

NOTES

CHARITABLE COMMERCE: EXAMINING PROPERTY TAX EXEMPTIONS FOR COMMUNITY ECONOMIC DEVELOPMENT ORGANIZATIONS

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Each state offers a property tax exemption to qualifying charitable organizations. Municipalities both administer these charitable exemptions and bear their economic cost. This creates an incentive for municipalities to adopt an interpretation of their state's exemption framework that limits the exemption's scope and preserves tax revenue. This Note focuses on community economic development (CED) organizations to explore how overly narrowed frameworks break down when applied to nontraditional charities. As part of this analysis, the Note tracks one CED organization's exemption from the initial grant through its subsequent revocation and ultimately to the New York Court of Appeals's affirmation of the revocation in Greater Jamaica Development Corp. v. New York City Tax Commission. In closing, this Note provides recommendations for state courts and local assessors to help standardize exemption decisions and identify deserving organizations.

INTRODUCTION

Every jurisdiction in the United States provides a property tax exemption to charitable organizations.¹ Though exemption frameworks vary from state to state, they all reflect the basic idea that “charitable property should not be burdened with taxation.”² These exemptions, however, come at a cost to municipalities, which depend on property taxes as a stable source of revenue.³ The charitable exemption translates

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1. Janne Gallagher, The Legal Structure of Property-Tax Exemption, *in* Property-Tax Exemption for Charities: Mapping the Battlefield 3, 3–4 (Evelyn Brody ed., 2002). These exemptions have existed in this country far longer than the federal income tax exemption for charitable organizations. John D. Colombo & Mark A. Hall, The Charitable Tax Exemption 3 (1995). While jurisdictions might exempt both real and personal property, this Note focuses on real property.

2. Gallagher, *supra* note 1, at 4.

3. See Ronald C. Fisher, The Changing State–Local Fiscal Environment: A 25-Year Retrospective, *in* State and Local Finances Under Pressure 9, 20–21 (David L. Sjoquist ed., 2003) (noting that property taxes accounted for 16.7% of state–local general revenue from 1961–1999); Steven M. Sheffrin, The Future of the Property Tax: A Political Economy Perspective, *in* The Future of State Taxation 129, 129 (David Brunori ed., 1998) (“The

into a significant funding loss, particularly in areas with a high concentration of nonprofits.⁴ To mitigate this loss and avoid increasing taxes on individuals and for-profit businesses, local officials are looking to the nonprofit sector for politically safer opportunities to boost property tax revenue.⁵

Charitable exemption requests are evaluated each year by local property tax assessors, who must determine whether an organization's purposes are sufficiently charitable and whether a particular property use furthers those charitable purposes.⁶ These evaluations are often difficult to make because the concept of "charity" and its underlying principles—for example, "public welfare"—lack distinct definitions and are therefore

property tax has always been an unpopular tax, but it was tolerated because it was a convenient vehicle to enable local autonomy in financing education, a service that the public values highly.").

4. See Daphne A. Kenyon & Adam H. Langley, *Urban Inst., The Property Tax Exemption for Nonprofits and Revenue Implications for Cities* 2 (Nov. 2011), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/412460-The-Property-Tax-Exemption-for-Nonprofits-and-Revenue-Implications-for-Cities.PDF> [<http://perma.cc/RV4P-YA6R>] ("For cities heavily reliant on the property tax, the exemption of nonprofits from property taxation means that homeowners and businesses must bear a greater share of the property tax burden."); Harvy Lipman, *The Value of a Tax Break*, *Chron. Philanthropy* (Nov. 23, 2006), <http://philanthropy.com/article/The-Value-of-a-Tax-Break/179013> [<http://perma.cc/7WMF-7MJ5>] ("States offer the exemptions because they believe the benefits that nonprofit groups offer a community far outweigh the costs, but it is the local municipalities that generally feel the impact of the tax loss.").

5. See Robert T. Grimm Jr., *Reforming Property Tax Exemption Policy in the Nonprofit Sector: Commercialism, Collective Goods, and the Donative Theory*, 9 *Nonprofit Mgmt. & Leadership* 241, 242 (1999) ("Local governments around the United States are increasingly turning to nonprofit organizations to help alleviate their growing deficits and finance the municipal services that nonprofits use. Nonprofits of all types currently face challenges to their traditional property tax exemptions . . ."); Gerald A. Rosenberg, *Real Property Tax Exemptions at Risk*, *Taxation of Exempts*, Sept.–Oct. 2008, at 1, 1, <http://www.pbwt.com/content/uploads/2015/07/EORisk.pdf> [<http://perma.cc/WP84-P3V4>] ("There is less political resistance to pursuing a relatively weak constituency, the nonprofit sector, than to increasing the marginal rates payable by individuals and for-profit business organizations . . ."). Nonprofit leaders have been outspoken about this fear. See Suzanne Garment & Leslie Lenkowsky, *Charitable-Deduction Fight Distracts from Bigger Financial Battle*, *Chron. Philanthropy* (Apr. 7, 2013), <http://philanthropy.com/article/Charitable-Deduction-Fight/155093> [<http://www.perma.cc/Z6CD-T5AH>] ("[Nonprofit leaders] know that state elected officials are short of cash and are looking for every opportunity—and frankly, excuse—to raid pots of money to pay for other pressing needs.").

Localities may instead try to access revenue from the nonprofit sector through "payments in lieu of taxes," commonly called PILOTs, or "services in lieu of taxes," commonly called SILOTs. Daniella Corcuera, Note, *Revisiting the Nonprofit Property-Tax Exemption: An Examination of the Need to Clarify Eligibility*, 32 *J.L. & Com.* 155, 161–63 (2013). An in-depth discussion of these revenue sources is beyond this Note's scope.

6. See *infra* sections I.A–B for discussions of the charitable-purpose and charitable-use tests, respectively.

open to individual interpretation.⁷ Assessors can use this flexibility to justify overly strict readings intended to shrink the exemption's scope.⁸

This approach particularly affects charitable organizations whose activities impact the commercial sector.⁹ While traditionally the nonprofit and for-profit sectors are distinct and separate, nonprofits are turning to revenue-generating activities to offset reductions in donations and government funding.¹⁰ Some types of nonprofits, such as community economic development (CED) organizations, further blur these lines by working directly with the commercial sector to accomplish their social-welfare missions.¹¹ CED organizations aim to stimulate economic

7. Joan M. Youngman, *The Politics of the Property-Tax Debate: Political Issues*, in *Property-Tax Exemption for Charities*, supra note 1, at 23, 23 [hereinafter Youngman, Politics] (arguing that “elements as basic as charity, public welfare, ownership, value, and even the definition of the tax itself” are “inherently unsettled”).

8. Kenyon & Langley, supra note 4, at 9 (“[S]ome additional revenue may be gained either by narrowing the permissible exemption or by more strictly enforcing the property tax exemption statutes and case law.”); National Council of Nonprofits *Flags NY Judicial Decision as Threat to Nonprofit Exemptions*, Philanthropy N.Y. (Aug. 11, 2015), <http://philanthropynewyork.org/news/national-council-nonprofits-flags-ny-judicial-decision-threat-nonprofit-exemptions> [<http://perma.cc/TRU9-AZNM>] (“[R]ecent reports from Florida, Michigan, New York, and elsewhere suggest that tax assessors in various communities have become more aggressive in challenging the longstanding property tax exemption of nonprofits.”). Courts are also taking a more aggressive stance on exemption qualifications. See Joan M. Youngman, *Property, Taxes, and the Future of Property Taxes*, in *The Future of State Taxation* 111, 120 (David Brunori ed., 1998) [hereinafter Youngman, *Future of Property Taxes*] (noting recent decisions reflecting “greater judicial scrutiny of the extent to which organizations seeking tax exemptions meet statutory requirements”).

9. See infra sections I.A–B (discussing the tension between commercial activity and limiting principles such as prohibition on private benefit); see also J. Gregory Dees, *Enterprising Nonprofits*, *Harv. Bus. Rev.*, Jan.–Feb. 1998, at 55, 58 (“When nonprofits become more businesslike, they may run afoul of public values and meet with political resistance.”).

Tax-exempt hospitals and universities are receiving the greatest amount of scrutiny, as municipalities question whether these organizations are too wealthy to qualify as “charities.” Stephanie Strom, *Tax Exemptions of Charities Face New Challenges*, *N.Y. Times* (May 26, 2008), <http://www.nytimes.com/2008/05/26/us/26tax.html> (on file with the *Columbia Law Review*); see also *AHS Hosp. Corp. v. Town of Morristown*, 28 N.J. Tax 456, 536 (2015) (holding the Morristown Medical Center is not entitled to tax exemption on the majority of its property and asserting “[i]f it is true that all non-profit hospitals operate like the [Morristown Medical Center] . . . modern non-profit hospitals are essentially *legal fictions*”); Lauren Karch, *Suit Against Princeton Heats Up: “The Billionaire Class” and the Town*, *Nonprofit Q.* (May 5, 2016), <http://nonprofitquarterly.org/2016/05/05/suit-against-princeton-heats-up-the-billionaire-class-and-the-town> [<http://perma.cc/LR4T-9J6T>] (describing the ongoing lawsuit between Princeton University and local residents over the university’s tax-exempt status). This Note argues that smaller, less complex organizations may also fit poorly into exemption frameworks.

10. See James J. Fishman, *The Nonprofit Sector: Myths and Realities*, 9 *N.Y.C. L. Rev.* 303, 306 (2006) (“Many nonprofits engage substantially, if not excessively, in regular business activity.”); Dees, supra note 9, at 56 (“[N]onprofit leaders are searching for the holy grail of financial sustainability. They view earned-income-generating activities as more reliable funding sources than donations and grants.”).

11. See infra section II.A (introducing CED organizations).

development, job growth, and community revitalization in economically depressed or underserved areas through initiatives such as job training and placement programs, local-business assistance, and commercial infrastructure projects.¹² The IRS recognizes economic development as a charitable purpose under the federal income tax exemption statute.¹³ Nevertheless, courts and assessors tend to disqualify CED organizations from receiving state property tax exemptions by applying principles designed to weed out self-proclaimed charities that improperly operate like for-profit businesses.¹⁴

This Note focuses on CED organizations to demonstrate the potential for arbitrary or overly restrictive administration of charitable property tax exemptions. A recent New York Court of Appeals case, *Greater Jamaica Development Corp. (GJDC II) v. New York City Tax Commission*,¹⁵ reveals how easily state courts and local assessors can mischaracterize CED organizations' good-faith efforts to benefit underserved communities and in turn create harmful precedent for nonprofits whose activities impact the commercial sector. Part I of this Note outlines property tax exemption structures and the exemption evaluation process. Part II introduces community economic development, then looks at its treatment within the *GJDC II* litigation. Part III proposes recommendations that will protect organizations engaged in charitable work, while enabling government agencies to identify those taking inappropriate advantage of the exemption.

I. CHARITABLE PROPERTY TAX EXEMPTION FRAMEWORKS

Organizations seeking a charitable tax exemption on real property have two hurdles to overcome: the charitable-purpose and charitable-use requirements.¹⁶ This Part surveys states' methods for determining whether organizations meet these requirements, which form the basis of

12. See *infra* section II.A (describing CED activities).

13. See Robert Louthian & Marvin Friedlander, IRS, Exempt Orgs. Continuing Prof'l Educ., Economic Development Corporations: Charity Through the Back Door 2-5 (1992), <http://www.irs.gov/pub/irs-tege/eotopicg92.pdf> [<http://perma.cc/4CQX-DKHM>] (outlining the IRS's treatment of CED organizations in the Revenue Rulings).

14. See *infra* sections I.A-B (discussing limiting principles that look at commercial activity); section II.C (analyzing the New York Court of Appeals's treatment of limiting principles in *Greater Jamaica Development Corp. v. New York City Tax Commission*).

15. 36 N.E.3d 645 (N.Y. 2015).

16. See *infra* section I.A (discussing "charitable purposes"); *infra* section I.B (discussing "charitable use"). This is sometimes worded as a three-part test; for example, Wisconsin courts require an organization to show: "(1) that it is a benevolent organization, (2) that it owns and exclusively uses the property, and (3) that it uses the property for exempt purposes." *Deutsches Land, Inc. v. City of Glendale*, 591 N.W.2d 583, 588 (Wis. 1999). This Note distinguishes factors related to an organization's charitable nature, or "purposes," from those related to "use." Under this two-part structure, (1) forms the charitable-purpose test, and (2) and (3) combine to form the charitable-use test.

states' charitable property tax exemption frameworks.¹⁷ Section I.A examines how legislatures and courts determine the boundaries of "charitable" purposes. Section I.B discusses frameworks for evaluating whether a particular activity qualifies as a "charitable use." Finally, section I.C outlines how assessors apply these tests in their exemption determinations.

A. *The Charitable-Purpose Requirement*

To obtain a charitable property tax exemption, an organization must first qualify as a charity.¹⁸ Although the term is commonly considered a "catchall" that encompasses many different kinds of organizations, each state has developed its own exemption regime to clarify what "charity" entails.¹⁹ Built around the same basic concepts, these exemptions contain slight wording variations that translate into different approaches to determining whether an organization is sufficiently charitable to merit exemption. Section I.A.1 describes typical variances in constitutional and statutory language, while section I.A.2 discusses how courts interpret these different structures.

1. *Constitutional and Statutory Language.* — With only a few exceptions, states refer to property owners and users²⁰ that are eligible for the exemption as "charities" or organizations with charitable purposes.²¹ Many further specify that organizations must be "exclusively" or "purely" charitable.²² The key question is how to narrow down the world of potential charities to identify those that fit the intended meaning in the text and therefore merit the exemption.

17. Evelyn Brody, All Charities Are Property-Tax Exempt, but Some Charities Are More Exempt than Others, 44 *New Eng. L. Rev.* 621, 634 (2010) [hereinafter Brody, All Charities].

18. *Id.* at 625–26.

19. See *id.* at 637.

20. When the property is owned and used by two separate parties, states typically require that both parties have charitable purposes. See, e.g., *Johnson Cty. Prop. Tax Assessment Bd. of Appeals v. KC Propco LLC*, 28 N.E.3d 370, 374–75 (Ind. T.C. 2015) ("When ownership, occupancy, and use of a property are not unified in one entity, each entity must demonstrate its own exempt purpose.").

21. Gallagher, *supra* note 1, at 10. A few states use the term "benevolent" rather than "charitable." Wash. Rev. Code Ann. § 84.36.030(1) (West 2004); Wis. Stat. Ann. § 70.11(4) (2013–2014). At least in Washington, "benevolent" and "charitable" are interchangeable. *Adult Student Hous., Inc. v. Dep't of Revenue*, 705 P.2d 793, 798 (Wash. Ct. App. 1985). The term also appears frequently in state statutes alongside "charitable." See, e.g., Or. Rev. Stat. § 307.130(2) (2015) (exempting property owned by "benevolent" institutions and "charitable" institutions).

22. See Brody, All Charities, *supra* note 17, at 626 ("State constitutions sometimes limit property-tax exemption to 'institutions of purely public charity' . . ."). Similarly, Florida's statute requires measuring "[t]he nature and extent of the charitable . . . activity" and comparing "such activities with all other activities of the organization." Fla. Stat. §196.196(1)(a) (2016).

Only eleven states try to provide this clarity by defining “charity” or “charitable” within their exemption statutes.²³ North Carolina’s statute, for example, defines “charitable purpose” as one with “humane and philanthropic objectives.”²⁴ Similarly, Tennessee’s statute defines “charitable institution” as “any nonprofit organization or association devoting its efforts and property . . . exclusively to the improvement of human rights and/or conditions in the community.”²⁵ Although these definitions often contain concrete limitations, like Tennessee’s nonprofit requirement, they hinge on terms that are just as amorphous as “charitable.”²⁶

The approach that most states take is to set constraints on qualifying organizations’ structures and operations. First, organizations must benefit the “public,” rather than private entities.²⁷ The public-benefit requirement’s wording varies from state to state: For instance, some focus on providing services for that state’s citizens,²⁸ while others cover a “significant segment of the community.”²⁹ A minority of states further narrow the exemption by including only organizations that benefit particular classes, such as the “indigent or afflicted.”³⁰ The public benefit requirement may appear alongside an explicit prohibition on private benefit or inurement.³¹ To limit the chance that private parties might profit from

23. Woods Bowman & Marion R. Fremont-Smith, *Nonprofits and State and Local Governments*, in *Nonprofits and Government: Collaboration and Conflict* 197, 203 (Elizabeth T. Boris & C. Eugene Steuerle eds., 2006).

