LOW-INCOME HOUSING AND THE CHARITABLE EXEMPTION

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I. INTRODUCTION

In the recently decided case of Pittman v. Sarpy County Board of Equalization, the Supreme Court of Nebraska, in a unanimous opinion, held that the Tax Equalization and Review Commission properly denied tax exempt status to Mercy Crestview Village ("Mercy"), the owner of an apartment complex located in Sarpy County, Nebraska. While there were procedural issues raised by the appeal of this case to the supreme court, the focus of this article will be upon the ruling of the Pittman court that the use of the property by the applicant was not "charitable" under the governing laws of the State of Nebraska pertaining to real property tax exemption. More particularly, this article will scrutinize and re-examine the Pittman court's re-affirmation of the "well established" rule that, as stated by the court, "[l]ow-income housing is not a charitable use of property." Even accepting the facts in the Pittman case at face value, indicating the applicant's "exclusive use of the property [was] to provide low-income housing," the author believes that there are cogent and compelling reasons why the court should have reached the exact opposite conclusion. This is not an area of law where the court is unduly constrained by the language of the Nebraska Constitution or the Nebraska statutes. It is true, that under the principle of stare decisis the Pittman court was, to some, and perhaps a great extent "governed" by prior case law, that the espoused principle was regarded as "well established." However, none of the members of the Nebraska Supreme

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3. The procedural issues raised by the appeal were: (1) whether the county assessor "had standing to bring the appeal," and (2) the allocation of the burden of proof. Pittman, 258 Neb. at 394, 603 N.W.2d at 451.
4. Pittman, 258 Neb. at 401, 603 N.W.2d at 455. This rule will be referred to as the "Pittman rule" in this article.
5. Id. at 401, 603 N.W.2d at 455 (emphasis added).
6. Upon further and close investigation of the prior case law, the author would suggest that the principle is less "well established" than first appears.
Court joining in the Pittman decision had ever before decided the issue before the court, namely, whether the provision of low-income housing constitutes a charitable use of property. While the current members of this court have displayed a willingness to re-examine precedent and overrule relatively recent decisions, the Pittman court was content to bow obsequiously to the well established rule without a hint of indecision. Given this approach and attitude, and even accounting for the fact-sensitive nature of tax exemption cases, the prognosis for a future court decision to depart from the “well-established” rule does not appear promising.

By its broad assertion that the provision of housing for low-income persons is not a charitable use, the Pittman court seems to rule out the possibilities of nuanced distinctions. It may well be that the supreme court is ill-equipped to make the types of nuanced distinctions that need to be made. If the law is to change, it may well be that the legislative forum is more appropriate. This article will explore that avenue in light of the federal government’s approach to the issue of tax exempt status for non-profit entities providing low-income rental housing. Given the fact that the Nebraska Legislature has, within the past fifty years, shown a willingness to address the issues of the availability and affordability of housing, it would be appropriate for the Nebraska Unicameral to take the lead in changing the existing law.

II. NEBRASKA LAW OF REAL PROPERTY TAX EXEMPTION

Section 2 of Article VIII of the Nebraska Constitution provides, in relevant part, that:

The Legislature by general law may classify and exempt from taxation property owned and used exclusively for agricultural

7. The “well established principle” was last affirmed by the Nebraska Supreme Court in Evangelical Luth. Good Samaritan. Soc. v. Buffalo Cty. Bd. Of Equal., 243 Neb. 351, 355, 500 N.W.2d 520, 523 (1993). Since 1993, the entire membership of the Nebraska Supreme Court has changed. The members of the court that decided the Good Samaritan case in 1993, were: Chief Justice Hastings and Justices Boslaugh, White, Caporale, Shanahan, Fahnbruch, and Lanphier. The Pittman court composition consisted of: Chief Justice Hendry (author of the opinion) and Justices Wright, Connolly, Gerrard, Stephen, McCormack and Miller-Lerman.


9. See infra section VII.
and horticultural societies and property owned and used exclusively for educational, religious, charitable, or cemetery purposes, when such property is not owned or used for financial gain or profit to either the owner or user[].10

The implementing statute states, in relevant part, that:

(1) The following property shall be exempt from property taxes:

(c) Property owned by educational, religious, charitable, or cemetery organizations and used exclusively for educational, religious, charitable, or cemetery purposes, when such property is not (i) owned or used for financial gain or profit to either the owner or user, (ii) used for the sale of alcoholic liquors for more than twenty hours per week, or (iii) owned or used by an organization which discriminates in membership or employment based on race, color, or national origin. . . . For purposes of this subdivision, charitable organization shall mean an organization operated exclusively for the purpose of the mental, social, or physical benefit of the public or an indefinite number of persons . . . .11

The statute thus creates a two-tier test: (1) the applicant must be what the Nebraska Department of Revenue regulations refer to as a "qualifying organization",12 (2) the property must be used exclusively for an exempt purpose.13 The last sentence of the statute quoted above addresses the first qualification—the organizational test as applied to a "charitable organization." The organizational test and the user test tend to blend together, but the Rules and Regulations of the Department of Revenue illustrate that the two qualifications are conceptually distinct.14

The discussion and analysis of the Pittman case and its predecessors will demonstrate that the organizational test gets subordinated to the user test. This is understandable inasmuch as a finding by the court that the use of the property in question was not "charitable" inexorably leads to the conclusion that the property does not satisfy the constitutional and statutory test. Since this article focuses upon the Pittman proposition that "low-income housing is not a charitable use

10. NEB. CONST., art. VIII, § 2.
13. NEB. ADMIN. CODE 40-005. The cases strongly emphasize the "exclusively" requirement and interpret this requirement as meaning that the "primary or dominant use of the property, and not an incidental use," is controlling. Pittman, 258 Neb. at 401, 603 N.W.2d at 455.
14. NEB. ADMIN. CODE 40-005.04 (1999) (providing examples of a "qualifying organization" that do not satisfy the exclusive user test).
of property," the first test relating to the status of the organization as a "charitable organization" will not be dwelt upon extensively. As might be expected there is abundant Nebraska case law interpreting the term "charitable" in the context of claimed charitable use by entities performing all manner and means of claimed charitable work. Before a selective review of this body of law is undertaken, a more expansive look at the meaning of "charitable" will be undertaken in the context of the English common law and general law in the United States.

