tax Appeals at Topeka, Kansas, this 8th day of May, 1987.

David C. Cunningham
SECRETARY

Sales Tax (Proposal No. 6). The Committee recommends a bill to amend the definition of "retailer doing business in this state" to enhance Kansas' ability to collect sales taxes on mail-order sales into Kansas. Also, the Committee recommends that $50,000 be appropriated to the Department of Revenue to assist in a forthcoming challenge to the Bellas Hess precedent. The Committee further recommends legislation to clarify the application of the tax to auctions and computer software and to limit the assessment for back taxes to three years prior to the date a retailer has registered, absent a finding of fraud. The Committee notes that extension of the tax to additional services merits future consideration as a means to improve the equity and elasticity of the tax. Finally, the Committee requests legislation without recommendation to permit the Department to pursue use tax assessments against purchasers for transactions occurring wholly within Kansas.

Statewide Reappraisal (Proposal No. 7). The Committee reiterates, in the strongest possible terms, its support for the statewide reappraisal program and the importance of completing the effort by January 1, 1989, to avoid a substantial decrease in assessed valuation and unintended shifts in property tax burden. The Committee recommends enactment of the Senate-passed version of H.B. 2388 to allow all counties to appoint advisory hearing panels, subject to guidelines prescribed by the Property Valuation Division (PVD), to assist and advise county boards of equalization. A package of legislation requested by PVD to address various property tax issues is introduced without recommendation.

Property Tax Abatements (Proposal No. 8). The Committee recommends the enactment of 1987 S.B. 284, which would require cities and counties seeking to grant the abatements to hold public meetings and publish notice of the meetings in official newspapers; would codify an Attorney General's opinion concerning the role of the Board of Tax Appeals when reviewing the abatements; and would allow counties to grant the abatements within city limits only with the approval of the city. The Committee also concludes that, after local units have obtained more experience in granting the abatements, additional legislative guidelines may be necessary.

Corporation Income Tax (Proposal No. 9). The Committee recommends legislation that would allow the Department of Revenue discretion in the determination of foreign income taxes and royalties paid by 80/20 corporations.

Bond Interest (Proposal No. 10). The Committee recommends a bill to exempt all interest earned on Kansas state and local bonds from the state income tax.