24. N.C. Gen. Stat. § 105-278.7(f)(4) (2015).

25. Tenn. Code Ann. § 67-5-212(c) (2013).

26. For instance, Merriam-Webster defines “humane” as (1) “marked by compassion, sympathy, or consideration for humans or animals” and (2) “characterized by or tending to broad humanistic culture.” Humane, Merriam-Webster, <http://www.merriam-webster.com/dictionary/humane> [<http://perma.cc/GFP7-JBXE>] (last visited July 26, 2016).

27. See Gallagher, *supra* note 1, at 10 (noting state statutes typically exempt “public” organizations or “institutions of purely public charity”).

28. See, e.g., Md. Code Ann., Tax-Prop. § 7-202(b)(1) (LexisNexis 2012) (exempting organizations “promot[ing] the general welfare of the people of the State”).

29. See, e.g., N.C. Gen. Stat. § 105-278.7(f)(4).

30. See, e.g., Ariz. Rev. Stat. Ann. § 42-11107 (2013). “Indigent” is defined as a person “without sufficient means or ability to provide themselves with adequate food, shelter or social necessities.” *Id.* § 42-11101. “Afflicted” is defined as “persons who, because of a mental or physical condition, illness or condition of distress, adversity or harassment, or imminent risk of such condition, are unable to reasonably take care of themselves or their families or to properly function in society without periodic or continuous assistance.” *Id.* But see Me. Rev. Stat. Ann. tit. 36, § 652(1)(A) (2010) (“[A benevolent and charitable institution] may not be deprived of the right of exemption . . . by reason of limitation in the classes of persons for whose benefit the funds are applied.”).

31. For examples of how constitutional provisions and statutes describe this prohibition, see Cal. Const. art. XIII, § 4 (requiring that “no part of [the organization’s] net earnings inures to the benefit of any private shareholder or individual”); N.H. Rev. Stat. Ann. § 72:23-1 (2012) (disqualifying organizations that provide “pecuniary profit or benefit to its officers or members, or any restrictions which confine its benefit or services to such officers or members, or those of any related organization”). The federal equivalent states that “[a]n organization is not operated exclusively for one or more exempt purposes if its net

the organization's efforts and resources, many states restrict qualifying organizations' ability to generate revenue; this restriction might be phrased as a condition that organizations are "nonprofits," though statutes rarely define this term's boundaries.³²

Qualifying organizations may also need to meet other constitutional or statutory requirements that dictate how the organization may function. For example, many state statutes mandate that organizations are "organized" and "operated" as charities, meaning that they have satisfied all formation and governance requirements and in fact function as charities.³³ States might require organizations to obtain a significant percentage of funding from government grants or public donations on the theory that reliance on public funding makes organizations accountable to the public.³⁴ States may also require organizations to provide services that people would otherwise obtain from government agencies; the argument is that these organizations deserve a subsidy for shouldering local governments' burdens.³⁵

A few states require qualifying organizations to obtain a federal income tax exemption—usually 501(c)(3)³⁶—before applying for a property tax exemption.³⁷ As much of the language in 501(c)(3) comes from

earnings inure in whole or in part to the benefit of private shareholders or individuals." *Treas. Reg. § 1.501(c)(3)-1(c)(2)* (2016).

32. See, e.g., *Tenn. Code Ann. § 67-5-212(c)* (2013) (limiting the exemption to "nonprofit[s]").

33. See, e.g., *D.C. Code § 47-1002(8)* (2001) (exempting institutions of "public charity" if "not organized or operated for private gain"); *N.Y. Real Prop. Tax Law § 420-a(1)(a)* (McKinney 2008) (covering "[r]eal property owned by a corporation or association organized or conducted exclusively for religious, charitable, hospital, educational, or moral or mental improvement of men, women or children purposes").

34. Compare *Me. Rev. Stat. Ann. tit. 36, § 652(1)(A)* (2010) ("Such an institution may not be deprived of the right of exemption by reason of the source from which its funds are derived."), with *Nev. Rev. Stat. § 361.140(1)(a)* (2015) (requiring funds "derived in whole or substantial part from grants or other donations from governmental entities or donations from the general public, or both").

35. See, e.g., *S.D. Codified Laws § 10-4-9.1* (2004) (requiring organizations to "lessen a governmental burden by providing its services to people who would otherwise use governmental services"); Brody, *All Charities*, *supra* note 17, at 640 ("Under the narrowest conception of the quid-pro-quo approach, the state bestows exemption because charities lessen the burdens of government. Some states explicitly require that a charity must relieve the burdens of government, either in all cases or as one factor.").

36. *26 U.S.C. § 501(c)(3)* (2012). This provision exempts a range of organizations but is best known as the federal "charitable" organization exemption. *Exemption Requirements—501(c)(3) Organizations*, IRS, <http://www.irs.gov/charities-non-profits/charitable-organizations/exemption-requirements-section-501-c-3-organizations> [<http://perma.cc/4W7H-KTWJ>] (last updated June 28, 2016).

37. See, e.g., *La. Const. Ann. art. VII, § 21(B)(1)(a)(i)* (2011) (requiring federal or state income tax exemption); *S.D. Codified Laws § 10-4-9.1* (requiring 501(c)(3) status).

preexisting state-level exemption frameworks,³⁸ an organization's 501(c)(3) status can help inform state-level exemption determinations as well as indicate that a government body has vetted the organization and continues to monitor it.³⁹ This requirement, however, is rare within state statutes; instead, courts generally dictate the weight given to an organization's federal tax-exempt status.⁴⁰

Though states can include a range of limitations within their charitable exemptions, these statutes tend to be brief and broad: For example, Arkansas's statute exempts property "belonging to institutions of purely public charity" without elaborating on how organizations might qualify.⁴¹ Courts must then determine how to apply these ambiguous frameworks as fairly and consistently as possible.⁴²

2. *Judicial Interpretations.* — Courts interpreting charitable exemption statutes must balance competing concerns. On the one hand, courts recognize that "the concept of charity evolves over time," as Professor Evelyn Brody notes, "to take into account the changing needs of society, new discoveries, and the varying conditions, characters, and needs of different communities."⁴³ On the other hand, courts are concerned about protecting local tax bases and curbing abuse.⁴⁴ With this in mind, most

38. See Gallagher, *supra* note 1, at 10 ("[P]roperty-tax exemption, rather than being derived from federal law, was the basis for many of the concepts that found their way into the income-tax regulations and rulings.").

39. See *infra* section III.A (discussing how to use 501(c)(3) principles within a charitable-purpose analysis). On the other hand, the IRS's vetting process and annual monitoring may not be as thorough as one would hope. See *infra* notes 245–246 and accompanying text (discussing the IRS review process's shortcomings).

40. See *infra* notes 57–62 and accompanying text (discussing courts' treatment of 501(c)(3)).

41. Ark. Code Ann. § 26-3-301(7) (2016).

42. See *infra* section II.C (discussing the court of appeals's interpretation of the New York statute). The Minnesota legislature actually opted to codify the multifactor test that emerged from court decisions. Brody, *All Charities*, *supra* note 17, at 635.

43. Brody, *All Charities*, *supra* note 17, at 635; see also *Supervisor of Assessments v. Grp. Health Ass'n*, 517 A.2d 1076, 1079 (Md. 1986) ("We do not at this time attempt to establish a hard-and-fast rule as to the meaning of 'charitable' Indeed, we doubt whether such a rule can be formulated."). But see *Colombo & Hall*, *supra* note 1, at 38 (calling the idea of charity as "an evolving concept" an "unilluminating platitude").

44. See, e.g., *Sisters of Mercy of the Ams. Mid-Atl. Cmty., Inc. v. City of Sea Isle City*, No. 012607-2011, 2014 WL 806809, at *3 (N.J. Tax Ct. Feb. 27, 2014) (noting exemption statutes "represent a departure from the fundamental approach that all property owners bear their fair share of the local property tax burden"); *Christ Church Pentecostal v. Tenn. State Bd. of Equalization*, 428 S.W.3d 800, 814 (Tenn. Ct. App. 2013) (expressing the concern that businesses will seek charitable exemptions to obtain an unfair advantage over nonexempt competitors).

will construe tax exemptions strictly⁴⁵ but “reasonably” in light of legislative intent.⁴⁶

Broad exemption statutes, however, leave courts with little guidance on what a “strict” but “reasonable” construction might look like. To resolve this problem, courts generally adopt additional limitations on “charitable” that do not appear explicitly in the exemption statute.⁴⁷ For example, Iowa and Alabama both exempt property used by “charitable” institutions⁴⁸ but take a different approach to whether these organizations must provide reduced-cost services in order to qualify. While Iowa courts hold “charity” necessarily involves offering “gratuitous or partly gratuitous” services to those in need,⁴⁹ Alabama courts require “an element of gift and of service to the general public.”⁵⁰ Alabama’s standard led the court of civil appeals to conclude that two retirement facilities did not meet their burden of proof regarding charitable purposes, even if

45. See, e.g., *Steer, Inc. v. Dep’t of Revenue*, 803 P.2d 601, 605 (Mont. 1990) (“The exemptions of property from taxation is clearly left to the discretion of the legislature and . . . are to be strictly construed.”). Wisconsin mandates strict construction of exemptions by statute. Wis. Stat. § 70.109 (2013–2014). In the few states in which exemption statutes are construed broadly, courts still aim to maintain this balance. See, e.g., *Christ Church Pentecostal*, 428 S.W.3d at 807 (“The purposes of the exemption must be balanced against the need for an equitable distribution of the tax burden.” (internal quotation marks omitted) (quoting *Middle Tenn. Med. Ctr. v. Assessment Appeals Comm’n*, No. 01A01-9307-CH-00324, 1994 WL 32584, at *2 (Tenn. Ct. App. Feb. 4, 1994))).

46. As one judge remarked, “[R]easonableness and honesty must be applied in granting those exemptions. To do otherwise, is not only unfair to all . . . charitable organizations, but also to our citizens who must bear and pay their individual share of the overall tax burden.” *Simpson v. Int’l Cmty. of Christ*, 796 P.2d 217, 221 (Nev. 1990) (Mowbray, J., concurring).

47. See Brody, *All Charities*, supra note 17, at 645–54 (discussing limiting principles but focusing on the private-benefit prohibition).

48. Ala. Code § 40-9-1 (LexisNexis 2011) (exempting “property . . . used exclusively for . . . purposes purely charitable”); Iowa Code § 427.1 (2016) (exempting “[a]ll grounds and buildings used or under construction” by charitable institutions).

49. *Carroll Area Child Care Ctr., Inc. v. Carroll Cty. Bd. of Review*, 613 N.W.2d 252, 256–57 (Iowa 2000).

50. *Surtees v. Carlton Cove, Inc.*, 974 So. 2d 1013, 1022 (Ala. Civ. App. 2007). The definition of “charity” as a “gift,” cited consistently by Alabama courts, comes from an 1885 decision:

A charity, in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature.

Johnson v. Holifield, 79 Ala. 423, 425 (1885). To note, this longstanding definition considers “charity” to include “assisting [persons] to establish themselves in life,” which seems to encompass economic development. *Id.*; see also *infra* section II.A (discussing community economic development).

the facilities helped residents obtain care when they were unable to pay, because they catered to the wealthy.⁵¹ The court focused on the private-versus public-benefit distinction, holding that the facilities “appear to benefit primarily private, rather than public, interests to the extent that they serve only a limited number of elderly persons with significant financial resources.”⁵² This example illustrates how courts use broad principles like the public-benefit requirement to analyze specific aspects of organizations’ operations.

Some courts have consolidated these limitations into multifactor tests, which on first glance appear to provide a robust framework for evaluating exemption requests.⁵³ As Professor Brody notes, these tests are difficult to apply in practice:

[Multifactor] tests create problems for compliance and application The factors are not quantitative and data—such as level of donations—may vary from year to year, raising the possibility of flipping in and out of exemption. Nor do the courts weigh the factors, some of which overlap. Other uncertainties—such as whether the charity’s receipt of government support means the charity is not lessening the burdens of government, or whether the presence of for-profit competitors means the charity should charge lower prices—lead different courts to reach different conclusions. Most importantly, the courts generally describe the factors collectively as suggestive, raising the question of whether any one or more factor is mandatory.⁵⁴

Even the most detailed multifactor tests still allow for a great deal of judicial discretion, creating opportunities for uneven application.⁵⁵

Another approach that courts may take to standardize decisions is to examine other areas of the law for guidance. In practice, courts vary on the extent to which they will import definitions of key terms such as “charitable.”⁵⁶ One example of this is courts’ treatment of 501(c)(3) status when a state’s constitution and exemption statute are silent. Courts generally will not rely on 501(c)(3) status as definitive proof of charitable purposes, holding that the federal exemption statute’s scope is too

51. *Carlton Cove*, 974 So. 2d at 1016–18.

52. *Id.* at 1022.

53. Brody, *All Charities*, *supra* note 17, at 635.

54. *Id.* For a discussion of the “lessening the burdens of government” requirement, see *supra* note 35 and accompanying text. For a discussion of this Note’s recommendation to compare organizations’ structures and operations with those of for-profit competitors, see *infra* section III.B.2.

55. See Brody, *All Charities*, *supra* note 17, at 635 (noting that courts are unlikely to be constrained by factors they describe as merely suggestive).

56. *Cf. id.* at 626 (noting the varying “degree of vigilance with which the courts guard their authority over constitutional terminology”).

broad⁵⁷ or reflects federal rather than state priorities.⁵⁸ However, most courts recognize that this distinction provides useful information for state-level exemption analyses because of the similarities between 501(c)(3) and many state statutes.⁵⁹ To determine how principles like the prohibition on private benefit might apply to particular situations, courts may look to IRS materials interpreting 501(c)(3).⁶⁰ A small minority of courts use the trust law definition of “charity” in lieu of looking to other sources,⁶¹ although scholars note that this definition is remarkably broad.⁶²

Courts have a great deal of discretion when making exemption determinations. Despite attempts to create a charitable-purpose test that effectively screens out ineligible organizations, courts may find it difficult to make these ad hoc assessments with the necessary level of precision and consistency.⁶³ This level of discretion is also present in the charitable-use test, the second hurdle organizations must overcome to receive the exemption.

B. *The Charitable-Use Requirement*

To receive the exemption, an organization that qualifies as “charitable” must then show that it uses the real property at issue to further

57. Treasury regulations define “charitable purposes” as including:

Relief of the poor and distressed or of the underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments, or works; lessening of the burdens of Government; and promotion of social welfare by organizations designed to accomplish any of the above purposes, or (i) to lessen neighborhood tensions; (ii) to eliminate prejudice and discrimination; (iii) to defend human and civil rights secured by law; or (iv) to combat community deterioration and juvenile delinquency.

Treas. Reg. § 1.501(c)(3)-1(d)(2) (2016); see also *infra* notes 180–182 and accompanying text (discussing the *GJDC II* majority’s justifications for rejecting the scope of 501(c)(3)).

58. See, e.g., *NBC-USA Hous., Inc.–Five v. Levin*, 928 N.E.2d 715, 721 (Ohio 2010) (“[T]ying charitable use so tightly to Congress’s policy goals is wrong because Congress does not define the scope of charitable use under Ohio law.”).

59. See *supra* note 38 and accompanying text (citing the similarities between state statutes and 501(c)(3)).

60. See, e.g., *Mingledorff v. Vaughan Reg’l Med. Ctr., Inc.*, 682 So. 2d 415, 418–21 (Ala. 1996) (analyzing the IRS’s requirements for “charitable status”).

61. See, e.g., *Boyd v. Frost Nat’l Bank*, 196 S.W.2d 497, 502 (Tex. 1946) (identifying functions cited in Restatement of Trusts § 368 (Am. Law Inst. 1935) as “charitable purposes”). The latest Restatement defines charitable trust purposes as including: “(a) the relief of poverty; (b) the advancement of knowledge or education; (c) the advancement of religion; (d) the promotion of health; (e) governmental or municipal purposes; and (f) other purposes that are beneficial to the community.” Restatement (Third) of Trusts § 28 (Am. Law Inst. 2003).