III. THE MEANING OF "CHARITABLE" AS HISTORICALLY UNDERSTOOD

It was in the context of the developing law of charitable trusts that the English Chancery courts were first presented with the fundamental question of "[w]hat constitutes a charitable use of property?" On the charitable trust side the inquiry was directed at the purposes for which the trustee held the property.\textsuperscript{15} In other words, if the trustee were holding the property for a charitable purpose, then it could be said that the use of the property (by the trustee) was charitable in nature.\textsuperscript{16} As the law of charities evolved, the "organizational" qualification developed as the law of non-profit corporations developed.\textsuperscript{17} In the area of tax law, the status of the non-profit corporation as a "charitable" entity became a recurrent issue in a variety of tax contexts, primarily in the area of tax exempt status under various tax laws.\textsuperscript{18} While the tax statutes might very well have created a separate body of law defining "charities," by the time the issue of charitable tax exemption started emerging, there was an existent body of developed charitable trust law that provided basic tests and rules as to whether property was being held for a charitable purpose. Even in the esoteric body of law known as the Rule Against Perpetuities, a "charitable" exemption developed and courts were once again left with the task of defining what constitutes a "charity."\textsuperscript{19}

\textsuperscript{15} For a overview of this topic, see Restatement (Second) of Trusts § 368, cmt. a (1959).

\textsuperscript{16} Restatement § 348 (providing the definition of a charitable trust is that the trustee "is held to equitable duties to deal with the property for a charitable purpose") (emphasis added).

\textsuperscript{17} The Nebraska Nonprofit Corporation Act is found at Article 19 of Chapter 21 of the Nebraska Revised Statutes. Neb. Rev. Stat. §§ 21-1901 to -19,177 (Reissue 1997).

\textsuperscript{18} The most prominent of these tax exemptions statutes is found at the federal level—section 501(c)(3) of the Internal Revenue Code, granting an organization tax exempt status if the organization is "organized and operated exclusively" for charitable purposes. I.R.C. § 501(c)(3) (1988 & Supp. 2000).

\textsuperscript{19} See L. Simes, Law of Future Interests 296-97 (2d ed. 1966) (discussing the "charitable exemption" but not addressing the question of what constitutes a charity).
What appears to be the most influential definition of "charity" is the definition of Judge Gray of the Supreme Judicial Court of Massachusetts, articulated in 1867:

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 to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government.20

A more open-ended definition of charity, one that has been quoted in decisions of the Nebraska Supreme Court in tax exemption cases, provides:

Charity is defined as being something more than mere almsgiving or relief of poverty and distress, and it has been given a significance broad enough to include practical enterprises for the good of humanity operated at a moderate cost to those who receive its benefits.21

Judge Gray's classic definition of a charity includes a listing of charitable purposes. The law of charitable trusts, going back to 1601, has consistently focused upon the concept of a charitable purpose.22 Unlike the law of private trusts, the property need not be held for the benefit of certain and definite beneficiaries.23 However, for the trust to be charitable it is essential that the property be held for purposes considered "charitable."24 It is at this point that the law of charitable trusts takes definite shape as the courts of equity started articulating what purposes were deemed charitable.

In the United States, a convenient starting point for the discussion of what constitutes a charitable purpose is the *Restatement (Second) of Trusts.*25 In section 368 of that work, published in 1959, the *Restatement* provides a non-inclusive definition of charitable under the section entitled "What Purposes Are Charitable." Section 368 states that:

Charitable purposes include:

(a) the relief of poverty;

(b) the advancement of education;

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25. *Id.*
(c) the advancement of religion;
(d) the promotion of health;
(e) governmental or municipal purposes;
(f) other purposes the accomplishment of which is beneficial to the community.\(^{26}\)

Comment b to section 368 sheds additional light on the Restatement's philosophy in drafting this section:

A purpose is charitable if its accomplishment is of such social interest to the community as to justify permitting the property to be devoted to the purpose in perpetuity.

There is no fixed standard to determine what purposes are of such social interest to the community; the interests of the community vary with time and place. At common law in England, and in the United States, it is agreed that the relief of poverty, the advancement of education and religion, the promotion of health, the accomplishment of governmental or municipal purposes, are of such social interest to the community as to fall within the concept of charity. As to what other purposes are of such interest to the community as to be charitable, no definite rule can be laid down.\(^{27}\)

Note that in the above quotation the statement is made that the "relief of poverty" is an agreed upon charitable purpose at common law in England and in the United States. This charitable purpose, traditionally associated with alms-giving, is sometimes thought of as the "highest" or "truest" form of charity.\(^{28}\) It is no wonder that it is the first listed charitable purpose in the Restatement list. It is no wonder that Restatement section 369 states that "[a] trust for the relief of poverty is charitable."\(^{29}\) This general rule, it would appear, is universally accepted.

Restatement section 369, in comment a, elaborates further on "Methods of assisting the poor."

A trust to assist the poor is charitable whether the method of assistance which is provided for by the terms of the trust is by the distribution of money or goods among the poor, by letting land to them at a low rent, by making loans to them, by assisting them to secure employment, by the establishment of a

\(^{26}\) Id.

\(^{27}\) Id. § 368 cmt. b.

\(^{28}\) The Statute of Charitable Uses (1601) contains numerous references to persons described as "poor." Id. § 368 cmt. a. The reference to a class of "poor" persons does not necessarily end the discussion as to whether a trust is charitable. See In re Estate of Creighton, 91 Neb. 654, 656, 136 N.W. 1001, 1002 (1912) (noting that Creighton created a testamentary trust for the establishment of a home for "poor, working girls").

\(^{29}\) RESTATEMENT § 369.
home or other institution, by providing soup kitchens and the like.\textsuperscript{30}

While not providing precise guidelines, comment d to section 369 attempts to address the question of identifying "the poor," under the heading "Destitution unnecessary."

A trust to aid persons who are in need is a charitable trust although the persons to be aided are not absolutely destitute. Thus, a trust to assist persons who have an income which does not afford the necessities of life without such assistance is charitable. So also, a trust to establish a home for such persons is charitable.\textsuperscript{31}

Based upon the Restatement criteria, it would appear that property held by a trustee for the purpose of providing low-income housing would be considered a charitable trust because the property is devoted to a charitable purpose.\textsuperscript{32} Is there any discernible reason why a non-profit entity, whose purpose is to provide low-income housing, should not be accorded charitable status under the Nebraska law pertaining to real property tax exemption? That is the over-arching question raised by this article, and to continue the story we now turn to how the "well established" rule became embedded in Nebraska law.