62. See, e.g., *Colombo & Hall*, *supra* note 1, at 38–39 (“If the trust concept is imported into tax law, essentially any legitimate nonprofit institution that serves the public at large is presumptively eligible for charitable tax exemption.”).

63. See *infra* section II.C (discussing the court of appeals’s analysis in *GJDC*).

charitable purposes.⁶⁴ This test assesses whether the property use is linked sufficiently to the organization's charitable activities, expressed in most state statutes as "exclusively" charitable use.⁶⁵ As both the purpose and use tests turn on the term "charitable," the same limiting principles apply.⁶⁶ Localities may tax any property, or portion of property, that fails the charitable-use test.⁶⁷

Since an organization's activities may not divide neatly into charitable and noncharitable uses, the "exclusive" requirement asks whether the link between property use and the organization's charitable purposes is satisfactorily strong. Many courts interpret "exclusive" to require that the property use is necessary for carrying out the organization's charitable purposes, a condition that appears explicitly in a few state statutes.⁶⁸ Under this interpretation, some states bar administrative property, like staff offices, and ancillary property, like parking facilities, from receiving the exemption.⁶⁹ Other states use a fact-dependent inquiry to determine whether these types of property in fact further charitable purposes: For example, the Court of Appeals of Tennessee upheld a charitable exemp-

64. See Brody, *All Charities*, supra note 17, at 634 (discussing the charitable-purpose and charitable-use requirements).

65. The Supreme Court of Alaska has phrased this slightly differently: "[T]he focus under the primary exemption provisions is on the purpose of the use, not on the organization." *Fairbanks N. Star Borough v. Dená Nená Henash*, 88 P.3d 124, 130 (Alaska 2004). Under this approach, it seems that courts must identify the central purpose behind each property use rather than looking at the link between the organization's stated purposes and its property use. This is similar to the New York Court of Appeals's analysis in *GJDC II*, though in that case the court seemed to conclude that economic development both was and was not a charitable purpose. See *infra* section II.C (discussing the majority's analysis).

66. See *supra* section I.A.2 (discussing limiting principles affecting the charitable-purpose test).

67. See, e.g., N.Y. Real Prop. Tax Law § 420-a(2) (McKinney 2008) ("If any portion of such real property is not so used exclusively to carry out thereupon one or more of such purposes but is leased or otherwise used for other purposes, such portion shall be subject to taxation and the remaining portion only shall be exempt.").

68. See, e.g., Md. Code Ann., Tax-Prop. § 7-202(b)(1) (LexisNexis 2012) ("[P]roperty is not subject to property tax if the property . . . is necessary for and actually used exclusively for a charitable . . . purpose to promote the general welfare of the people of the State . . .").

69. See, e.g., *In re Tax Appeal Queen's Med. Ctr.*, 661 P.2d 1201, 1205 (Haw. 1983) ("While we do not doubt the construction and operation of an office building and parking garage can be related to 'better, more efficient, and cost effective medical care,' we do not think the activities constitute hospital activities in themselves." (quoting lower court's decision)); *Lifespan Corp. v. City of Providence*, 776 A.2d 1061, 1061-62 (R.I. 2001) (denying exemption to property in an administrative building used by an "umbrella entity" to provide services to hospitals along with other nonhospital corporations); Brody, *All Charities*, supra note 17, at 665 (describing "administrative facilities" and "ancillary facilities" as "pressure points").

tion on property used as a staging and parking area for a benefit golf tournament, holding that these facts showed a directly charitable use.⁷⁰

The “exclusive” requirement also invites courts to consider the private-benefit prohibition, which limits a charitable organization’s ability to use its property in a manner that grants an unfair benefit to private entities.⁷¹ One point of disagreement among states is whether income-generating activities can qualify as charitable property uses. Some states prohibit profit-generating or “business” uses,⁷² though this rule may not be as strict as it appears.⁷³ Under more lenient frameworks, courts may analyze whether a particular use is primarily profit-motivated, rather than “exclusively charitable.”⁷⁴ A revenue surplus might indicate this, though courts generally do not disqualify uses on these grounds alone.⁷⁵ Courts may also look to whether for-profit businesses engage in the activity at issue—which could indicate that a nonprofit is trying to edge out for-profit competitors⁷⁶—and whether the nonprofit uses the revenue for

70. *Youth Programs, Inc. v. Tenn. State Bd. of Equalization*, 170 S.W.3d 92, 104–05 (Tenn. Ct. App. 2004). It is worth noting that Tennessee construes its exemption statute liberally. *Id.* at 98.

71. See *supra* note 31 and accompanying text (introducing the private-benefit prohibition).

72. E.g. Ala. Code § 40-9-1 (LexisNexis 2011) (disqualifying property used “for business purposes . . . notwithstanding that the income from such property shall be used exclusively for . . . charitable purposes”); see also Brody, *All Charities*, *supra* note 17, at 652 (“The desire to deny exemption in cases of private benefit sometimes turns on state statutes or judicial decisions prohibiting the charity from operating the property ‘for profit.’ . . . But the line can be hard to draw.”).

73. For example, the Alabama Supreme Court exempted a nonprofit hospital’s entire property, including an income-generating parking deck, cafeteria, and gift shop, though the statute denies the exemption for property used “for business purposes.” Ala. Code § 40-9-1; *Mingledorff v. Vaughan Reg’l Med. Ctr., Inc.*, 682 So. 2d 415, 417, 422–23 (Ala. 1996).

74. See, e.g., *Fairbanks N. Star Borough v. Dená Nená Henash*, 88 P.3d 124, 132 (Alaska 2004) (“Our ‘charitable purposes’ doctrine also requires analyzing whether the property sustains activities motivated by a ‘dominant profit motive.’” (quoting *City of Nome v. Catholic Bishop of N. Alaska*, 707 P.2d 870, 891 (Alaska 1985))). To note, the court invoked its “charitable purposes doctrine” while discussing a particular property use and thereby seems to conflate the two tests. *Id.*; see also *infra* section II.C (discussing the New York Court of Appeals’s conflation of charitable-purpose and charitable-use analyses in *GJDC II*).

75. See, e.g., *Dená Nená Henash*, 88 P.3d at 131 (“That a given charity manages, through effective fund-raising and careful management, to generate a surplus while carrying out its charitable purposes does not necessarily deprive the charity of a property tax exemption.”).

76. See Brody, *All Charities*, *supra* note 17, at 652–53 (“[T]he existence of for-profit competitors is generally not alone enough to render property taxable Nevertheless, courts often do consider competition as a factor in the analysis.”).

nonexempt purposes.⁷⁷ This inquiry captures organizations that qualify as charities but use property to conduct noncharitable, for-profit activities.

States may also interpret “exclusively charitable” to permit “incidental” use.⁷⁸ Under this distinction, organizations can operate for-profit activities, provided that these activities further—or at least, do not overwhelm—the organization’s primary charitable purposes.⁷⁹ Minnesota, for instance, exempts real property used for both commercial and charitable purposes, so long as the commercial use is “incidental to and reasonably necessary in furtherance of the entity’s charitable activities.”⁸⁰ The Minnesota Supreme Court relied on this to exempt property owned by the Afton Historical Society Press, an “institution of purely public charity” that also used its facility to produce work on a contract basis.⁸¹

Together, the charitable-purpose and charitable-use tests provide courts with frameworks to assess whether certain organizations qualify for charitable property tax exemptions based on the facts at hand. The next section explores the administration of charitable exemptions to explain how the legal frameworks function at a practical level for organizations seeking exemptions.

C. *Administering the Charitable Property Tax Exemption*

The first decision on whether to grant a charitable property tax exemption comes from a local tax assessor.⁸² Using that state’s particular framework, assessors determine whether the requesting organization merits the exemption.⁸³ The first step for organizations is to submit an

77. See, e.g., *Dená Nená Henash*, 88 P.3d at 138–39 (“We hold that an operating surplus will not preclude an otherwise valid tax exemption so long as . . . revenue is allocated only to support exempt purposes.”).

78. See, e.g., *In re Yeshivath Shearith Hapletah v. Assessor*, 590 N.E.2d 1182, 1184 (N.Y. 1992) (“The term ‘exclusively’, in this context, has been broadly defined to connote ‘principal’ or ‘primary’ such that purposes and uses merely ‘auxiliary or incidental to the main and exempt purpose and use will not defeat the exemption.” (citing *In re Ass’n of the Bar v. Lewisohn*, 313 N.E.2d 30, 35 (N.Y. 1974))).

79. *Id.*; see also *infra* section II.C.3 (discussing court of appeals’s treatment of New York’s “incidental use” allowance in *GJDC II*).

80. *Afton Historical Soc’y Press v. County of Washington*, 742 N.W.2d 434, 441 (Minn. 2007).

81. *Id.*

82. See Legal Servs. Div., Iowa Legislative Servs. Agency, Local Property Tax 13 (Dec. 2015), <http://www.legis.iowa.gov/docs/publications/LG/9447.pdf> [<http://perma.cc/975B-54JB>].

83. See, e.g., Minn. Dep’t of Revenue, Minnesota Property Tax Administrator’s Manual Module #5: Exempt Property 5 (July 2015), http://www.revenue.state.mn.us/local_gov/prop_tax_admin/education/ptamannual_module5.pdf [<http://perma.cc/TUX7-2YK9>] (“The assessor has an extremely important responsibility in extending exemptions only to properties that meet the qualifications under law.”); Wash. State Ass’n of Cty. Assessors, County Assessor’s Reference Manual for Washington State 3 (Nov. 2011), http://dor.wa.gov/docs/pubs/prop_tax/assessorrefmanual.doc (on file with the *Columbia Law Review*) (“The assessors’ primary duty is determining the value of all taxable real and

exemption request form to the municipality's designated agency.⁸⁴ An assessor then uses information from the form, as well as a location visit in some jurisdictions, to place a value on the property and make the exemption determination.⁸⁵

As organizations have the burden of showing entitlement,⁸⁶ it is crucial that these application forms contain enough information to enable assessors to make informed decisions. To that end, some jurisdictions translate the statute's requirements into a series of "plain English" questions on application forms.⁸⁷ Forms might also include explanatory information, such as the exemption statute's citation and relevant text,⁸⁸

personal property within their jurisdiction for the purpose of equitable distribution of the tax liabilities of property owners for various districts.”).

84. See, e.g., Ill. Dep't of Revenue, Application for Non-Homestead Property Tax Exemption (Form PTAX-300) [hereinafter Ill. Form], <http://www.kanecountyassessments.org/Forms/nonhomestead.pdf> [<http://perma.cc/F8VA-USEF>] (last visited July 26, 2016) (informing applicants to file the form with the county board of review); Wis. Dep't of Revenue, Property Tax Exemption Request (Form PR-230), <http://www.revenue.wi.gov/forms/govexmpt/pr-230.pdf> [<http://perma.cc/TJ45-UNYQ>] (last visited Aug. 8, 2016) (instructing applicants to file with the tax assessor).

85. See, e.g., Div. of Prop. Taxation, State of Colo., Application for Exemption of Property Owned and Used for Strictly Charitable or School Purposes (Form 901-A) 7 [hereinafter Colo. Form], <http://www.colorado.gov/pacific/sites/default/files/Schools%20%26%20Charitable%20Application%20Form.pdf> [<http://perma.cc/K5FL-AZZG>] (last visited July 26, 2016) (“An examiner may perform an inspection of the subject property at any time.”); Ill. Form, *supra* note 84 (noting, in Illinois, the county board of review will recommend whether the exemption should be granted, which may require a hearing to evaluate the application and supporting documents).

86. See, e.g., Legal Servs. Div., Iowa Legislative Servs. Agency, *supra* note 82, at 13 (“The exemption statutes are to be strictly construed in favor of the taxing body and the burden of proof is on the taxpayer to show that an exemption should be granted.”); Minn. Dep't of Revenue, *supra* note 83, at 5 (“Whenever property is removed from the tax rolls, the other taxpayers of that jurisdiction pay a higher share of the tax burden. Therefore, burden of proof is on the one seeking exemption to prove to the assessor that they are entitled to the exemption.”).

87. See, e.g., State of Md. Dep't of Assessments & Taxation, Application for Exemption Charitable Property [hereinafter Md. Form], <http://www.dat.state.md.us/SDAT%20Forms/chrtble.pdf> [<http://perma.cc/w3CR-NE6H>] (last visited July 26, 2016) (“Describe the facilities located on the property and how they are used.”). On the other hand, some of these “plain English” questions do not seem helpful for applicants that lack a sense of the underlying law. See, e.g., Pulaski Cty. Assessor's Office, Property Exemption Application [hereinafter Pulaski Cty., Ark., Form], <http://www.pulaskicountyassessor.net/docs/Property%20Exemption%20Applicationpdf.pdf> [<http://perma.cc/U2RQ-N9JA>] (last visited Aug. 15, 2016) (“Please state your reason for requesting an exemption.”).

88. See, e.g., Town of Brunswick Assessing Dep't, Application for Exemption from Local Property Taxation [hereinafter Brunswick, Me., Form], <http://www.brunswickme.org/wp-content/uploads/2011/12/AppforexemptionfrlocTaxFILLABLE.pdf> [<http://perma.cc/X5JE-FB9H>] (last visited July 26, 2016) (noting the applicable exemption statute, Me. Rev. Stat. Ann. tit. 36, § 652 (2010)).

definitions for terms of art,⁸⁹ and other notes.⁹⁰ To determine how much of the property at issue qualifies for the exemption, most forms will request that applicants denote exactly how much square footage is devoted to each of the organization's activities.⁹¹

Exemption request forms often instruct applicants to attach supplementary documents as well. Most frequently, applicants must include the organization's governance documents, proof of tax-exempt status, and recent financial statements.⁹² Jurisdictions might also request a range of other documents, including any lease agreements,⁹³ brochures or other materials describing the organization's activities,⁹⁴ and copies of formal policies.⁹⁵ For the most part, these requested documents provide additional evidence for the charitable-purpose test: For example, the

89. See, e.g., Colo. Form, *supra* note 85, at 1 (listing categories of "real" and "personal" property).

90. See, e.g., Pulaski Cty., Ark., Form, *supra* note 87 ("Exemption follows USE, not Non-Profit Status. Note: 501(c)(3) Non-Profit Status DOES NOT give you automatic Exemption Status.").

91. See, e.g., Kootenai Cty. Comm'rs, Property Tax Exemption Worksheet 1-2, <http://www.kcgov.us/departments/boardcommish/downloads/Property%20Tax%20Exemption%20Worksheet%2063-602C.pdf> [<http://perma.cc/B27S-X2MU>] (last visited July 26, 2016) (requiring applicants to provide "total square footage" of property, square footage leased or used by others, and square footage used for business or commercial purposes); Real Prop. Assessment Div., Dep't of Budget & Fiscal Servs., City & Cty. of Honolulu, Claim for Exemption Charitable (Nonprofit) Purposes, <http://www.realpropertyhonolulu.com/content/rpadcms/documents/exemption/bfsrpp5.pdf> [<http://perma.cc/539U-QN44>] (last visited July 26, 2016) (requiring "a plot plan illustrating the location of buildings and area (in square feet), and indicating their specific use," along with notes on any area "not exclusively being used for charitable purposes," "being used by other parties or organizations," or "being used for . . . recurring commercial activities").

92. See, e.g., Revenue Div., City of Wilmington, Non-Profit Application and Affidavit for Property Tax Exemption [hereinafter *Wilmington, Del., Form*], <http://www.ci.wilmington.de.us/home/showdocument?id=472> [<http://perma.cc/2GS5-CH88>] (last visited July 26, 2016) (requiring "Government Affirmation Letter from the IRS to prove status as a 'tax exempt' or charitable entity" and "Financial Statement and/or Independent Audit Report"); see also Prop. Tax Div., Minn. Dep't of Revenue, Assessment and Classification Practices Report: Institutions of Purely Public Charity 9 (Feb. 2, 2009) [hereinafter *Minn. Institutions of Purely Public Charity Report*], http://www.revenue.state.mn.us/propertytax/reports/acp_09_ppcharity.pdf [<http://perma.cc/XK6U-H68M>] ("Some criteria are possible to verify through documentation: 501(c)(3) statuses, Articles of Incorporation, amount of donations, fees charged, etc.").