IV. THE NEBRASKA CASE LAW LEADING UP TO PITTMAN

In support of its statement that "[i]t is well established that low-income housing is not a charitable use of property" the Pittman court cited five Nebraska Supreme Court cases\textsuperscript{33} from 1961 to 1993. Oddly enough, the five cases really amount to three cases, inasmuch as in two of the cases the same applicant and the same property were before the court. The applicants for tax exempt status lost both in the origi-

\begin{itemize}
\item \textsuperscript{30} Id. § 369 cmt. a (emphasis added).
\item \textsuperscript{31} Id. § 369 cmt. d.
\item \textsuperscript{32} While there might have been some doubt in 1912 as to the Creighton trust for "poor, working girls" and its status as charitable, when that trust came before the Supreme Court of Nebraska in 1941, the Nebraska court had no hesitancy in concluding that the trust "is a public charity." John A. Creighton Home For Poor Working Girls v. Waltman, 140 Neb. 3, 299 N.W. 261 (1941).
\end{itemize}
nal appeals and in the subsequent appeals. The common denominator in all of these cases was that the use of the property in question was for housing for the elderly. Because the focus of this article is upon the Pittman rule as it pertains to "low-income housing," the review of the precedent-setting cases will be undertaken solely from the perspective of the manner in which the Nebraska Supreme Court came up with the "well established" rule that "low-income housing is not a charitable use of property."

A. The OEA Cases (1961 and 1971) and the Christian Retirement Homes Case

Unquestionably, the 1961 case entitled County of Douglas v. OEA Senior Citizens, Inc. (hereafter "OEA I") set the precedent that has guided the course of Nebraska law ever since. The defendant, OEA Senior Citizens, Inc., was a Nebraska nonprofit corporation seeking exemption on the ground that the property it owned was charitable in nature and therefore entitled under Nebraska law to tax exempt status. The property in question was an apartment building catering primarily to retired teachers, but persons others than retired teachers were also eligible to apply for rental. According to the facts, the "charges to the residents would be no more than costs involved." While the court was willing to concede that "the design and purpose of the building... was to furnish housing to selected persons at low cost," the court pointed out that there was nothing in the record "to indicate that [the cost charged] was to be below the cost of the service furnished." The defendant, OEA Manor, had alleged that its $70 per month charge went "toward cost of maintenance and amortization of a mortgage on the property" and that any excess maintenance costs would be paid by another entity, the Omaha Education Association. If occupants failed to pay the monthly maintenance charges, the court stated that such residents "might be allowed to remain."

34. See Good Samaritan II, 243 Neb. 351, 500 N.W.2d 520; Good Samaritan I, 230 Neb. 135, 430 N.W.2d 502; OEA II, 186 Neb. 593, 185 N.W.2d 464; OEA I, 172 Neb. 696, 111 N.W.2d 719.
35. There is a voluminous amount of litigation in the law of tax exemption pertaining to housing for the elderly. See, e.g., John D. Perovich, Annotation, Homes for the Aged as Exempt from Property Taxation, 37 A.L.R.3d 565 (1971).
36. Pittman, 258 Neb. at 401, 603 N.W.2d at 455.
39. OEA I, 172 Neb. at 701, 111 N.W.2d at 722.
40. Id. at 707, 111 N.W.2d at 725.
41. Id. at 700, 111 N.W.2d at 722.
42. Id. at 707, 111 N.W.2d at 725.
In its discussion of the law of charitable tax exempt status, the court did not focus on the definition of "charity," but emphasized the word "exclusively" in examining the legal test for charitable tax exemption. The court's discussion continued with this notable passage:

No definition of charity found in any available lexicon is sufficient upon which to declare what has been described in this record as exclusively charitable, that is that the furnishing of low-cost housing at its real cost is charitable. There have been decisions in other jurisdictions which are contrary to this view, the citations of which will not be included herein. This court is unwilling to follow what is regarded as fallacious reasoning.

The court then cited, with approval, two decisions from the Ohio Supreme Court which the court believed to be on point. In the second of the decisions cited, the Nebraska court seized upon this single sentence of the Ohio court: "The use of the property in the instant case is primarily for furnishing low-rent housing and not exclusively for charitable purposes." Syllabus number six, written by the court, in OEA I, gave birth to the "well established rule":

Property which is owned and used primarily for the purpose of furnishing low-rent housing is not property owned and used exclusively for charitable purposes within the meaning of the Constitution and statutes of the State of Nebraska.

In the quotation from the OEA I case cited above, the court used the term "low-cost" housing and contrasted that with the charging of the "actual cost" of the housing. However, in the syllabus written by the court, the term utilized is "low-rent" housing. In the courts' opinion, there was expressed concern that the cost paid by the residents might have equaled or exceeded the actual cost. The fact that the court would be concerned that the alleged "low cost" is the same as the "real cost" is understandable, for there appears to be little charity involved in "selling" housing at its "real" cost. When the court, in writing syllabus six, used the term "low-rent" housing, the focus shifted from the price of the housing compared to the "market" rate and seems to ignore the actual cost. Lost in all of this is what ostensibly should be the most important consideration—the furnishing of housing to the

43. Id. at 708, 111 N.W.2d at 726.
44. Id. at 707-08, 111 N.W.2d at 725.
45. Id. at 708, 111 N.W.2d at 726 (citing Cleveland Branch of Guild of St. Barnabas for Nurses v. Board of Tax Appeals, 83 N.E.2d 229 (1948); Beerman Found., Inc. v. Board of Tax Appeals, 87 N.E.2d 474 (1949)).
46. Id. (quoting Beerman Found. v. Board of Tax Appeals, 87 N.E.2d 474, 476 (1949)).
47. Id. at 696, 111 N.W.2d at 720.
Because the record in *OEA I* is not clear as to the exact basis upon which the applicant sought tax exempt status, it is difficult to tell precisely what argument the court is responding to. By virtue of what the court emphasized, it appears that, from the court's perspective, the fact that the housing was furnished at its "real cost" became the determinative factor as to whether the use was in fact, "charitable." On the other hand, this particular point was overshadowed by the citation, quoted above, from the Ohio court's opinion and syllabus six of the court's opinion, also quoted above.

By focusing exclusively upon the quotation from the Ohio court and syllabus six, the rationale of *OEA I* is reduced to a simple *ipse dixit*. The failure of the court to clearly articulate why the applicant's furnishing of "low-rent housing" did not satisfy the charitable user test is problematic. While the court did make a cryptic reference to the "incidents and practices" of the applicant,\footnote{49. "There is here a record of incidents and practices which make it clear that this property was not owned and used exclusively for charitable purposes." *OEA I*, 172 Neb. at 707, 111 N.W.2d at 725.} the concluding paragraph quoting the Ohio court is wholly conclusory. While Justice Yeager referred to the "fallacious reasoning" of the judicial decisions reaching a contrary view, one might say that at least these decisions did contain some element of reasoning, fallacious or not. To repeat: if the critical factor to the *OEA I* ruling was that the furnishing of "low-cost housing" was at its "actual cost," then at least there is a rationale upon which the conclusion might said to be logically compelled. Syllabus six, the genesis of the "well established rule," did not articulate a rationale, but simply stated a conclusion.