93. See, e.g., Ill. Form, *supra* note 84 (requiring "[c]opies of any contracts or leases on the property").

94. See, e.g., Prop. Tax Assistance Div., Tex. Comptroller of Pub. Accounts, Application for Charitable Organization Property Tax Exemption (Form 50-115) 2, <http://www.comptroller.texas.gov/taxinfo/taxforms/50-115.pdf> [<http://perma.cc/DCY9-W69Z>] (last visited Aug. 15, 2016) (allowing applicants to attach "representative copies of newsletters, brochures or similar documents for supporting details" to the "narrative description of activities").

95. See, e.g., Brunswick, Me., Form, *supra* note 88 (requesting the applicant's written policies regarding services for those who cannot afford to pay).

Brunswick, Maine, form asks organizations that offer subsidized services to provide documentation on the number of clients that the organization charges full, reduced, or no fees.⁹⁶ Documents like activity brochures may also serve as proof of charitable use. Some jurisdictions encourage applicants to submit any other materials that they believe would support their exemption requests, although the forms provide little guidance on additional information that might be useful to assessors.⁹⁷

In some states, each county—or even each city—might use a different form, framing questions about charitable purpose and use in substantively different ways.⁹⁸ Though these differences might simply reflect drafters' wording preferences, they may also reveal discrepancies in how municipalities interpret state exemption standards. In fact, a 2008 survey of Minnesota assessors found that each county has its own method for applying the state's exemption framework.⁹⁹ The survey attributes this in part to the difficulty of proving ambiguous criteria such as “charity,” lessening the burden of government, competition in market, etc.”¹⁰⁰ However, Minnesota counties also have different approaches to criteria that the survey deems “possible to verify through documentation,” such as whether 501(c)(3) status is a mandatory requirement.¹⁰¹

Assessors in most jurisdictions are encouraged to deny an exemption if they have any doubts as to whether the requirements are satisfied,¹⁰² but the extent to which they will seek additional information or advice before doing so is unclear.¹⁰³ While some states advise assessors to contact

96. *Id.*

97. See, e.g., Washington Cty. Assessor's Office, Property Exemption Application, <http://www.co.washington.ar.us/Modules/ShowDocument.aspx?documentid=1801> [<http://perma.cc/N5KC-VG7F>] (last visited Aug. 21, 2016) (instructing applicants to attach “any other pertinent information which may assist in determining whether the property qualifies for exemption from ad valorem taxation”).

98. For example, the form for Kalamazoo, Michigan, asks applicants to “list *all* uses of this property and percentage of each,” while the form for Lansing, Michigan, asks applicants to answer the following: “What activities take place at the location requested for exemption? Demonstrate how these activities would fit the above definition of a charity.” City Assessor's Office, City of Kalamazoo, Application for Exemption from Property Taxes 3 [hereinafter *Kalamazoo, Mich., Form*], <http://www.kalamazoocity.org/documentlibrary/city-of-kalamazoo/management-services/assessors/163-property-tax-exemption-application/file> [<http://perma.cc/D4FE-M6YG>] (last visited July 26, 2016); Lansing City Assessor's Office, Request for Exempt Status, <http://www.lansingmi.gov/DocumentCenter/Home/View/406> [<http://perma.cc/T7GG-8UBF>] (last visited Aug. 21, 2016). The Lansing, Michigan, form also requests additional information on use, including any fees charged and whether the property is open to or available to the general public. *Id.*

99. See Minn. Institutions of Purely Public Charity Report, *supra* note 92, at 8–9.

100. *Id.* at 9.

101. *Id.* at 8–9.

102. See, e.g., Minn. Dep't of Revenue, *supra* note 83, at 5 (“If an assessor is in doubt as to the taxable status of a property, the property should be placed on the tax rolls and the taxpayer should be allowed to appeal to Minnesota Tax Court.”).

103. See, e.g., Dakota Cty., Minn., Institution of Purely Public Charity Property Tax Exemption Application (Form CR-IPPC), <http://www.co.dakota.mn.us/HomeProperty/>

the state attorney or a particular agency with any legal questions about the exemption, there is little information on whether this occurs in practice.¹⁰⁴ Jurisdictions may also have unique methods of confirming whether applicants are entitled to the exemption.¹⁰⁵ For example, one county responding to Minnesota's survey indicated that they would review applications with assessors from other counties to see if similar properties owned by the same entity are exempted, while another indicated that they would hold meetings with the organization.¹⁰⁶

Since municipalities typically reassess real property every few years, most require property-owning charitable organizations to resubmit their exemption requests along with each new assessment.¹⁰⁷ Assessors generally treat these as new requests, meaning that organizations cannot rely on past exemption grants to prove future entitlement.¹⁰⁸ One notable exception is New York, which distinguishes subsequent denials as

TaxPrograms/Exempt/Documents/ExemptApplicationPublicCharity.pdf [http://perma.cc/GVG5-YC6C] (last visited July 26, 2016) (informing applicants “[t]he assessor may also ask for any information which would clarify explanations provided under ‘Charitable Organization Information’”); N.Y. State Dep’t of Taxation & Fin., Assessor’s Manual, Volume 4, Exemption Administration (2014), http://www.tax.ny.gov/research/property/assess/manuals/vol4/pt2/sec4_05/rptaxex.htm [http://perma.cc/3WF7-57CK] (instructing assessors to request additional information if necessary); see also *infra* section III.B (proposing recommendations regarding additional information).

104. See, e.g., Minn. Institutions of Purely Public Charity Report, *supra* note 92, at 9 (“Many counties noted that they would seek advice from the Department of Revenue if a question arose.”). Professor Brody has doubts that assessors regularly take this step. Brody, *All Charities*, *supra* note 17, at 633 (“It seems that . . . the state revenue agency might consult with the state attorney general about whether a particular organization is a charity. Anecdotally, however, this sort of communication rarely occurs.”).

105. For example, Utah’s county boards of equalization, which are responsible for determining properties’ exempt status, may subpoena and question applicants under oath regarding evidence submitted with the exemption application. 2 Prop. Tax Div., Utah State Tax Comm’n, *Property Tax Exemptions: Standards of Practice 22* (2016), <http://propertytax.utah.gov/library/pdf/standards/standard02.pdf> [http://perma.cc/D7XF-N5LR].

106. Minn. Institutions of Purely Public Charity Report, *supra* note 92, at 9.

107. Brody, *All Charities*, *supra* note 17, at 656 (“While a nonprofit usually need not apply for exemption every year, state requirements vary on how often the nonprofit must renew its exemption.”).

108. To that end, organizations that fail to meet their burden of proof in a given year can simply remedy any deficiencies and reapply in the future with a clean slate. See *id.* at 625. In some states, however, assessors may categorize exemptions into new requests and “renewals.” See *Wilmington, Del., Form*, *supra* note 92 (asking organizations to note changes in “exempt status,” “purpose or function of the organization,” and “requirements for a person or groups of persons to receive [the organization’s] services”).

“revocations.”¹⁰⁹ The municipality then has the burden of proving that the organization at issue no longer merits the exemption.¹¹⁰

In one sense, requiring organizations to reapply frequently has the advantage of better enabling municipalities to identify organizations that are taking advantage of the exemption system.¹¹¹ However, if assessors truly see exemption determinations as “‘feeling-based’ as opposed to ‘fact-based,’” as Minnesota’s survey concluded,¹¹² this practice also gives assessors an opportunity to narrow their interpretation of exemption criteria in order to deny previously granted exemptions. As Greater Jamaica Development Corporation (GJDC) learned, even New York organizations protected under the state’s “revocation” distinction may not be able to prevent municipalities from rescinding exemptions unexpectedly and with little justification.

II. GREATER JAMAICA DEVELOPMENT CORPORATION V. NEW YORK CITY TAX COMMISSION: PITFALLS FOR COMMUNITY ECONOMIC DEVELOPMENT ORGANIZATIONS

*Greater Jamaica Development Corp. v. New York City Tax Commission*¹¹³ illustrates how courts struggle to apply exemption frameworks to property uses that are jointly commercial and charitable. Greater Jamaica Development Corporation, a 501(c)(3) community economic development organization, challenged the New York City Department of Finance’s decision to revoke existing property tax exemptions on the organization’s five parking garages.¹¹⁴ The New York Court of Appeals ul-

109. *Greater Jam. Dev. Corp. v. N.Y.C. Tax Comm’n*, 36 N.E.3d 645, 649 (N.Y. 2015) (“[W]here the taxing authority seeks to revoke that exemption previously granted, it is the taxing authority that has the burden of establishing that the property is not exempt from taxation.” (citing *In re Lackawanna Cmty. Dev. Corp. v. Krakowski*, 910 N.E.2d 997, 999 (N.Y. 2009))).

110. *Id.* (“In order to meet that burden, the City was required to demonstrate either that petitioners were not ‘organized or conducted exclusively for’ exempt purposes or that the [property was] not ‘used exclusively for carrying out thereupon one or more’ exempt purposes.” (quoting N.Y. Real Prop. Tax Law § 420-a(1)(a) (McKinney 2008))); see also *infra* section II.C (discussing revocation analysis in *GJDC II*). New York courts may overturn agency actions “only if the determination or action made or taken was (i) in contravention of law; (ii) arbitrary, capricious or an abuse of discretion; or (iii) if a hearing held at the agency level was not supported by substantial evidence in the record.” N.Y. State Unified Court Sys., *How to Commence a Special Proceeding 2*, http://www.nycourts.gov/courts/gjd/forms/SRForms/sp_howtocommence.pdf [<http://perma.cc/2EVH-RGET>] (last visited Aug. 8, 2016).

111. See, e.g., *Christ Church Pentecostal v. Tenn. State Bd. of Equalization*, 428 S.W.3d 800, 814 (Tenn. Ct. App. 2013) (noting the potential for organizations to obtain unfair advantages through exemption).

112. *Minn. Institutions of Purely Public Charity Report*, *supra* note 92, at 9.

113. 36 N.E.3d 645.

114. See *id.* at 648; see also *infra* section II.B (describing the exemption grant and revocation).

mately affirmed the revocation in an opinion that can serve as precedent for municipalities looking to cut back on exemptions by disqualifying certain types of charities.¹¹⁵

Section II.A introduces CED organizations' goals and methods. Section II.B provides background information on GJDC and its parking facilities and then discusses the Department of Finance's initial exemption grant and subsequent revocation. Section II.C analyzes the court of appeals's decision to affirm the revocation, contrasting it with Judge Susan Read's dissenting analysis.

A. *Community Economic Development*

CED organizations aim to revitalize economically depressed or underserved communities by stimulating economic growth.¹¹⁶ These groups often fill roles formerly occupied by government agencies, making them essential to local revitalization efforts.¹¹⁷ At the same time, many CED organizations take on projects that have for-profit counterparts, such as venture capital funds and business incubators.¹¹⁸ While organizations can justify their commercial projects by arguing that direct aid to private parties translates into job creation and economic growth, some scholars question whether these activities should qualify as charitable.¹¹⁹ In the property tax exemption context, CED organizations'

115. See *GJDC II*, 36 N.E.3d at 655; see also *infra* section II.C (discussing the majority opinion and dissent).

116. See James DeFilippis & Susan Saegert, *Communities Develop: The Question Is, How?*, in *The Community Development Reader* 1, 5 (James DeFilippis & Susan Saegert eds., 2d ed. 2012) [hereinafter DeFilippis & Saegert, *Community Development Reader*] ("Community development occurs when the conditions of surviving and thriving in a place are not being supplied by capital. Thus community development emerges in the context of the current limitations of the capitalist political economy to fulfill the needs and desires of the community.").

117. See Gregory G. Maher, *Charitable Economic Development: It's Time the IRS Took Another Look*, 7 *J. Affordable Housing & Community Dev. L.* 31, 32 (1997) ("Increasingly, the philanthropic, business, and government sectors look to [community development corporations (CDCs)] to play a catalytic role in stimulating economic development, job growth, and community revitalization.").

118. Matthew J. Rossman, Benesch Friedlander Coplan & Aronoff LLP, *Economic Development Organizations and the Private Benefit Doctrine*, Perspectives 4 (Sept. 2014) [hereinafter Rossman, *Economic Development*], http://www.beneschlaw.com/Files/Publication/c2718b68-5cac-4491-a28f-b3133d2a9c4b/Presentation/PublicationAttachment/1f8d8170-2742-4f9c-8fc8-53cf881816e6/Benesch_Perspectives_Sept2014.pdf [http://perma.cc/K7UN-R9X5].

119. See *id.* (arguing that organizations "providing direct aid to for-profit businesses in order to increase regional job opportunities" create, at best, "trickle down charity" that "represents a reversal of what the private benefit doctrine permits").

ties to commercial activity do not fit neatly into frameworks designed to assess “traditional” types of charities.¹²⁰

1. *CED Practices*. — While there is no widely accepted definition of “community economic development,”¹²¹ the term typically applies to nonprofit, nongovernmental groups that aid underserved, low-income, or otherwise at-risk communities by developing housing, jobs, or business opportunities for residents.¹²² As municipal governments scale back on providing these types of social services, CED organizations have stepped in to address unmet needs.¹²³

CED activities stimulate economic growth by addressing a range of issues: At the individual level, CED organizations help community members both directly, through job training and placement, and indirectly, by working with businesses to shift hiring practices and employment policies.¹²⁴ They assist small businesses through services such as management

120. See *infra* section II.C for a discussion of how this plays out in *GJDC II*. For recommendations on how courts and assessors should consider commercial activity, see *infra* section III.A.

121. Letter from Judy A. England-Joseph, Dir., Hous. & Cmty. Dev. Issues, Res., Cmty. & Econ. Dev. Div., Chairman, Comm. on the Budget, House of Representatives (July 28, 1995), <http://www.gao.gov/assets/90/84745.pdf> [<http://perma.cc/X7PH-LHSJ>].

122. William H. Simon, *The Community Economic Development Movement 3* (2001); see also Maher, *supra* note 117, at 32 (“The goals of the project . . . are usually the creation of local jobs for neighborhood residents, and the physical stabilization of the community through blight removal.”). A 2003 bill proposed in the U.S. Senate describes CED projects as involving “(A) investment in business enterprises, including investments in the form of loan origination, equity investment, and monetary assistance to home buyers or to business owners for business development projects; or (B) the construction or rehabilitation of facilities, including commercial or industrial facilities, homes, apartment buildings, and community parks.” S. 1711, 108th Cong. § 3 (2003).

123. See Peter Boothroyd & H. Craig Davis, *Community Economic Development: Three Approaches*, 12 *J. Plan. Educ. & Res.* 230, 230 (1993) (“The growing CED movement reflects continuing disenchantment with the welfare state and its ability to maintain full employment and rising standards of living, provide adequate social and municipal services, and reduce regional disparity.”); James DeFilippis, *Community Control and Development*, in DeFilippis & Saegert, *Community Development Reader*, *supra* note 116, at 30, 34 (noting that community development corporations CDCs “grew in spite of, and partially in reaction to, the shrinking desire of the public sector to provide goods to collective consumption”). Municipal governments generally appreciate CED organizations’ efforts to provide services. *Id.* at 35 (“This role was embraced by the state, as it willingly walked away from the provision of these services, and looked to the community-based sector to fill in the holes it has left behind.”).

124. Per Professors Norman Glickman and Lisa Servon, CED organizations may do this in several ways:

First, CDCs help match people with jobs by providing them with, or referring them to, appropriate training programs. Second, CDCs make linkages to local businesses and negotiate employment agreements to ensure that residents will have access to jobs in the community and regionally. Third, community organizations educate constituents about the forces driving unemployment and low wages, which can give residents the motivation they need to organize and fight those forces.

training.¹²⁵ In addition, CED organizations engage in neighborhood-business retention, which covers activities ranging from small-business loan services to advocacy work and community organizing.¹²⁶ At the broadest level, CED organizations take on community-revitalization projects that add to and improve infrastructure in commercial districts.¹²⁷ These activities share a common goal: to empower residents and local-business owners to take control of local economies that have deteriorated as a result of market forces and inadequate government intervention.¹²⁸

2. *CED from a Charitable Exemption Perspective.* — CED activities are difficult to analyze using property tax exemption frameworks because they do not fall neatly into either charitable or commercial activity. CED organizations' ability to receive the exemption generally turns on the charitable-purposes analysis.¹²⁹ Though several states explicitly protect CED organizations' charitable status by statute,¹³⁰ courts faced with the

Norman J. Glickman & Lisa J. Servon, More than Bricks and Sticks: Five Components of Community Development Corporation Capacity, *in* DeFilippis & Saegert, Community Development Reader, *supra* note 116, at 54, 62.

125. *Id.* (“CDCs also foster the creation, stabilization, and expansion of small businesses within the community by providing training and technical assistance for business development. This strategy has the potential for job creation and for keeping money circulating in target communities.” (citations omitted)).

126. Wim Wiewel et al., The Economic Development of Neighborhoods and Localities, *in* DeFilippis & Saegert, Community Development Reader, *supra* note 116, at 107, 107 (“Neighborhood business retention identifies business problems, organizes business leaders, provides technical assistance and loan packaging, organizes collective services . . . , launches industrial real estate projects . . . , and advocates for public policies . . . beneficial to specific industrial locations, economic sectors, and firm sizes.”).

127. See Maher, *supra* note 117, at 46 (“[T]he revitalization of run-down commercial corridors in cities throughout the United States has consistently been supported by exempt nonprofits. The primary goal of most of these projects is to stem community deterioration and revitalize the area.”). Traditionally, CED organizations focused construction efforts on building low-income housing; in recent years, however, organizations have taken on large-scale real-estate-development projects, often alongside or in place of local government. See Susan R. Jones, Current Issues in the Changing Roles and Practices of Community Economic Development Lawyers, 2002 Wis. L. Rev. 437, 462 (“As Mary Nelson of Bethel New Life Church, a highly regarded Christian Community Development Association in Chicago observed, “[w]e started in housing, but what we found is that even the most affordable housing is not affordable without jobs.” (alteration in original)); Wiewel et al., *supra* note 126, at 107–08 (“[CED] involves neighborhood organizations promoting the economic growth of commercial districts by . . . commercial strip management (as at shopping centers) . . . and targeted real estate development.”). For a discussion of GJDC’s large-scale projects, see *infra* section II.B.1.

128. Boothroyd & Davis, *supra* note 123, at 230 (“However CED is practiced, the general objective is the same: to take some measure of control of the local economy back from the market and the state.”).

129. See *supra* section I.A (describing the charitable-purpose test); *infra* notes 132, 134 (outlining cases in which courts’ decisions centered on the charitable-purpose test).

130. See, e.g., Tex. Tax Code Ann. § 11.231 (West 2015) (exempting property owned by “a nonprofit community business organization” that performs one or more of the following: “(1) promoting the common economic interests of commercial enterprises; (2)

question of whether economic development qualifies as a charitable purpose rarely receive guidance from state legislatures.¹³¹ Courts are divided on whether CED organizations can qualify as charities, though most tend to reject economic development as a valid charitable purpose.¹³²

The primary aspect that troubles courts is the degree to which CED activities directly benefit businesses compared with the overall community impact.¹³³ Many courts that have addressed this issue hold that the primary objective behind CED is to further private business interests, which cannot be a charitable motive.¹³⁴ Focusing on the benefit to businesses translates into the view that the overall community benefit is incidental to an organization's main purpose: serving private parties.¹³⁵ When CED is characterized this way, it follows that granting the exemption would violate the private-benefit doctrine, which permits only for-profit activity that is incidental to a charitable purpose.¹³⁶

improving the business conditions of one or more types of business; or (3) otherwise providing services to aid in economic development”).

131. See *supra* notes 41–42 and accompanying text (discussing the open-ended nature of property-tax exemption statutes).

132. Compare, e.g., *Hancock v. Prestonsburg Indus. Corp.*, 365 S.W.3d 199, 203 (Ky. 2012) (reversing the Kentucky Court of Appeals's decision that appellee was a purely charitable organization exempt from taxation), and *Growth P'ship for Ashtabula Cty. v. Testa*, No. 2011–A–0002, 2012 WL 34436, at *5 (Ohio Ct. App. Jan. 9, 2012) (affirming the Ohio Board of Tax Appeals's decision to deny appellant tax-exempt status), with *Miracit Dev. Corp. v. Zaino*, No. 04AP-322, 2005 WL 564073, at *9 (Ohio Ct. App. Mar. 10, 2005) (reversing the Ohio Board of Tax Appeals's denial of tax-exempt status to appellant).

133. As Professor Matthew Rossman points out in the context of 501(c)(3), “jurisprudence related to economic development for charitable purposes *should* turn on the private benefit doctrine.” Rossman, *Economic Development*, *supra* note 118, at 4 (emphasis added).

134. See, e.g., *Prestonsburg Indus. Corp.*, 365 S.W.3d at 202 (“Simply stated, commercial and economic development are the promotion of business interests and not, therefore, indicative of actions of a purely public charity.”); *Growth P'ship for Ashtabula Cty.*, 2012 WL 34436, at *4–5 (contrasting “economic development” with “providing services to those in need” to hold that the organization did not qualify as a charitable institution because of its “private economic purpose and focus”). Similarly, the Alaska Supreme Court determined that “attempts to economically benefit certain businesses . . . [and] provide for economic development of certain areas” may not necessarily have charitable purposes, which disqualifies property used for those purposes from receiving that state's charitable exemption. *Fairbanks N. Star Borough v. Dená Nená Henash*, 88 P.3d 124, 140 (Alaska 2004). In a related opinion regarding a nonprofit research institute, the Minnesota Supreme Court held that “the purpose of improving directly the profit-making potential of a private business is not a ‘public purpose’ in a sense comparable to such purposes as the relief of poverty and sickness, the general dissemination of knowledge, and the encouragement of religion, science, and the arts.” *N. Star Research Inst. v. County of Hennepin*, 236 N.W.2d 754, 758 (Minn. 1975).

135. See *supra* notes 78–79 and accompanying text (discussing “incidental” use).

136. Rossman, *Economic Development*, *supra* note 118, at 4 (“This represents a reversal of what the private benefit doctrine permits—it is privately owned businesses that are the direct beneficiaries of the organization's activities and the community's residents who benefit incidentally.”).

This view, however, ignores the direct, intentional impact that CED activities have on at-risk communities, which justifies labeling economic development as a charitable purpose. As Judge William Scott noted in his dissent in *Hancock v. Prestonsburg Industrial Corp.*, CED organizations are committed to serving communities in need, meaning that job creation and business growth are the main objectives rather than the incidental result of this activity.¹³⁷ Businesses benefitting from CED, first, “employ people—those people (and their families) benefit just as much or more than the incorporated organizations” and, second, pay taxes themselves.¹³⁸

Despite the trend toward rejecting economic development as a charitable purpose, courts have demonstrated that exemption frameworks are flexible enough to permit certain CED activities. When the Brazos County Appraisal District tried to challenge the constitutionality of Texas’s statute protecting economic development organizations’ property tax exemption, the Court of Appeals of Texas looked at how the state’s basic framework defined “charitable purposes.”¹³⁹ Ultimately, the court reasoned that “promoting a local community’s common economic interests of commercial enterprises; improving the business conditions of one or more types of business of a local community; or otherwise providing services to aid in economic development for a local community” qualified as “other purposes the accomplishment of which is beneficial to the community,” and therefore was a charitable institution.¹⁴⁰ As the *Brazos County* decision indicates, a state’s existing exemption framework can protect CED organizations even in the absence of specific statutory safeguards.¹⁴¹

B. *Assessing a “Charitable” Parking Lot*

The key to determining whether an organization should receive a charitable exemption is understanding why the organization chose to use a piece of property in a particular way.¹⁴² Sections II.B.1 and II.B.2 provide background information on GJDC’s decision to operate parking facilities in downtown Jamaica, as well as the city’s initial exemption grant. Section II.B.3 then discusses the Department of Finance’s decision to revoke the exemption.

137. 365 S.W.3d at 205–06 (Scott, J., dissenting).

138. *Id.* at 206.

139. See *Brazos Cty. Appraisal Dist. v. Bryan–Coll. Station Reg’l Ass’n of Realtors, Inc.*, 419 S.W.3d 462, 465 (Tex. App. 2013) (explaining that the Texas Supreme Court defines “charitable purposes” as including “governmental or municipal purposes” and “purposes the accomplishment of which is beneficial to the community” (internal quotation marks omitted) (quoting *Boyd v. Frost Nat’l Bank*, 196 S.W.2d 497, 502 (Tex. 1946))).

140. *Id.* (quoting *Boyd*, 196 S.W.2d at 502).

141. See also *infra* section II.C (analyzing the *GJDC II* dissent’s approach to economic development as a charitable purpose).

142. See *supra* Part I (discussing charitable-purpose and charitable-use tests).

1. *Greater Jamaica Development Corporation*. — GJDC was organized in 1967 “as a charitable, not-for-profit corporation with a mission to promote the development of the business-commercial-retail district of Jamaica, Queens.”¹⁴³ An important business and retail center during the first half of the twentieth century, Jamaica fell victim to urban decline and by the 1970s significantly trailed the rest of New York City in economic growth.¹⁴⁴ GJDC formed in response, with local civic leaders’ support.¹⁴⁵

GJDC’s current activities are closely linked to the commercial sector: The organization’s website lists “planning with private developers through a special entity, administration of a small business loan fund, administration of government programs in industrial retention and commercial revitalization, and a host of programs and undertakings designed to improve the quality of life, general marketing and perception of Downtown Jamaica.”¹⁴⁶ Many of GJDC’s projects have a considerable scope; for example, GJDC was involved in constructing the AirTrain connecting the John F. Kennedy International Airport to Jamaica’s mass-transit stations.¹⁴⁷ Through these activities, GJDC aims to “expand[] economic opportunity and improve[] quality of life for the ethnically and economically diverse residents of Jamaica and for the region at large.”¹⁴⁸

2. *Jamaica First Parking, LLC*. — In 1996, GJDC purchased a parking garage from the City of New York, largely at the government’s request.¹⁴⁹ Downtown Jamaica’s parking facilities were municipally owned at the time and had fallen into disrepair—these garages were purportedly so unpleasant and unsafe that people avoided using them.¹⁵⁰ In contrast, shopping malls in nearby Nassau County offered free parking in new facilities, making Nassau County a more compelling choice for retail customers.¹⁵¹ Community groups and local businesses felt that safe, inexpensive, and convenient parking would bring retail customers back to downtown Jamaica, bolstering economic development.¹⁵²

143. *Greater Jamaica Dev. Corp. v. N.Y.C. Tax Comm’n (GJDC I)*, 975 N.Y.S.2d 749, 750 (App. Div. 2013).

144. Brief for Lawyers Alliance for New York et al. as Amici Curiae Supporting Respondents at 10–11, *GJDC II*, 36 N.E.3d 645 (N.Y. 2015) (No. 2012-04300) [hereinafter Brief for Lawyers Alliance].

145. *Id.* at 11.

146. About Us, Greater Jamaica Dev. Corp., <http://gjdc.org/about-us/> [<http://perma.cc/T8HN-AGUH>] (last visited July 26, 2016).

147. *Id.*; AirTrain JFK, Port Auth. of N.Y. & N.J., <http://www.panynj.gov/airports/jfk-airtrain.html> [<http://perma.cc/6TB6-KZFU>] (last visited Aug. 21, 2016).

148. Mission, Greater Jamaica Dev. Corp., <http://www.gjdc.org/about-us/mission/> [<http://perma.cc/D24P-SU65>] (last visited July 26, 2016).

149. *GJDC II*, 36 N.E.3d at 647; see also Brief for Lawyers Alliance, *supra* note 144, at 14.

150. Brief for Lawyers Alliance, *supra* note 144, at 14.

151. *Id.* at 11.

152. *Id.* at 13–14. This is a recognized method of combatting community deterioration. See Wiewel et al., *supra* note 126, at 95 (“Neighborhoods are part of a market-based

Once GJDC committed to the project in earnest, it created a new subsidiary organization—Jamaica First Parking, LLC (JFP)—to acquire, develop, and operate these facilities.¹⁵³ JFP's governing documents were crafted carefully to protect GJDC's tax-exempt status.¹⁵⁴ To further shield itself, GJDC solicited a private letter ruling from the IRS.¹⁵⁵ The IRS determined that JFP's activities would not adversely affect GJDC's 501(c)(3) status, as the parking facility was "substantially related" to GJDC's charitable tax-exempt purposes.¹⁵⁶ GJDC began including JFP in its federal tax filings, calling it "a project of the Corporation to plan and facilitate a comprehensive public parking system to better serve the businesses, institutions, residents and visitors of Jamaica Center," aiming to "reduce traffic and congestion, improve transportation, support local economic activity and development, and attract visitors and shoppers."¹⁵⁷

In 2007, the New York City Department of Finance (DOF) granted JFP a charitable property tax exemption on the company's now five public parking facilities.¹⁵⁸ For the next four years, JFP operated these

hierarchy of commercial places defined by types of goods, family income, and transportation access When consumer preferences are not met in neighborhoods, neighborhood income leaks to other shopping districts.").

153. *GJDC I*, 975 N.Y.S.2d 749, 750 (App. Div. 2013). This structure did not play a role in the court of appeals's ultimate decision. See Michael J. Cooney et al., *Nixon Peabody LLP, New York Narrows the Availability of Real Property Tax Exemptions for Nonprofits, Now & Next Nonprofit Orgs. Alert* (July 28, 2015), http://www.nixonpeabody.com/files/178949_Nonprofit_Alert_28JUL2015.pdf [<http://perma.cc/G5K4-8RAX>] ("In some jurisdictions, the interposition of an entity . . . as a title-owner of realty . . . fail[s] the ownership prong [T]he majority . . . assumes an identity of interest between the LLC and its owner, which is consistent . . . [with] federal tax law.").

154. JFP's LLC agreement, as amended, states that JFP was "formed for the purpose of acquiring, owning, developing and operating public parking facilities *on a nonprofit basis*, including financing the acquisition and development of three public parking facilities in Jamaica, New York, *in furtherance of the charitable purposes* of the Member[, GJDC]." *GJDC II*, 36 N.E.3d at 648 (emphasis added). Similarly, JFP's certificate of formation provides that it "shall carry on any lawful purpose or activity not inconsistent with" GJDC's 501(c)(3) status. *Id.* Note that GJDC must verify to the IRS each year in its 990 filing that its activities remain primarily charitable in nature. See, e.g., Greater Jamaica Dev. Corp., *Return of Organization Exempt from Income Tax (Form 990)* (2013) [hereinafter *GJDC, Form 990*], http://projects.propublica.org/nonprofits/download-filing?path=2014_12_EO%2F11-2563026_990_201312.pdf [<http://perma.cc/ZL2E-BNKV>] (last visited Aug. 21, 2016).

155. A private letter ruling is a written statement issued in response to a taxpayer's request that interprets and applies tax laws to the taxpayer's represented set of facts. Tax Exempt Bonds Private Letter Rulings: Some Basic Concepts, IRS, <http://www.irs.gov/Tax-Exempt-Bonds/TEB-Private-Letter-Ruling:-Some-Basic-Concepts> [<http://perma.cc/5DNR-4LE9>] (last updated May 3, 2016). It is worth noting that private letter rulings cannot be used or cited as precedent, so this conclusion technically does not bear on similar organizations' federal exemptions going forward. 26 U.S.C. § 6110(k)(3) (2012).

156. *GJDC I*, 975 N.Y.S.2d at 751.

157. *GJDC, Form 990*, *supra* note 154.

158. *GJDC I*, 975 N.Y.S.2d at 751. The exemption was granted under section 420-a(1)(a) of the New York Real Property Tax Law, which provides a mandatory exemption

ostensibly charitable facilities by charging users a below-market rate.¹⁵⁹ GJDC then used the surplus revenue in part to support the organization's projects.¹⁶⁰

3. *The City's Case for Revoking JFP's Property Tax Exemption.* — In 2011, DOF revoked the facilities' property tax exemptions on the grounds that no "authority in the case law [exists] to consider use of the properties for the purpose of operating parking lots—even for economic development of an underdeveloped area—to be 'charitable.'"¹⁶¹ In addition, DOF determined that the parking lots, dubbed a "commercial enterprise," were "not incidental to another recognized charitable purpose but . . . the very purpose for which the property is being used."¹⁶² Although DOF did not give a reason for its interpretation change in the initial letter to GJDC, the New York City Tax Commission's brief to the court of appeals states simply, "DOF determined that the exemption had originally been granted in error."¹⁶³

An amicus brief to the court of appeals suggests that DOF changed its mind about GJDC's exemptions following a *New York Daily News* exposé.¹⁶⁴ The author, Juan Gonzalez, asserted that DOF granted the exemptions over protests from local tax assessors, who allegedly had "become increasingly frustrated in recent years by the willingness of Finance Department brass to grant tax exemptions without proper reviews."¹⁶⁵ The article also insinuated that an unseemly relationship existed between GJDC and local politicians, who the author referred to as the "Southeast

for an organization that can demonstrate: (1) It is "organized or conducted exclusively for religious, charitable, hospital, educational, or moral or mental improvement of men, women or children purposes"; and (2) the real property at issue is "used exclusively for carrying out" one or more of these purposes. N.Y. Real Prop. Tax Law § 420-a(1)(a) (McKinney 2008). Without record of the tax assessors' analysis at the time, it is not possible to pinpoint the city's reason for granting the exemption, which it would later describe as a mistake. See *infra* note 163 and accompanying text.