In the 1970 *Christian Retirement Homes* case,\footnote{50. 186 Neb. 11, 180 N.W.2d 136 (1970).} the Nebraska Supreme Court once again ruled that a retirement home, designed for senior citizens, owned and operated by a nonprofit corporation, was not entitled to tax exempt status as a charity. According to the court, the "primary or dominant use of the property . . . [was] to provide housing for elderly persons."\footnote{51. *Christian Retirement Homes, Inc.* v. *Board of Equalization*, 186 Neb. 11, 13, 180 N.W.2d 136, 138 (1970).} Those entering the home were required to sign an occupancy agreement, pay an entrance endowment, and pay a monthly food and service charge. If an admitted resident were unable to pay monthly charges, the resident would be allowed to remain "if such dispensation can be granted without impairing the ability of the..."
home to operate on a sound financial basis.”\textsuperscript{52} It was estimated that over an eight to ten year period of time the indebtedness of the home would be paid off.\textsuperscript{53}

On these facts the Nebraska Supreme Court stated that it was “committed” to the rule of \textit{OEA I}—“property which is owned and used primarily for the purpose of furnishing low-rent housing is not entitled to exemption . . . ”\textsuperscript{54} The court admitted the facts of the instant case were “somewhat different” from \textit{OEA I}, but “the fact remains that the primary use of the property is to provide housing for elderly persons.”\textsuperscript{55} Notice that the court did not assess whether the cost of the housing matched the actual cost nor did the court emphasize the eligibility requirements for admission. While some services available to the elderly residents made the case factually different from \textit{OEA I}, the court simply viewed the facts as presenting a “retirement” home—with the furnishing of housing being the primary use of the property.

In 1971, the Nebraska Supreme Court had another opportunity to examine the tax exempt status of the OEA Manor in \textit{OEA II}.\textsuperscript{56} Certain physical changes had been made to the manor property and certain added services were available to the residents. The Manor catered to retired persons (those over age 65), primarily teachers. It appeared that the Manor took in only those able to pay for the charges imposed by the Manor. A retired teacher who was admitted to the Manor might receive assistance from the OEA Foundation if that person was in need of assistance in making payment of the charges.\textsuperscript{57} In once again denying tax exempt status to the applicant, the court pointed out that while the Manor operated a medical care center, that use was “merely incidental” to the main use.\textsuperscript{58}

Judge Spencer, writing for the majority, reiterated that, like the \textit{OEA I} case ten years earlier, the “dominant purpose” of the applicant “is to provide housing facilities for members of the teaching profession[].”\textsuperscript{59} The opinion of Judge Spencer concluded with the following observations:

Because an institution is organized as a nonprofit corporation, it is not, merely by virtue of that description, entitled to tax exemption. Even though an enterprise may be operated at a very moderate cost or even at cost, and for the good of humanity, it is not solely by virtue of those facts a charitable

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\footnotesize
\item 52. \textit{Christian Retirement Homes}, 186 Neb. at 13, 180 N.W.2d at 138.
\item 53. \textit{Id.} at 13, 180 N.W.2d at 138.
\item 54. \textit{Id.} at 14, 180 N.W.2d at 138.
\item 55. \textit{Id.} at 14, 180 N.W.2d at 139.
\item 56. \textit{OEA II}, 186 Neb. at 593-605, 185 N.W.2d at 464-71.
\item 57. \textit{Id.} at 594-601, 185 N.W.2d at 466-68.
\item 58. \textit{Id.} at 602, 185 N.W.2d at 469.
\item 59. \textit{Id.}
\end{thebibliography}
institution within the meaning of our law. With the advent of social security, welfare, medicare, and medicaid programs, assistance is now much more readily available to the elderly than formerly, and possibly some of our earlier thinking on the charitable aspects of certain institutions may not now be realistic. We now see no reason why an institution, merely because it caters to the needs of the aged and the infirm, should be exempt from taxation if someone other than that institution is furnishing the cost of the care and maintenance provided by the institution.60

The last sentence quoted became syllabus six of the court's opinion. The court's syllabi for OEA II did not repeat the sixth syllabus of OEA I which baldly stated that "furnishing low-rent housing" is not a non-charitable use. Syllabus six of OEA II implies that the existence of governmental benefit programs for the elderly somehow impacts the determination of whether the applicant's use of the property is charitable in some unspecified way. Once again what is not present in the case is a focus on whether the applicant restricted its services to those in need. There is a statement in the opinion that the property was for the benefit of a class "having the ability to pay."61 If this is so, then the facts of the case do not present a situation involving "low-income" housing and anything said by the court in regard to "low-income housing" would be dicta.

B. THE "GOOD SAMARITAN" CASES

In 1988 and 1993, the Nebraska Supreme Court reviewed the status of property owned by the Evangelical Lutheran Good Samaritan Society, and in each instance denied the claim for tax exempt status.62 Both cases involved the same property, an apartment complex that was part of Good Samaritan Village, which consisted of a sixty-bed nursing home, thirty-one independent living apartments in eight buildings, a preschool and twenty-three acres of farmland. The appeals involved only the status of the independent living units. The court reviewed, in fairly extensive detail, the operations of the Good Samaritan Society, the practices and procedures regarding admission and evictions, and the financial data pertaining to charges and other matters.63 In the 1988 case, the trial court had ruled that the apartment units "constitute a reasonable and necessary extension of the

60. Id. at 602-03, 185 N.W.2d at 469-70.
61. Id. at 602, 185 N.W.2d at 469.
62. Good Samaritan I, 230 Neb. 135, 430 N.W.2d 502; Good Samaritan II, 243 Neb. 351, 500 N.W.2d 520.
63. Good Samaritan I, 230 Neb. at 136-37, 430 N.W.2d at 503.
intermediate care facility” and granted the exemption.\(^6\) On appeal, this decision was reversed by a panel of three judges of the supreme court and two district court judges.\(^6\) One of the district court judges, sitting on the supreme court, dissented.\(^6\)

The majority opinion quoted from OEA I also quoted the broad definition of charity previously cited above. The court rejected the “natural extension” theory of the trial court and placed the case in a now familiar pigeonhole: “[t]he primary use of the apartments was low-cost housing.”\(^6\) While conceding that some of the services offered to the tenants were “favorable and beneficial to the tenants . . . those benefits in themselves do not change the low-cost-housing character of the apartments.”\(^6\)

When the Supreme Court of Nebraska reviewed the status of the same property in 1993, the Society attempted to show the Society’s affiliation with the American Lutheran Church and the Lutheran Church in America as a changed circumstance entitling the applicant to exemption on the grounds of using the property for religious purposes.\(^6\) The court rejected that argument fairly summarily and concluded, as in the first appeal, that the predominant use of the property was for low-rent housing and that the rule announced in OEA I applied, just as it did in 1988.\(^7\)

V. THE PITTMAN CASE

A. BACKGROUND

The supreme court’s statement of the factual “Background” is as follows:

In 1996, Mercy purchased an apartment complex in Sarpy County, Nebraska. Mercy, a nonprofit corporation, is ultimately sponsored by the Sisters of Mercy, a Catholic religious order. Mercy’s mission is to “create and strengthen healthy communities through the provision of quality, affordable, service-enriched housing for individuals and families who are economically poor.”