159. *GJDC II*, 36 N.E.3d at 647, 654.

160. *Id.* at 654.

161. Transcript of Record at 73–75, *GJDC II*, 36 N.E.3d 645 (No. 2014-00165) [hereinafter Transcript of Record]; see also *supra* notes 109–110 and accompanying text (discussing New York's revocation standard).

162. Transcript of Record, *supra* note 161, at 74–75.

163. Brief for the Appellants at 6, *GJDC II*, 36 N.E.3d 645 (No. 2014-00165) [hereinafter Brief for Appellants]. It bears on the discussion in section II.C that DOF never mentioned an error in its letter to GJDC. Transcript of Record, *supra* note 161, at 74 ("Based on our review . . . we have concluded that the properties listed above are not entitled to a tax exemption under Real Property Tax Law ('RPTL') section 420-a.").

164. Brief for Lawyers Alliance, *supra* note 144, at 18–19; see also Juan Gonzalez, Queens Garage Company Gets Unusual Tax Exemption for 2,000-Space Parking System, *N.Y. Daily News* (Dec. 3, 2010, 4:00 AM), <http://www.nydailynews.com/new-york/queens-garage-company-unusual-tax-exemption-2-000-space-parking-system-article-1.469283> (on file with the *Columbia Law Review*) [hereinafter Gonzalez, Queens Garage's Unusual Tax Exemption].

165. Gonzalez, Queens Garage's Unusual Tax Exemption, *supra* note 164.

Queens Democratic machine.”¹⁶⁶ Gonzalez’s follow up, published shortly after the revocation, attributed DOF’s decision to review JFP’s exemptions to the initial article.¹⁶⁷ Given Gonzalez’s unflattering portrayal, DOF may have revoked JFP’s exemptions in order to resolve an embarrassing incident.¹⁶⁸ On the other hand, DOF might simply have seen the JFP situation as an opportunity to acquire previously out-of-bounds revenue,¹⁶⁹ or more innocently, to reexamine whether existing precedent truly permitted this type of use.

C. *Court of Appeals Analysis*

The New York Court of Appeals ultimately affirmed the city’s exemption revocation, validating DOF’s interpretation of case law as put forward in the revocation letter.¹⁷⁰ The majority held that the city met its

166. *Id.* On that front, Gonzalez may have been playing into local anger toward Queens politicians: Congressman Gregory Meeks, who according to Gonzalez “directed tens of millions of dollars in federal aid” to GJDC, was under federal investigation earlier that year for alleged illegal involvement with another nonprofit group. *Id.*; William K. Rashbaum & Danny Hakim, *Subpoena Seeks Senator’s Records on Funds He Directed to Community Groups*, N.Y. Times (Feb. 11, 2010), <http://www.nytimes.com/2010/02/12/nyregion/12subpoena.html> (on file with the *Columbia Law Review*). But see Glickman & Servon, *supra* note 124, at 67 (“In order to increase their political leverage, many CDCs work on building relationships with, and educating, local officials. CDCs often seek to increase public services to low-income neighborhoods. Cities where local government involvement in community economic development is substantial show higher levels of CDC activity than other cities.”).

167. Juan Gonzalez, *Politically-Linked Nonprofit’s Garage, Jamaica First Parking, Stripped of Charity Status*, N.Y. Daily News (Mar. 2, 2011, 4:00 AM), <http://www.nydailynews.com/new-york/politically-linked-nonprofit-garage-jamaica-parking-stripped-charity-status-article-1.118830> (on file with the *Columbia Law Review*) (“Frankel’s reversal of Jamaica First Parking’s exemption was triggered by a Daily News report in December that questioned how a commercial parking garage system with more than 2,000 spaces could be considered a charity.”).

168. *Cf.* Youngman, *Politics*, *supra* note 7, at 30, 38–40 (discussing the media coverage’s role in creating “[p]ublic uneasiness with the size and influence of tax-exempt institutions”). For another example of negative media coverage of property tax exemptions, see Gilbert M. Gaul & Neill A. Borowski, *Free Ride: The Tax-Exempt Economy 3* (1993) (“At the local level, the exclusion of billions of dollars worth of property from the tax rolls of cash-starved school districts and municipalities is increasing budget woes and straining social services.”).

169. *Cf.* Youngman, *Politics*, *supra* note 7, at 29–30 (“[E]rosion of the tax base places additional revenue pressure on local governments and can easily lead to new challenges to existing exemptions.”).

170. *GJDC II*, 36 N.E.3d 645, 646, 650 (N.Y. 2015) (holding GJDC and JFP are not entitled to real property tax exemption under section 420–a). To summarize the procedural posture: GJDC and JFP responded to the revocation by requesting a judgment declaring that DOF’s decision was arbitrary and capricious and contrary to law, as well as a judgment directing the city to grant the exemptions. *Id.* at 648. The supreme court affirmed the revocation and dismissed the petition. *Id.* On appeal, the appellate division reversed the order and judgment, granted the parking facilities the tax exemption, annulled the city’s determination, and denied the city’s cross-motion. *Id.* At each level of review, New York courts took a different approach to analyzing the case.

revocation burden by “demonstrating that the ‘use’ of the parking facilities was not for ‘charitable’ purposes but rather for economic development, and that the use of the parking facilities was not ‘incidental to another recognized charitable purpose,’” which in turn “shift[ed] the burden to petitioners to establish their entitlement to an exemption.”¹⁷¹ The majority then concluded that the parking facilities’ use was neither directly related nor incidental to a tax-exempt purpose, as New York’s exemption statute requires.¹⁷² New York’s nonprofit community has expressed concern that the majority’s analysis disrupts the state’s exemption framework and harms the nonprofit sector.¹⁷³

In a dissenting opinion, Judge Read strongly criticized the majority’s analysis and provided a different approach to applying New York’s exemption framework.¹⁷⁴ The dissent concentrated on DOF’s revocation analysis, utilizing the charitable-purpose and charitable-use tests to find that the revocation was unjustified.¹⁷⁵ This section compares the majority’s and dissent’s approaches: Section II.C.1 discusses CED as a charitable purpose, sections II.C.2 and II.C.3 survey CED as a “direct” and “incidental” charitable use, respectively, and section II.C.4 describes each opinion’s approach to the revocation analysis.

171. *Id.* at 649–50.

172. *Id.* at 652–54; see also N.Y. Real Prop. Tax Law § 420–a (McKinney 2008) (exempting “[r]eal property owned by a corporation or association organized or conducted exclusively for . . . charitable . . . purposes . . . and used exclusively for carrying out thereupon one or more of such purposes”). Under section 420–a, an organization cannot receive an exemption if any of these avowed purposes is a “guise or pretense for directly or indirectly making any other pecuniary profit for [the organization] or for any of its members or employees” or if the organization is “not in good faith organized or conducted exclusively” for charitable purposes. *Id.*

173. See Cooney et al., *supra* note 153 (“[This case] has narrowed the ability of charities owning and using property in the state to qualify for real property tax exemption The decision will complicate the process for seeking and maintaining exemption and . . . likely increase the costs of charities conducting activities in the state.”); Government Relations Council Updates, Nonprofit Coordinating Comm. of N.Y., <http://www.npcny.org/advocacy/government-relations-council-updates/> [<http://perma.cc/VHZ2-MXTL>] (last visited July 26, 2016) (“[T]he Court of Appeals ruled against GJDC, seriously eroding what was considered settled law . . . [and creating uncertainty that] may have a significant impact on other nonprofits engaged in economic development, especially those generating income from real estate.”); National Council of Nonprofits Flags NY Judicial Decision as Threat to Nonprofit Exemptions, Philanthropy N.Y.: N.Y. PhilanthroPost (Aug. 11, 2015), <http://philanthropynewyork.org/news/national-council-nonprofits-flags-ny-judicial-decision-threat-nonprofit-exemptions> [<http://perma.cc/3T3A-MN7H>] (“A decision in New York to impose retroactive property tax liability on a charitable nonprofit is only the latest instance in a growing trend involving non-legislative officials reconsidering, and even rewriting, the longstanding rationale for nonprofit property tax exemptions.”).

174. See *GJDC II*, 36 N.E.3d at 655–64 (Read, J., dissenting).

175. See *id.* at 657–60 (“[T]he agency has not justified its determination that as of 2011 the five parcels no longer qualified.”).

1. *Community Economic Development as a Charitable Purpose.* — The confusion within the majority’s analysis stems in part from a failure to analyze whether economic development is a valid charitable purpose.¹⁷⁶ The dissent explicitly noted this:

[The majority] has not shown that Greater Jamaica fails to fulfill section 420–a (1)(a)’s “purpose” or “organized or conducted” criterion, unless the majority is willing to go so far as to declare that economic and community development are not “charitable, educational, or mental or moral improvement” purposes within the meaning of Real Property Tax Law § 420–a (1)(a). We have never so held and neither has the Appellate Division.¹⁷⁷

However, the majority did elaborate on the charitable-purpose framework in its discussion of 501(c)(3)’s applicability to New York’s statute, section 420–a.¹⁷⁸ The majority emphasized that “section 420–a does not contain a definition of what constitutes a ‘charitable’ purpose”¹⁷⁹ and as a result “courts have interpreted this category to include relief of poverty, advancement of governmental and municipal purposes, and other objectives that are beneficial to the community.”¹⁸⁰ After setting out these broad boundaries, the majority did not provide courts with any guidance on how to apply New York’s framework going forward.

In particular, the majority seemed to diminish courts’ ability to use 501(c)(3) status as evidence of charitable purposes. The majority pointed out “significant distinctions” between section 420–a and 501(c)(3)—namely: (1) 501(c)(3) is a federal income tax exemption and section 420–a is a real property tax exemption and (2) section 420–a’s test looks at real property “use,” while 501(c)(3) does not.¹⁸¹ While the majority held that the correct way to use an entity’s 501(c)(3) status is to “consider[] [it] as part of [the] overall analysis,”¹⁸² the analysis that followed never addressed GJDC’s 501(c)(3) exemption.¹⁸³

Judge Read’s dissent, in contrast, shows how New York courts might use 501(c)(3) within the charitable-purpose analysis. The dissent first

176. In fact, the majority even seems to affirm that GJDC and JFP were organized and operated for charitable purposes without mentioning the term “economic development.” *Id.* at 650 n.3 (majority opinion) (“Indeed, there is evidence in the record that both petitioners met this standard.”).

177. *Id.* at 660 (Read, J., dissenting).

178. See *id.* at 650–52 (majority opinion).

179. *Id.* at 651.

180. *Id.* at 648 (quoting *GJDC I*, 975 N.Y.S.2d 749, 752 (App. Div. 2013)).

181. *Id.* at 651–52. The majority also remarked that the New York Legislature could have referenced the Internal Revenue Code’s definition in section 420–a or adopted it outright if it desired but did not. *Id.*

182. *Id.* at 652. The majority’s major point was that organizations cannot make a presumptive showing of entitlement based on section 501(c)(3).

183. See Cooney et al., *supra* note 153 (noting the court “did not indicate how the scope of ‘charitable purpose’ in New York differs from the federal; nor did the court enunciate a standard for determining the scope”).

referenced the nearly identical text in 501(c)(3) and section 420-a—“organized and operated exclusively”¹⁸⁴ versus “organized or conducted exclusively”¹⁸⁵—and confirmed that GJDC was indeed “organized and operated exclusively for charitable, scientific and educational purposes within the meaning of section 501(c)(3)”¹⁸⁶ In addition, Judge Read acknowledged GJDC and JFP’s good-faith motives: “This is not a situation where Greater Jamaica’s ‘avowed [charitable] purpose[] [is] a guise or pretense’ for profit-making.”¹⁸⁷ Under this approach, the information on hand was sufficient to determine that GJDC’s purpose of “economic rejuvenation” qualified as charitable under section 420-a.¹⁸⁸

2. *Community Economic Development as a “Direct” Charitable Use.* — Without a clear analysis of whether economic development is a charitable purpose, the majority’s property-use analysis did not appropriately address the connection between GJDC’s purposes and the parking facilities’ use. Further, the majority appeared to hold both that economic development is a charitable purpose and is not the basis for a charitable use, which does not seem possible under the exemption’s structure.¹⁸⁹

Analyzing “direct use,” the majority stated that the primary purpose behind GJDC’s property use—characterized as “facilitation of parking for [the] purposes” of “enabl[ing] visitors to frequent local businesses” in order to “create and maintain a viable downtown Jamaica”—was “economic benefit” to local businesses.¹⁹⁰ According to the majority, this use “inures to the benefit of private enterprise and cannot be said to further any charitable purpose.”¹⁹¹ The majority’s point, however, contradicted an earlier statement that, based on the record, both GJDC and JFP arguably satisfy the 420-a charitable-purposes requirement.¹⁹² By focusing almost exclusively on the immediate benefits to businesses and customers,

184. *GJDC II*, 36 N.E.3d at 655, 660 (Read, J., dissenting) (“As the majority also acknowledges, a nonprofit organization’s section 501(c)(3) status bears on the overall analysis of whether it is ‘organized or conducted exclusively for’ a tax-exempt purpose within the meaning of section 420-a(1)(a).” (quoting N.Y. Real Prop. Tax Law § 420-a(1)(a) (McKinney 2008))).

185. N.Y. Real Prop. Tax Law § 420-a(1)(a).

186. *GJDC II*, 36 N.E.3d at 655.

187. *Id.* at 663 (quoting N.Y. Real Prop. Tax Law § 420-a(1)(b)).

188. *Id.* See *infra* section III.A for recommendations on how courts might use 501(c)(3) within the charitable-purpose analysis in a manner that does not unduly broaden interpretations of “charitable.”

189. See N.Y. Real Prop. Tax Law § 420-a.

190. *GJDC II*, 36 N.E.3d at 653. The majority makes this argument by stating that the parking facilities “lessen[] the burden of local businesses, obviating any need for them to make their own parking arrangements for prospective customers” and the below-market rates “provide an incentive for the public to patronize those businesses, providing a dual benefit for local businesses and a benefit to prospective customers of those businesses.” *Id.*

191. *Id.*

192. *Id.* at 650 n.3 (“[T]here is evidence in the record that both petitioners met this standard.”).

the majority implied that operating parking lots cannot directly address GJDC's overall purpose of increasing Jamaica's economic growth. This application of the private-benefit prohibition implies too narrow a view of the connection between purposes and use.

Along with "economic development," the majority also rejected "lessen[ing] the burdens of government" as a charitable use.¹⁹³ The majority claimed that the petitioners' argument is "[e]ssentially . . . that the parking facilities provide a public benefit," which "is not the test of qualification for exemption."¹⁹⁴ However, the majority never explained the logical step from lessening the burden of government to public benefit.¹⁹⁵ Further, the majority seemed to overrule prior decisions establishing "lessen[ing] the burdens of government"¹⁹⁶ or "lessen[ing] the burden on taxpayers"¹⁹⁷ as a valid charitable purpose without acknowledging this result.¹⁹⁸

In contrast, the dissent found a direct link between JFP's parking facilities and GJDC's economic-revitalization efforts.¹⁹⁹ These parking

193. *Id.* at 653.

194. *Id.* Invoking "public benefit" might be a scare tactic on the majority's part—as many courts and commentators have noted, using a public-benefit or public-interest standard would create an impossibly large category of exempt property. See *Nebbia v. New York*, 291 U.S. 502, 536 (1934) ("[T]here is no closed class or category of businesses affected with a public interest . . ."); *Colombo & Hall*, *supra* note 1, at 38 ("Attempts to police the substantive limits of the exemption under the rubric of 'public benefit' would be . . . flawed . . ."). The public-benefit standard should not be confused with the public-benefit requirement. See *supra* notes 27–29 and accompanying text (describing the public-benefit requirement).