The apartment complex consists of 154 residential units. One unit is used as an office and another is used as a “network

\(^6\) Id. at 138-39, 430 N.W.2d at 504.
\(^6\) Id. at 136, 142, 439 N.W.2d at 503, 506.
\(^6\) District Judge Buckley believed that the units in question were part of a “multilevel integrated facility” and were a “logical extension’ of the care facility.” Id. at 142, 144, 430 N.W.2d at 506-07.
\(^6\) Id. at 142, 430 N.W.2d at 506 (citation omitted).
\(^6\) Id. at 142, 430 N.W.2d at 506.
\(^6\) Good Samaritan II, 243 Neb. at 355, 500 N.W.2d at 523.
\(^7\) Id. at 355-57, 500 N.W.2d at 523-24.
The network center is used to provide programs such as neighborhood watch, tutoring, computer classes, home ownership seminars, cancer awareness, and CPR classes. The network center is also used for social events and as a meeting place. Tenants are not required to participate in any of the services Mercy provides through the network center.

Mercy employs a service coordinator who meets with individual tenants to assess what programs or services would meet the needs of the tenants. The coordinator encourages tenants to participate in programs offered through the network center. The programs and services offered are constantly changing based on the specific needs of the tenants. Classes offered through the network center are generally taught by volunteers, and class materials are informational in nature. In October 1998, the network center was used [twelve] percent of the time ([sixty-one] hours) for providing educational programs.

Persons applying to live at Mercy are subject to a credit check. Tenants must sign a lease and pay rent. Mercy has two low-income housing contracts with the Department of Housing and Urban Development (HUD), commonly referred to as “Section 8” and “Section 236” contracts. In order to qualify for HUD housing, a tenant’s income must be at or below a certain level. Mercy sets a rental rate in compliance with HUD’s requirements. Tenants of Section 8 units may receive a HUD subsidy. Tenants are subject to eviction for nonpayment of rent. There is no time limit on how long a tenant may reside at Mercy.

Mercy is self-supporting based on rent and rent subsidies. The property is expected to stand on its own financially. Any operating loss is covered by the “reserve for replacement” account, which is funded by Mercy’s operating income. Mercy has never had to go beyond this reserve account to cover losses. However, if the reserve account would run short of covering a loss, Mercy would apply to HUD for a rent increase.\textsuperscript{71}

Mercy sought tax exempt status in 1996 and 1997, and exemption was granted by the county board over the protests of the county assessor. In 1998, the county board again granted exemption and the county assessor appealed this decision to the Tax Equalization and Review Commission (“TERC”). Mercy contested the standing of the county assessor to bring the appeal, but this issue was ultimately resolved against Mercy and a hearing before TERC was held. TERC reversed the county board’s decision finding that the “predominant use

\footnotesize{\textsuperscript{71} Pittman, 258 Neb. at 392-93, 603 N.W.2d at 450.}
of the property was to provide low-income housing and that thus, it was not exempt from taxation."\(^{72}\)

**B. THE SUPREME COURT DECISION**

The supreme court's review of the "sufficiency of evidence" (to support TERC's finding) began with the court quoting the governing statute: "[p]roperty 'owned by educational, religious, charitable, or cemetery organizations and used exclusively for educational, religious, charitable, or cemetery purposes' is exempt from property taxes."\(^{73}\)

The court then proceeded to examine the record and concluded that Mercy did not qualify as an educational organization, as a religious organization, or as a cemetery organization. Thus, said the court, Mercy could only qualify as a "charitable organization using the property exclusively for charitable purposes."\(^{74}\)

The supreme court then engaged in a two-step process to affirm TERC's ruling: (1) the court first concluded that record supported TERC's determination that the exclusive use of the property was to "provide low-income housing" and (2) the court concluded that "low-income housing is not a charitable use of property[,]" citing the five cases discussed in the previous section.\(^{75}\) Two paragraphs of the court's opinion were devoted to distinguishing the instant case from the 1964 YWCA case,\(^{76}\) wherein the court had granted tax exempt status to the property used by the YWCA for "temporary low-cost housing for young women."\(^{77}\) According to the court's comparison, "[o]peration of Mercy's property is significantly different from that involved in YWCA."\(^{78}\)

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\(^{72}\) Id. at 393-94, 603 N.W.2d at 450-51.

\(^{73}\) Id. at 399, 603 N.W.2d at 454. The portion of the Nebraska statute cited became subsection (d) of Section 77-202 when a 1999 amendment to the statute took effect on January 2, 2000. LB 271, 1999 Neb. Laws 5-6, § 4.

\(^{74}\) Pittman, 258 Neb. at 400, 603 N.W.2d at 454.

\(^{75}\) Id. at 400, 603 N.W.2d at 455.

\(^{76}\) Young Women's Christian Ass'n v. City of Lincoln, 177 Neb. 136, 128 N.W.2d 600 (1964).

\(^{77}\) Pittman, 258 Neb. at 400, 603 N.W.2d at 455.

\(^{78}\) Id. at 401, 603 N.W.2d at 455. The factual differences the court seized upon were: duration of the tenancy; the optional nature of the services; the "self supporting" nature of the operation and the fact that in Mercy's operation, "only one unit ... is used to provide services[.]" Id. According to the Pittman court, "[a]lthough the supportive services may be important to Mercy's overall goals, they do not constitute the predominant use of the property." Id. Rather than focusing upon these factual distinctions and the YWCA case, the author believes that the "public charity" status of housing for "poor, working girls" is a far more compelling analogy. See supra note 32 and accompanying text.
C. THE QUESTIONS RAISED BY PITTMAN

The Pittman court did not see fit to re-examine the "well established rule," but accepted it as an article of faith. Apparently the court felt that it was not necessary to justify the "well established rule" in light of the accumulated precedent. That is understandable, but not acceptable. The author respectfully submits that from the time of OEA I (1961) until the present, the Nebraska Supreme Court has failed to articulate a coherent rationale justifying the "well established rule." So far as the author is concerned, the Nebraska Supreme Court has yet to explain exactly why it believes that a non-profit entity, providing housing for persons of low and moderate income, is not engaging in charitable activity.

As will be recalled from the prior discussion of the "general law" supra, the Restatement's view is that the "relief of poverty" is a preeminent charitable activity and that this includes "letting land to them [poor people] at a low rent." For the court to conclude, without benefit of discussion, that this view is "fallacious," is disingenuous at best and arrogant at worst. It is admittedly, in the modern day welfare state, a delicate task to determine precisely whether an entity is a "charitable" organization and whether the predominate use of the property is "charitable" in nature. But other branches of government have faced this task and have presented a different viewpoint as to the meaning of "charitable" that at least raises questions regarding the Pittman court's broad and sweeping conclusory statement regarding the nature of low-income housing. In the next section, an alternative view to that of the Nebraska court will be presented.

VI. THE FEDERAL TAX EXEMPTION

Under Section 501(c)(3) of the Internal Revenue Code, corporations "organized and operated exclusively for . . . charitable . . . purposes" are exempt from taxation. According to the applicable regulation, the term "charitable," as used in section 501(c)(3) is used "in its generally accepted legal sense." The regulation further states the term "charitable" includes "[r]elief of the poor and distressed or of the underprivileged[.]" The federal regulation, in the main, tracks

79. See supra section III.
80. See supra note 30 and accompanying text.
81. See supra note 44 and accompanying text.
82. I.R.C. § 501(c)(3).
the “charitable purposes” section of the Restatement (Second) of Trusts quoted above. 85

According to a 1996 Revenue Procedure, 86 three revenue rulings, issued in 1967, 1970, and 1976, “hold that the provision of housing for low-income persons accomplishes charitable purposes by relieving the poor and distressed.” 87 This conclusion is, of course, directly at odds with the “well established rule” endorsed in Pittman, that “low-income housing is not a charitable use of property.”

A Nebraska income tax statute grants an exemption to “[a]ny organization to the extent that it is exempt from income taxes under the laws of the United States.” 88 Thus, a Nebraska non-profit corporation providing low-income housing could be treated as exempt both under Federal and state income tax law, as exclusively charitable, and yet not qualify for real estate property tax exemption under the Pittman rule. An anomaly of this type might be expected under a system of federalism where the federal government and the state government operate independently in separate spheres. But when the state’s tax laws treat an entity as charitable for one purpose, but not for another, the inconsistency cries out for an explanation. 89

Revenue Ruling 70-585, interpreting the requirement of “charitable” in the federal tax exemption statute, makes the following statement in regard to the furnishing of low-income housing by a non-profit organization: “By providing homes for low income families who otherwise could not afford them, the organization is relieving the poor and distressed.” 90 Recall the Restatement (Second) of Trusts view that a trust may be considerable charitable by “assisting the poor” by “letting land to them at low rent.” 91 Note the emphasis in the foregoing authorities upon the provision of housing for the “low-income families” at “low rent.” While the federal test for exemption does provide for an “organizational” as well as an “operational” test, 92 the focus is, at present, on the use of the property. Determining whether property qualifies as “exclusively charitable” can, and maybe should be, a multi-

85. See supra note 26 and accompanying text.
89. The inconsistency may be explainable. For instance, an exempt organization may be holding title to property that it does not use for its charitable purpose. While exempt from income taxation at both the federal and state levels, that entity may not lawfully be entitled to an exemption under the state’s real property exemption law. The Nebraska Department of Regulations pertaining to property tax exemption provides an example of this type. See Neb. Admin. Code 40-005.03 (1999).
91. See supra note 30 and accompanying text.
layered problem that goes beyond the simple binary issue of whether the provision of low-income housing is or is not a charitable use. The federal tax exemption approach, with its nuanced and comprehensive analyses, aided by the administrative processes of regulations and rulings, presents a more compelling case than the simplistic *Pittman* rule.

VII. THE LEGISLATIVE FINDINGS

In giving substantive definition to the meaning of the term "charitable" in the Nebraska Constitution and statutes, the Nebraska Supreme Court is deciding an important issue of public policy. If the Nebraska Supreme Court were to re-examine *de novo* the issue of whether the provision of low-income housing qualifies as a charitable use, the court might properly be guided by the findings made by the Nebraska legislature in enacting statutes pertaining to the provision of housing, particularly for those of low-income status. In interpreting the provisions of the Nebraska Constitution, the Supreme Court of Nebraska has stated: "The findings of the Legislature, while not absolutely controlling, are entitled to great weight."93 It would be particularly appropriate for the supreme court to consider the legislative findings in the charitable use area pertaining to low-income housing, as the court had previously acknowledged the legislative findings in cases pertaining to the provision of housing for low-income persons.94

In the area of housing, the Nebraska legislature has, for over fifty years, addressed the problems of the *availability* and *affordability* of housing. The parade of legislation began in 1937 with acts establishing local housing authorities. The findings made by the Nebraska Legislature in 1937 are noteworthy:

It is hereby declared: (a) that there exist in the State insanitary or unsafe dwelling accommodations and that persons of low income are forced to reside in such insanitary or unsafe conditions . . .95

It is hereby found and declared that there exist in the State unsafe and insanitary housing conditions and a shortage of safe and sanitary dwelling accommodations for persons of low income . . .96

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94. See supra note 93 and accompanying text. See also Lennox v. Housing Auth., 137 Neb. 582, 588-89, 290 N.W. 451, 456-57 (1940).
In 1978, the Nebraska Unicameral enacted the Nebraska Mortgage Finance Fund Act and the legislative findings included the following:

There exists in the urban and rural areas of this state an inadequate supply of, and a pressing need for, sanitary, safe, and uncrowded housing at prices which persons of low and moderate income can afford and as a result such persons are forced to occupy insanitary, unsafe, and overcrowded housing.\footnote{Nebraska Mortgage Finance Fund Act, LB 476, 1978 Neb. Laws 286, § 3.}

The Nebraska Mortgage Finance Fund, in 1983, became a part of the newly created Nebraska Investment Finance Authority.\footnote{Nebraska Investment Finance Authority Act, LB 626, 1983 Neb. Laws 1437.}

The existing legislation relating to the Nebraska Investment Finance Authority contain the following finding:

There exists in the urban and rural areas of this state an inadequate supply of and a pressing need for sanitary, safe, and uncrowded housing at prices at which low-income and moderate-income persons, particularly first-time homebuyers, can afford to purchase, construct, or \textit{rent} and as a result such persons are forced to occupy unsanitary, unsafe, and overcrowded housing.\footnote{\textsc{Neb. Rev. Stat.} § 58-202(2)(c) (Supp. 1999) (emphasis added).}

In 1996, the Nebraska Unicameral enacted the "Nebraska Affordable Housing Act." In this Act the Legislature made the following significant findings:

The Legislature finds that current economic conditions, lack of affordable housing, federal housing policies that have placed an increasing burden on the state, and declining resources at all levels of government adversely affect the ability of Nebraska's citizens to obtain safe, decent, and affordable housing. Lack of affordable housing also effects the ability of communities to maintain and develop viable and stable economies.