195. See *GJDC II*, 36 N.E.3d at 650–52 (comprising the majority's entire discussion of 501(c)(3)); see also *supra* note 35 and accompanying text (discussing the requirement to "lessen the burdens of government").

196. E.g., *Am. Soc'y for the Prevention of Cruelty to Animals v. Tax Comm'n*, 448 N.Y.S.2d 921, 926 (Sup. Ct. 1981) ("A charitable use is not confined to the relief of the poor or the assistance of learning and religion, but includes the advancement of objects of general public utility. Thus a trust which tends to reduce taxation and lessen the burdens of government was a charitable use." (quoting *Sherman v. Richmond Hose Co.* No. 2, 130 N.E. 613, 614 (N.Y. 1921))).

197. E.g., *Canton Human Servs. Initiatives, Inc. v. Town of Canton*, 780 N.Y.S.2d 714, 718–19 (Sup. Ct. 2004) ("Organizations can be considered charitable when their purpose is to lessen the burden on taxpayers by providing what is otherwise a governmental function . . .").

198. This approach is unusual, as "lessening the burdens of government" is one of the primary justifications for the charitable exemption. See *Brody*, *All Charities*, *supra* note 17, at 640 ("Under the narrowest conception of the quid-pro-quo approach, the state bestows exemption because charities lessen the burdens of government. Some states explicitly require that a charity must relieve the burdens of government, either in all cases or as one factor.").

199. See *GJDC II*, 36 N.E.3d at 655 (Read, J., dissenting). Judge Read noted, "From the outset . . . it was apparent that the shortage of downtown parking hampered economic revitalization." *Id.* This led GJDC to help construct a new municipal garage, which the city originally operated. *Id.* When "the garage sunk into a state of disrepair and consequently, disuse," GJDC purchased it from the city. *Id.*

facilities furthered GJDC's charitable purpose of economic rejuvenation by "providing shoppers and other visitors a safe place to park while they patronize local businesses and educational, arts and religious institutions."²⁰⁰ The dissent also noted that GJDC chose to operate these facilities under the good-faith belief that this activity would further the organization's charitable purposes: "Greater Jamaica alleges that these 'parking facilities, operated efficiently and at below-market prices, are integral to [its] mission of creating and maintaining a viable downtown Jamaica."²⁰¹ This analysis acknowledges that New York's exemption permits some benefit to private businesses, as long as the property use sufficiently relates to the organization's charitable purposes.

3. *Community Economic Development as an "Incidental" Charitable Use.* — In its "incidental use" analysis, the majority adopted DOF's stance that "the parking facilities were 'not incidental to another recognized charitable purpose but [were] the very purpose for which the property [was] being used.'"²⁰² The majority justified this by analogizing the facts at hand to prior cases involving nonprofit hospitals that set aside parking spaces for private medical clinics,²⁰³ as well as a case centering on a for-profit thrift store that distributed funds to charitable institutions.²⁰⁴ The majority held that, as in these cases, it cannot be said that "the operation of the parking facilities is 'incidental' to a charitable purpose."²⁰⁵

This reasoning, however, does not address the fundamental issue, which is not the exact character of the property use but whether this use was incidental to the organization's overall charitable purposes.²⁰⁶ As the dissent noted, "There is no question that the parking lots are being 'used' as parking lots—i.e., areas where visitors to Jamaica's urban core may leave their vehicles temporarily for a fee."²⁰⁷ Here, as well as in the "direct use" test, the majority failed to address the connection between

200. *Id.* at 663.

201. *Id.* at 656. In addition, the dissent was not concerned with JFP's excess revenue. Judge Read noted that the decision cited by DOF as precedent on this point was "based solely on the fact that the only use of the property was as a revenue-producing rental." *Id.* at 663. Instead, Judge Read analogized to *Adult Home at Erie Station, Inc. v. Assessor*, in which the New York Court of Appeals held that "[A]n economic benefit to a charitable organization does not by itself extinguish a tax exemption. The question is how the property is used, not whether it is profitable." *Id.* at 663–64 (quoting 886 N.E.2d 137, 142 (N.Y. 2008)).

202. *Id.* at 647 (majority opinion). The dissent did not analyze whether the parking lots' use was incidental to GJDC's charitable purposes, since the use was deemed directly related. See *supra* notes 199–201 and accompanying text.

203. *GJDC II*, 36 N.E.3d at 654 (citing *Vassar Bros. Hosp. v. City of Poughkeepsie*, 97 A.D.3d 756, 759 (N.Y. App. Div. 2012); *St. Francis Hosp. v. City of Taber*, 76 A.D.3d 635, 640 (N.Y. App. Div. 2010)).

204. *Id.* at 655 (citing *Stuyvesant Square Thrift Shop v. Tax Comm'n*, 76 A.D.2d 461, 464–65 (N.Y. App. Div. 1980), *aff'd*, 426 N.E.2d 478 (N.Y. 1981)).

205. *Id.* at 653.

206. See *supra* notes 78–79 (discussing incidental use).

207. *GJDC II*, 36 N.E.3d at 662 (Read, J., dissenting).

the facility use and GJDC's overall charitable purposes and therefore did not properly analyze whether this use qualified as "incidental" to a charitable purpose.

4. *Applying the Revocation Analysis.* — Though New York nonprofits receive some protection from the state's "revocation" distinction,²⁰⁸ the majority's analysis implies that municipalities can meet their burden easily.²⁰⁹ Further, the majority seemed to take the city's erroneous award reasoning at face value; the question of whether the revocation was arbitrary is only mentioned in the procedural posture.²¹⁰ In contrast, Judge Read devoted a significant amount of space in the dissent to analyzing the DOF letter, ultimately deciding that the position reversal was arbitrary:

On this record, all we know is that DOF interpreted the facts and the law one way in 2007, and the opposite way in 2011, although neither the facts nor the law had changed in the interim. Such an unexplained reversal of position is the very epitome of arbitrary administrative decisionmaking.²¹¹

Critically, DOF failed to provide an "objective indication" that the revocation resulted from something other than a "mere change of heart."²¹² If objective justifications are no longer required, "The nonprofit still effectively bears the burden of showing entitlement and, importantly, enjoys no protection from being sandbagged by capricious and unpredictable administrative decisionmaking . . ." ²¹³ Judge Read's revocation analysis shows that New York courts can construe the state's exemption framework narrowly while still permitting organizations that use property in good faith to further economic-development purposes to qualify for the exemption.²¹⁴

The majority's revocation analysis, however, is now part of New York nonprofit law. This decision has a broad impact on the state's nonprofit sector because it opens the door for agencies to adopt new readings of precedent without warning.²¹⁵ The majority seemed convinced that DOF

208. See *supra* notes 109–110 and accompanying text (stating New York's revocation standard).

209. See *supra* note 171 and accompanying text (citing the court of appeals's revocation analysis).

210. *GJDC II*, 36 N.E.3d at 648 (majority opinion).

211. *Id.* at 664 (Read, J., dissenting).

212. *Id.* at 661 (noting that "a prior decision does not become a 'mistake' or 'erroneous' any time a municipality decides to interpret existing authorities in a different way").

213. *Id.*

214. See Cooney et al., *supra* note 153 ("There is ample authority, much of it involving federal tax-exempt status, concerning the reach of economic development as a charitable function versus something that would be more appropriate for a nonprofit with a civic focus."); cf. *GJDC II*, 36 N.E.3d at 655–65 (arguing the parking lots "directly further[ed] Greater Jamaica's charitable purpose of economic rejuvenation").

215. See Michael J. Hilkin, Morrison & Foerster LLP, Court of Appeals Affirms Revocation of Tax Exemption for Public Parking Facilities, MoFo N.Y. Tax Insights, Aug. 2015, at 1, 2, <http://www.mofo.com/~media/Files/Newsletter/2015/08/>

justified the revocation by stating that its current interpretation of the law is correct, while its previous interpretation was incorrect.²¹⁶ The problem with this holding is that the majority, by failing to apply the framework, did not appropriately determine whether DOF's current interpretation of the law truly was correct. As the dissent pointed out, this led the majority to shift the burden of proof back to the petitioners once the municipality made "colorable allegations" that the property use did not further an exempt purpose.²¹⁷ Going forward, New York nonprofits have reason to be concerned both about losing existing property tax exemptions and about purchasing real property for their activities with the expectation that the property will be tax exempt.

III. RECOMMENDATIONS FOR ASSESSING CHARITABLE ORGANIZATIONS' PROPERTY TAX EXEMPTION REQUESTS

Addressing the problem of how best to analyze charitable purposes and use within property tax exemption frameworks is difficult because of the tension between two competing goals: preserving municipalities' tax bases, on the one hand, and encouraging and protecting charitable activity, on the other.²¹⁸ Drawing clear lines that exclude certain categories of activity from qualifying as charitable may be tempting but could improperly exclude activities with charitable goals and suppress innovation in the nonprofit sector.²¹⁹ At the same time, if assessors and courts²²⁰ persist in choosing idiosyncratic interpretations of important limiting principles, confusing decisions like *GJDC II* will continue to harm the nonprofit sector.

150811MoFoNewYorkTaxInsights.pdf [http://perma.cc/E6RN-8FYQ] ("It had been well established under New York law that when a taxing authority has granted a property tax exemption and later attempts to revoke it, the burden of proof is on the taxing authority . . . [Here,] the burden on the taxing authority appears to have been easy to meet.").

216. See *GJDC II*, 36 N.E.3d at 649 (majority opinion) ("The City revoked the tax exemption on the ground that it was erroneously awarded . . . It met its burden in this regard by demonstrating that the 'use' of the parking facilities was [neither] for 'charitable' purposes . . . [nor] 'incidental to another recognized charitable purpose.'" (quoting N.Y. Real Prop. Tax § 420-a(1) (McKinney 2008))).

217. See *id.* at 660 (Read, J., dissenting) (insinuating that the majority believes "once a municipality makes colorable allegations that a nonprofit's use of real property fails to further an exempt purpose, then the burden shifts *back* to the nonprofit to establish its entitlement to an exemption").

218. See *supra* notes 43–46 and accompanying text (noting courts are conscious of balancing these factors).

219. See Peter Swords, *Charitable Real Property Tax Exemptions in New York State 157* (1981) ("New charitable purposes emerge in response to new societal problems. By keeping the term broad recognition can be given to these new purposes.").

220. This Note refers to assessors and courts collectively as "decisionmakers" going forward.

The recommendations proposed in this Part would improve existing frameworks by clarifying how to apply the charitable-purpose and charitable-use tests. *GJDC II*'s lesson is that interpreting these frameworks in a muddled fashion can distort precedent and destabilize the nonprofit sector.²²¹ In addition, requiring decisionmakers to make a good-faith effort to understand the link between an organization's charitable purposes and how its property use furthers those purposes would help standardize exemption decisions, providing clearer guidance for organizations going forward. Section III.A addresses how decisionmakers can analyze charitable purposes without disqualifying categories of charitable organizations unfairly. Section III.B discusses how nonprofits can clarify the connection between their charitable purposes and property use so that decisionmakers can reach informed determinations.

A. *The Charitable-Purpose Test: Establishing Appropriate Definitional Boundaries*

Property tax exemption awards rest on whether the property-owning organization is considered a "charity."²²² The term's boundaries, however, are fluid—as property tax scholar Marion Fremont-Smith notes, "Due to the fact that these purposes of charities are permitted to change over time, the law of charity is unlike other areas of the law, where basic definitions tend to remain fixed."²²³ This potential for definitional change gives the nonprofit sector room to experiment with innovative solutions to societal problems as they emerge without worrying about jeopardizing existing or future exemptions.²²⁴ The key issue then is how to provide definitional lines for decisionmakers that allow them to identify noncharitable organizations, while still giving charities room to adapt to emerging social problems.²²⁵

Decisionmakers can create these definitional lines by applying limiting principles in a clear and consistent fashion that aligns with those principles' purposes. This Note proposes that decisionmakers accomplish this by looking to 501(c)(3) analogs for guidance on how to interpret

221. See *supra* section II.C (discussing the court of appeals's analysis).

222. See *supra* note 18 and accompanying text (surveying the charitable-purpose requirement).

223. Marion R. Fremont-Smith, Urban Inst., *Do We Need a New Legal Definition of Charity?* 18 (Sept. 2013), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/412946-Do-We-Need-a-New-Legal-Definition-of-Charity-PDF> [http://perma.cc/GFX5-LWBL].

224. See Swords, *supra* note 219, at 157 (discussing terminology's role in preserving nonprofits' ability to innovate).

225. See Richard D. Pomp, *The Collision Between Nonprofits and Cities over the Property Tax*, in *Property-Tax Exemption for Nonprofits: Mapping the Battlefield* 383, 384 (Evelyn Brody ed., 2002) ("Once an exemption is provided by law, taxpayers will restructure their transactions to bring themselves within the exempt category. The stakes are high, so definitional lines come under enormous pressure.").

limiting principles within property tax exemption frameworks. Many of the central principles in 501(c)(3) originated from property tax exemption frameworks and therefore map onto them well.²²⁶ Further, most jurisdictions already take 501(c)(3) into consideration, though the appropriate analysis is not always clear.²²⁷

In particular, 501(c)(3)'s "operated exclusively" language, found in many property tax exemption statutes, can add substantial clarity to the charitable-purpose test.²²⁸ This framework analyzes the link between an organization's activities and its charitable purposes to ascertain if the organization is truly pursuing those purposes. At the federal level, an organization is "operated exclusively" for charitable purposes only if it (1) "engages primarily" in activities that accomplish charitable purposes and (2) limits activities that do not further an exempt purpose to an "insubstantial part" of its overall activities.²²⁹ Most importantly for CED organizations, nonprofits may conduct business activities without jeopardizing 501(c)(3) status if these activities are "substantially related" to the organization's exempt purposes.²³⁰ In fact, New York's "operated exclusively" language in section 420-a played a significant role in the *GJDC II* dissent's charitable-purposes analysis.²³¹ Judge Read noted that GJDC's economic-development activities were substantially related to the organization's charitable purpose of community revitalization, as the IRS recognized.²³²

The "operated exclusively" test is also the source of the federal public-benefit requirement: An organization can only satisfy the "operated exclusively" test if it serves a public rather than a private interest.²³³ Importantly, this requirement still allows organizations to conduct activi-

226. See Fremont-Smith, *supra* note 223, at 17 (referring to federal and state law definitions of a "charity" as having "almost complete overlap"); *supra* note 38 and accompanying text (noting similar language).

227. See *supra* notes 35–39, 57–61 and accompanying text (discussing 501(c)(3)'s role in property tax exemption frameworks).

228. See, e.g., *supra* notes 184–186 and accompanying text (noting the dissent in *GJDC II* picked up on the "operated exclusively" requirement in section 420-a).

229. Treas. Reg. § 1.501(c)(3)-1(c)(1) (2016).

230. See Bruce R. Hopkins, *The Law of Tax-Exempt Organizations* 83 (11th ed. 2016) ("The core issue is whether the substantial business activity accomplishes or is in furtherance of an exempt purpose. (The existence of an operating profit is not conclusive as to a business purpose.)"). Professor Bruce Hopkins notes further that, "[f]or a business to be substantially related to exempt purposes, the production or distribution of the goods or the performance of the services from which the gross income is derived must 'contribute importantly to the accomplishment of those purposes.'" *Id.* at 116 (quoting Treas. Reg. § 1.513-1(d)(2)).

231. See *supra* notes 184–188 and accompanying text (outlining the dissent's analysis).

232. See *GJDC II*, 36 N.E.3d 645, 650, 663 (N.Y. 2015) (Read, J., dissenting) (noting GJDC's 501(c)(3) designation and the organization's charitable purposes); *supra* notes 184–186 and accompanying text (discussing the dissent's approach).