To enhance the economic development of the state and to provide for the general prosperity of all of Nebraska's citizens, it is in the public interest to assist in the provision of safe, decent, and affordable housing in all areas of the state.\footnote{\textsc{Neb. Rev. Stat.} § 58-702 (Reissue 1998).}

In 1999, the Nebraska Unicameral passed the "Nebraska Housing Agency Act," which contained the following legislative declarations:

The Legislature declares that:

(1) There exists within this state a shortage of residential housing that is decent, safe, and sanitary, situated in safe,
livable neighborhoods, and affordable to persons of low and moderate income;
(2) Many persons and families throughout this state occupy inadequate, overcrowded, unsafe, or unsanitary residential housing because they are unable to locate and secure suitable housing at a price that they can reasonably afford. This circumstance has resulted in undue concentration of impoverished populations in certain areas, increased rate of crime, deterioration in human health, and other family and social dysfunction, thereby seriously and adversely affecting the public health, safety, and welfare of persons residing in this state[.]

While the goal and purpose of the Nebraska Affordable Housing Act was to foster and to stimulate home ownership, the “Nebraska Housing Agency Act” stated that its purposes include:

(1) To remedy the shortage of decent, safe, and sanitary housing affordable to persons of low and moderate income, to provide opportunities to secure such housing to all such persons, to preserve existing supplies of such housing, and to create, administer, and operate programs to increase and maintain access to decent, safe, and sanitary rental housing and home ownership upon terms affordable to such persons;

(4) To provide housing, rental, and other assistance to persons of low and moderate income and assistance to properties and entities in accordance with the provisions of the act . . . .

The Nebraska Supreme Court, if it were facing the low-income housing charitable exemption issue as a matter of first impression, might properly look to the legislative findings, which, the court has previously stated, are entitled to “great weight.” Given the legislative lead, the Nebraska Supreme Court could easily interpret “charitable” so as to include the provision of low-income housing as a charitable use, a finding that would be consistent with the “general law,” previously discussed. As noted earlier, given the fact that the Pittman decision was rendered by a unanimous court and given the ever-present principle of stare decisis, the Nebraska high court’s continued adherence to the Pittman rule is likely to continue. This, in

103. See supra note 93 and accompanying text. It can be argued that the court’s deference to the legislative findings is only appropriate in cases determining whether the act of the legislative is in furtherance of a “public purpose.” The author disagrees inasmuch as the decision as to whether a use is charitable or benevolent (non-charitable) is exactly the same type of line-drawing that courts should be guided by the will of the people as expressed in duly enacted legislation.
the author's opinion, is very unfortunate at a time when the need for low-income rental housing has never been greater.\textsuperscript{104} Now is the time for the Nebraska Unicameral to legislatively overrule \textit{Pittman}. This course of action is logical and as a matter of policy, more desirable as will be explained in the next section.

VIII. THE ADVANTAGES OF LEGISLATION

Assuming that one agrees with the author's premise that providing low-income housing is a societal good, and that extending the charitable tax exemption to organizations providing such housing is an appropriate and legal manner of encouraging and supporting such endeavors, the problem is that, a case by case approach may be a very inefficient and ill-suited way to deal with the distinctions that will inevitably arise. Precise line-drawing is a task best suited to the legislative and administrative processes, not the courts. Clear statutory and administrative guidelines would assist the court in performing its role as judicial arbiter.\textsuperscript{105}

The experience of the federal government in statutorily, and by administrative processes, defining what a charity is (the organizational test) and the critical term "low-income,"\textsuperscript{106} points the way for the State of Nebraska to proceed. The Nebraska statutes could be amended to provide for a "low-income housing" exemption just as the Nebraska exemption statute was amended to provide clarity as to the "educational organization" exemption. In the current statutory formulation, the "charitable organization" definition is meaningless.\textsuperscript{107}

\begin{footnotesize}
\begin{enumerate}
\item According to a finding by a national research organization, "34% of renters in Nebraska are unable to afford Fair Market Rent for a two-bedroom unit." National Low Income Housing Coalition, \textit{Out of Reach} (September 2000), available at http://www.nlihc.org/cgi-bin/oor2000.pl?getstate=on&state=ne.
\item The lead opinion of Judge Spencer in \textit{OEA II} adverts to the difficulty of the task that the court has experienced in the past:
There is some merit to appellant's contention that it is difficult to distinguish this case from some of the previous cases where exemption has been allowed. It is entirely possible some of the distinctions made in the past may be more ethereal than real. This sometimes results from a case-by-case application where ill-defined rules are constantly expanded in difficult cases. Possibly we may have gone too far in some of those cases. Because conditions do change, if they were before us today the result might be otherwise.\textit{OEA II}, 186 Neb. at 599, 185 N.W.2d at 468. Judge Boslaugh took exception to the above remark, particularly as it related to decisions of the court relating to institutions caring for the sick and infirm. \textit{Id.} at 603, 185 N.W.2d at 470 (Boslaugh, J., concurring). Speaking of distinctions "more ethereal than real," the \textit{Pittman} court felt that it had satisfactorily distinguished the facts in \textit{Pittman} from those presented in the YWCA case. See supra note 78 and accompanying text. When all is said and done, in the author's view, YWCA presented a case where the predominant use was housing.
\item \textit{See supra} note 11 and accompanying text.
\end{enumerate}
\end{footnotesize}
The present definition adds nothing and says nothing that is not otherwise encompassed by the term "charitable."

Following the model of the federal tax exempt organization statute, the Nebraska statute should be amended to delineate an organizational test and an operational test. The organizational test should specify that a "charitable" organization must be organized as a non-profit entity and must further provide that in the event the organization ceases to exist; the assets of the organization must be transferred to another qualifying charitable organization. The statute could simply require that the applicant for charitable exemption for low-income housing must have an exemption under the federal income tax statute (just as the state income tax statute currently provides). This would alleviate concerns expressed in the Nebraska case law by one judge who envisioned a cooperative apartment arrangement qualifying for tax exempt status.108

As for the operational test, the challenge is greater because a statute which grants exempt status to an otherwise qualifying organization which provides "low-rent" housing, or housing to persons of "low-income" provides no clear guidelines. At the federal level, the Internal Revenue Service, in 1996, issued Revenue Procedure 96-32, which provided low-income housing guidelines. This revenue procedure set forth the "safe harbors" for the IRS in determining whether otherwise qualifying organizations were serving the "poor and distressed." The revenue procedure identified "those low-income housing organizations that will, with certainty, be considered to relieve the poor and distressed."109 The Nebraska legislature's deference to the federal government's determination as to whether the entity was indeed serving the "poor and distressed" may or may not be the best approach, but it is an idea worth considering.