233. Treas. Reg. § 1.501(c)(3)-1(d). See *supra* sections I.A–B for a discussion of the public-benefit requirement within property tax exemption frameworks.

ties with a private-benefit component, provided that the public benefit cannot be achieved without necessarily benefiting certain private individuals.²³⁴ This captures the nature of certain CED activities: Though private businesses benefit initially, the entire community receives the overall long-term benefits.²³⁵ In *GJDC II*, the majority instead focused on the effects on local businesses, which do not constitute a charitable class, to argue that CED activities cannot serve a broader charitable purpose.²³⁶

Commercial-sector activity also implicates 501(c)(3)'s rule against private inurement, which requires that "no part of [an organization's] net earnings . . . inure[] to the benefit of any private shareholder or individual."²³⁷ "Private shareholder or individual" is defined to mean "persons who, because of their particular relationship with an organization, have an opportunity to control or influence its activities."²³⁸ The proper way to apply this principle, used in the majority of property tax exemption frameworks, is to investigate whether the organization gives an unfair benefit to any private parties. This would indicate that the organization does not devote its resources to furthering charitable purposes and therefore does not qualify as a charity.²³⁹ This was not the case in *GJDC II*: As the dissent acknowledged, GJDC used net profits from the parking facilities toward charitable activities, rather than distributing them to private parties.²⁴⁰

In addition to using the 501(c)(3) framework as a guide for applying limiting principles, decisionmakers should also consider using 501(c)(3), in the absence of contradictory state legislative or judicial material, to decide whether an organization's stated purpose is categorically

234. Matthew J. Rossman, Evaluating Trickle Down Charity: A Solution for Determining When Economic Development Aimed at Revitalizing America's Cities and Regions Is Really Charitable, 79 *Brook. L. Rev.* 1455, 1475 (2014) [hereinafter Rossman, Trickle Down Charity] ("A charity is not prohibited from benefitting private interests through its activities so long as this benefit is incidental to the public benefit the charity seeks to accomplish.").

235. See *supra* section II.A (describing CED purposes and methods).

236. See *GJDC II*, 36 N.E.3d at 650–54 (majority opinion) (containing the majority's "use" analysis); *supra* notes 190–198 and accompanying text (unpacking the majority's analysis and noting the discussion touches on charitable purposes).

237. 26 U.S.C. § 501(c)(3) (2012).

238. I.R.S. Gen. Couns. Mem. 39,862 (Nov. 22, 1991).

239. IRS, Overview of Inurement/Private Benefit Issues in IRC 501(c)(3) (1990), <http://www.irs.gov/pub/irs-tege/eotopic90.pdf> [<http://perma.cc/KJ86-EWKJ>] ("[A]ny transaction between an organization and a private individual in which the individual appears to receive a disproportionate share of the benefits of the exchange relative to the charity served presents an inurement issue.").

240. *GJDC II*, 36 N.E.3d at 663–64 (Read, J., dissenting) (noting that the "parking facilities generate revenue, which is funneled back into Greater Jamaica's numerous development initiatives" and stating that New York precedent permits this).

charitable.²⁴¹ They would then determine whether the facts at hand demonstrate that the organization has a good-faith commitment to that purpose. In GJDC's case, this would mean operating from an initial assumption that economic development is a charitable purpose, as indicated by the IRS,²⁴² then assessing whether GJDC's demonstrated purpose truly was economic development.²⁴³ This recommendation allows states to opt out: Legislatures that feel certain types of 501(c)(3) nonprofits should not receive property tax exemptions are free to create carve-outs.²⁴⁴

These proposed recommendations do not ask decisionmakers to see 501(c)(3) status as an indication that a particular organization has a charitable purpose for several reasons. First, the IRS has limited resources devoted to screening nonprofit organizations.²⁴⁵ In addition, resource scarcity has forced the agency to scale back on issuing precedential guidance concerning nonprofits, which means that information used by IRS officers to assess certain types of organizations may be sparse or outdated.²⁴⁶ Courts may also bristle at the idea of deferring to the IRS on such an important decision, as the New York Court of Appeals noted in *GJDC II*.²⁴⁷ Instead, courts and assessors should, at a minimum, follow IRS guidance regarding how to apply widely used principles of nonprofit law to screen out undeserving organizations. This

241. This is a bigger ask than the first recommendation, as courts generally do not consider charitable purposes in the state property tax context coterminous with the IRS's conception of charitable purposes. See *supra* notes 57–58 and accompanying text.

242. See generally Louthian & Friedlander, *supra* note 13, at 2–5 (discussing the IRS's treatment of economic development as a charitable purpose).

243. See *supra* section II.B.1 (discussing GJDC's purported charitable purposes); *supra* section II.B.3 (detailing the DOJ revocation decision).

244. Many courts support the idea that legislatures are best equipped to address this issue. See, e.g., *N. Star Research Inst. v. County of Hennepin*, 236 N.W.2d 754, 762–63 (Minn. 1975) (Kelly, J., concurring) (“The weight that . . . factors should have in solving the problem at hand depends upon a variety of complex economic and political questions that could best be solved by the legislature. Indeed, that body was chosen by the people to determine the precise issue presented here.”).

245. See Lloyd Hitoshi Mayer, “The Better Part of Valour is Discretion”: Should the IRS Change or Surrender Its Oversight of Tax-Exempt Organizations?, 7 *Colum. J. Tax L.* 80, 97 (2016) (citing reports raising concerns about “shrinking resources” for IRS oversight of tax-exempt organizations).

246. See *id.* at 93–94 (noting a “sharp decline in [precedential] guidance, particularly revenue rulings and procedures” beginning in the 1980s, as well as the discontinuation of “some forms of public education in recent years, most notably . . . Exempt Organizations Continuing Professional Education Technical Instruction Program [articles]”).

247. See *GJDC II*, 36 N.E.3d 645, 651 (N.Y. 2015) (“Our local governments derive significant revenue from the imposition of real property taxes, and federal income taxation standards cannot be utilized to create a presumption in favor of a property owner seeking an exemption from a state real property tax.”); *supra* notes 181–183 and accompanying text (outlining the court of appeals's analysis of 501(c)(3) in *GJDC II*).

would help states move toward standardization within the nonprofit sector without requiring an overhaul of existing laws.²⁴⁸

B. *The Charitable-Use Test: Clarifying the Link Between Purposes and Use*

Applying the charitable-use test can be a straightforward process—for example, an organization that owns and operates a kitchen facility to prepare meals for the homeless is clearly using this real property to further its goal of helping those in need. Difficulties arise when organizations use property for activities that do not register as charitable at first glance. Decisionmakers may have trouble seeing a direct connection between organizations' charitable purposes and their means for achieving those goals, as assessed in the use test. As *GJDC II* shows, this holds true for CED organizations.²⁴⁹ Despite the longstanding connections among economic development, community organizing, and antipoverty efforts, it can be difficult to tell how effective CED projects really are.²⁵⁰ The overall benefit to the community often feels theoretical, while the benefit to individual businesses is apparent and quantifiable.²⁵¹ These factors may translate into a knee-jerk reaction that the means by which CED organizations aim to help underserved communities do not qualify as charitable.²⁵²

This problem is exacerbated when charitable organizations' activities resemble for-profit ventures.²⁵³ In *GJDC* and *JFP*'s case, facility users paid a fee, albeit a fee that was below market, for parking.²⁵⁴ In 2011, these fees produced an operating surplus that *GJDC* used in part to fund other projects.²⁵⁵ While the availability of low-cost parking may have had a measurable impact on downtown Jamaica's economy, the result on its

248. See Brief for Lawyers Alliance, *supra* note 144, at 8 (“[Local tax assessors’] decisions would be far more reliable if they were able to take note of the determinations that other experienced government entities have made.”); Evelyn Brody, Institutional Dissonance in the Nonprofit Sector, 41 *Vill. L. Rev.* 433, 481 (1996) (“A close approximation of uniformity can be achieved through state adoption of uniform laws or multistate cooperation, but such an effort takes time and political persuasion.”).

249. See *supra* section II.C (discussing the court of appeals’s use analysis).

250. See Wiewel et al., *supra* note 126, at 113 (“Careful assessment of the effectiveness of the practice elements laid out above has not been done. Not much is known about where they do and do not work or how they interact with each other.”).

251. See Rossman, *Trickle Down Charity*, *supra* note 234, at 1486 (“Aid to the community trickles down slowly if at all; the only certain beneficiaries are the for-profit companies.”); *supra* section II.A (describing CED organizations).

252. See *supra* section II.A.2 (discussing courts’ analysis of CED organizations requesting exemptions).

253. See *supra* section II.A.2 (discussing courts’ treatment of CED organizations’ exemption requests).

254. See *supra* note 159 and accompanying text (discussing *JFP*’s facilities management).

255. See *supra* note 160 and accompanying text (discussing *GJDC*’s use of its budget surplus).

face looks more like a moneymaking scheme than a charitable venture. The question then is how decisionmakers can distinguish organizations making good-faith efforts to use real property in ways that further charitable purposes from those that are not.

1. *Encouraging Assessors to Seek Additional Information.* — Before denying or revoking exemptions, assessors should seek out additional information on how the organization believes using the real property at issue in a particular manner will further its charitable purposes. This would help clarify whether there is a sufficient link between purposes and use, which assessors must evaluate in order to make a decision regarding the exemption grant.

The idea of asking CED organizations in particular to submit additional information in order to receive charitable exemptions is not new: Professor Matthew Rossman proposed that a CED organization seeking 501(c)(3) status should be required to prove “a strong nexus between the businesses it aids and improving economic distress.”²⁵⁶ If Professor Rossman’s idea were extended to property tax exemptions, CED organizations would have to demonstrate not only how a real property use impacts particular businesses at present but also how supporting those businesses would contribute to the community’s economic growth in the long term.

Professor Rossman’s recommendations, however, may put an unreasonable burden on organizations seeking charitable property tax exemptions. Requiring CED organizations to prove in advance that their activities will have a demonstrable impact on economic development is similar to asking for success metrics: Only organizations that can prove their methods in advance will pass this test, while organizations looking to test innovative methods may not.²⁵⁷ Further, government forms may not effectively capture this kind of complex information.²⁵⁸

256. Rossman, *Trickle Down Charity*, supra note 234, at 1517.

257. At the federal level, organizations are not required to prove success at meeting charitable goals in order to obtain or maintain tax exempt status. Cf. IRS, U.S. Dep’t of the Treasury, Form 990 (2015), <http://www.irs.gov/pub/irs-pdf/f990.pdf> [<http://perma.cc/5VJN-W8JA>] (annual information return for 501(c)(3) entities); IRS, U.S. Dep’t of the Treasury, Form 1023 (2013), <http://www.irs.gov/pub/irs-pdf/f1023.pdf> [<http://perma.cc/S2G2-HMEN>] (application for 501(c)(3) status). Similarly, property tax exemption forms do not contain questions asking for success metrics. See supra section I.C. (outlining data collected in property tax exemption forms).

258. See Panel on the Nonprofit Sector, *Strengthening Transparency, Governance, Accountability of Charitable Organizations: A Final Report to Congress and the Nonprofit Sector 5* (June 2005), http://www.neh.gov/files/divisions/fedstate/panel_final_report.pdf [<http://perma.cc/7UM8-NFNQ>] (finding the IRS’s 990 forms “are not useful as a tool to communicate complex information about program goals, accomplishments, failures, and changes that have affected an organization’s overall performance or the performance of a particular program”); supra section I.C. (surveying municipalities’ property tax exemption forms).

This Note's recommendation applies to a broader range of nonprofits and presents a minimal chilling effect on the nonprofit sector. Many states already encourage assessors to seek out additional information if necessary, although the types of information solicited and the extent to which this happens is unclear.²⁵⁹ Asking for further details on how an organization believes its activities will further its charitable goals would enable assessors to verify that the organization is making a good-faith effort to achieve its goals without requiring organizations to prove that their efforts will be successful.

At a minimum, organizations asked to show more information would need to demonstrate that they have made a good-faith effort to evaluate the program's relationship to the charitable purpose. Organizations would not be required to provide assessors with detailed research on their projects but would have the option to do so.²⁶⁰ Although this process would place an additional burden both on organizations and on tax assessors, this burden would not be substantial. By giving assessors discretion regarding whether to ask for additional information, the process would only slow down in difficult cases, while clear-cut cases would proceed along the normal track. Organizations may even find the process useful, as this information might help them self-evaluate, craft material for the public, and adapt their activities if needed.²⁶¹ Further, organizations challenging exemption denials or revocations may need to have this information on hand to help bolster their cases.

2. *Analyzing For-Profit Comparables.* — In addition to the above recommendation, decisionmakers should consider analyzing nonprofits engaged in commercial ventures by asking whether a for-profit counterpart would function in the same way. Traditionally, the nonprofit sector is expected to operate differently than the for-profit sectors.²⁶² This concept has translated at the federal level into the "commerciality doctrine," which states that if an organization is effectively acting like a business, this may indicate that the organization is not making a good-faith effort to further a charitable purpose.²⁶³

259. See *supra* notes 97, 103–105 and accompanying text (discussing assessors' practice of soliciting additional information or legal opinions).

260. One complication is that assessors may interpret a lack of organizational data as evidence of a tenuous connection between the use and the purpose. Agencies would have to guard against this.

261. See Panel on the Nonprofit Sector, *supra* note 258, at 5 ("Every charitable organization should, as a recommended practice, provide more detailed information about its operations, including methods it uses to evaluate the outcomes of programs, to the public through its annual report, website, and other means.").

262. See *supra* note 10 and accompanying text (noting separation between the nonprofit and for-profit sectors).

263. See Hopkins, *supra* note 230, at 112 ("A tax-exempt organization . . . is engaged in a nonexempt activity when that activity is undertaken in a manner that is *commercial* in nature . . . [meaning] it has a direct counterpart in, or is conducted in the same or similar manner as is in, the realm of for-profit organizations.").

This recommendation, however, does not require nonprofits to steer clear of all activities that ought to be done by for-profit businesses.²⁶⁴ Assessors should instead use these comparisons to decide whether an organization is operating in good faith as a nonprofit—rather than as a for-profit business—when conducting those activities, meaning that the activities are “substantially related” to charitable purposes.²⁶⁵ In GJDC’s case, the city argued that JFP’s parking facilities operated in a substantially similar way as commercial garages, even though JFP charged below-market rates, because JFP made a sizable profit.²⁶⁶ In that respect, the court of appeals may have had a basis for concluding that JFP was functioning more like a business than a charity—JFP was not maximizing benefits to the public because it easily could have charged lower rates.²⁶⁷ Under that logic, JFP could have retained the exemption by lowering parking fees to minimize profit margins, which would have increased the benefit to the public without jeopardizing JFP’s ability to operate the garages.

Like the previous recommendation, the goal of this comparison is to ensure that organizations are making a good-faith effort to use property in a way that furthers a charitable purpose. Nonprofits are typically seen as accountable to the public at large when they are funded primarily by diverse public donations, government grants, or both.²⁶⁸ Based on this reasoning, nonprofits that generate revenue through commercial activities, rather than through donations and grants, may appear less accountable to the public and therefore less deserving of exemptions.²⁶⁹

CONCLUSION

The New York Court of Appeals’s *Greater Jamaica Development Corp. v. New York City Tax Commission* decision illustrates the challenges involved in applying property tax exemption frameworks in a fair and consistent manner. In the absence of direct precedent, local tax assessors seem to

264. *Id.* at 113 (arguing this false premise contributes to the confusing application of commerciality doctrine).

265. See *supra* note 230 and accompanying text (describing 501(c)(3)’s “substantially related” requirement).

266. Brief for Appellants, *supra* note 163, at 1 (asserting garages were “stand-alone, for-profit, commercial parking facilities”).

267. In addition, this touches on the partial subsidization or “gift” requirements that some states enforce. See *supra* notes 49–50 and accompanying text.

268. See 26 U.S.C. §§ 509(a)(1)–(2) (2012) (outlining “public charity” tests); see also IRS, U.S. Dep’t of the Treasury, Pub. 557, *Tax-Exempt Status for Your Organization 5* (2016), <http://www.irs.gov/pub/irs-pdf/p557.pdf> [<http://perma.cc/9NSC-RBTP>] (“A new section 501(c)(3) organization will be classified as a publicly supported organization and not a private foundation if it can show when it applies for tax-exempt status that it reasonably can be expected to be publicly supported.”).

269. See *supra* note 34 and accompanying text (discussing public funding’s role in creating public accountability).

be free to narrow their conceptions of charitable purposes and use at will, with the courts' support. This destabilizes the nonprofit sector by creating uncertainty around whether or not organizations will receive property tax exemptions to help offset the cost of beneficial, but potentially expensive, activities. By screening out organizations that are not operating in good faith as charitable nonprofits, rather than categorically disqualifying certain types of charities, and by increasing the amount of information that courts and assessors can use to evaluate the relationship between charitable purposes and charitable use, states can more effectively protect both municipalities and the nonprofit sector.