Another approach to this task would be for the Legislature to borrow the standards set forth in the Nebraska Finance Authority Act110 or those set forth in the new Nebraska Housing Agency Act.111 The Legislature, if it so chose, could delegate to the Tax Commissioner the task of defining, by regulation, those who would be considered "low-income" or those entities that would be considered as low-income housing organizations. The many options available suggest how difficult the task of line-drawing is and how ill-equipped a court would be

108. See concurring opinion of Judge Newton in OEA II, 186 Neb. 605, 185 N.W.2d at 471 (Newton, J., concurring).
in either engaging in ad hoc line-drawing or arbitrarily incorporating some external standard. The fact that other states have taken the route of enacting legislation in this area also gives credence to the argument that the problem is best solved by legislation.112

IX. CONCLUSION

At the national level, there is much data to support the conclusion that America is in the grips of a housing crisis, particularly as it relates to the availability and affordability of low-income rental housing.113 As the number of affordable rental units in the private market has declined, the federal government has assumed a more critical role as a low-cost housing provider.114 The 1980's were marked by a decline of housing subsidies generally, with a greater shift toward middle-income housing and a reduction in the number of housing for low-income households. State and local governments have not stepped into the breach to fill in the gap left by the federal government's decreasing commitment to low-income rental housing.

The non-profit sector can play a vibrant and important role as the story of Habitat for Humanity dramatically illustrates in regard to providing housing purchase opportunities for low-income persons. When a non-profit entity secures a federal exemption and thereby pledges that its assets will be used in the future solely for charitable purposes and that no private gain or inurement will occur, that non-profit entity thereby deservedly earns the title of a "charitable organization." When that non-profit entity provides low-income housing and supportive services, as was the case in Pittman, that entity should, as the Sarpy County Board of Equalization voted, be entitled to a tax exemption under a fair construction of the statute. To say that the law stands in the way of reaching that result is true only if one be-

112. The experience of the California legislature is detailed in a 1993 article. See Lance S. Bocarsly & Steven C. Koppel, Real Property Tax Exemptions in Affordable Housing Transactions, 2 J. AFFORDABLE HOUSING & COMMUNITY Dev. L. 12, 12 (1993). The fact that the entity in question receives assistance from the federal government in the form of a mortgage or grant is the criterion by which some states determine whether a real property tax exemption for low-income housing is granted under state law. See also Mich. Comp. Laws Ann. § 125.1415(a) (Supp. 2000); Nev. Rev. Stat. § 361.082 (2000).

113. The data is voluminous. The most current data has been published by the Joint Center for Housing Studies at Harvard University in "The State of the Nation’s Housing: 2000." Information about this study is available at www.gsd.harvard.edu/jcenter/. Another useful website containing many references is that of the National Low Income Housing Coalition, available at www.nlihc.org.

lieves that OEA I enunciated the correct guiding principle. It is the author's view that OEA I is lacking a rationale as to why "low income housing is not a charitable use of property" and all of the subsequent cases, especially Pittman,115 simply compound the error.

In the Rules and Regulations adopted by the Nebraska Property Tax Commissioner, a hypothetical fact situation is recited:

A qualifying corporation owns and operates a residential facility for low-income elderly persons. Rent, meals, and other charges are designed to cover the actual costs of the services provided. Even though the corporation is nonprofit, the operation is in the nature of a business selling housing since no part of the cost is donated to residents and no element of charity is present. The property is used for residential purposes, not used exclusively for charitable purposes, thus no exemption is allowable.116

With the exception of the restriction to elderly persons, the assessor's brief on appeal in the Pittman case argued that "the example from the regulations presents exactly the fact situation that exists in the instant case."117 To be noted in this example is not an emphasis on the eligibility criteria or the restriction to "low-income." What the assessor believed to be controlling was the "charges" and the "actual cost." The authority for this approach may be well-founded in light of the discussion in the OEA cases.118 But to take the foregoing example and attempt to label the works of the Sisters of Mercy, an apostolate motivated by the purest of motives, in purchasing an apartment complex, providing low-income housing and supportive services as "in the nature of a business" borders on the surreal.

The Nebraska Legislature has, for the past fifty years, taken commendable steps to address the lack of affordable housing. Given the Pittman decision and the current rules and regulations of the State Tax Commissioner, it appears it will take an act of the Legislature to change the course of Nebraska law as regards low-income housing and the charitable property tax exemption. Given the legislative findings that the Legislature has made in recent legislation, there is a current need to increase the availability and affordability of rental housing. For the legislature to mandate the charitable tax exemption for properties owned by and used by qualifying charitable organizations is a right and just action that is called for at this time. While it is true

115. The five cases discussed in Section IV supra were about housing for the elderly, which has its own special set of problems. On the record before it, the Pittman court did have an applicant whose housing was specifically geared to low-income persons.
118. See supra Section IV(A).
that housing is not a fundamental right guaranteed by the United States Constitution,\(^{119}\) that does not excuse the body politic from responsibility.

The United States Congress, in the Housing Act of 1949, stated:

The Congress hereby declares that the general welfare and security of the Nation . . . require . . . the realization as soon as feasible of . . . a decent home and a suitable living environment for every American family . . . .\(^{120}\)

Church leaders have also expressed their views on this topic, as witnessed by this statement from the United States Catholic Conference in 1998:

The Church has traditionally viewed housing, not as a commodity, but as a basic human right. This conviction is grounded in our view of the human person and the responsibility of society to protect the life and dignity of every person by providing the conditions where human life and human dignity are not undermined, but enhanced.\(^{121}\)

Most recently, the National Conference of Catholic Bishops/United States Catholic Conference has stated:

The lack of safe, affordable housing is in a national crisis. We support a recommitment to the national pledge of “safe and affordable housing” for all and effective policies that will increase the supply of quality housing and preserve, maintain, and improve existing housing. We promote public/private partnerships, especially those that involve religious communities.\(^{122}\)

Access to decent housing is not just a supply and demand problem that market forces can or will overcome. By providing tax exempt status to low-income housing property owned by charitable entities, the State of Nebraska reinforces and supports the efforts of those persons of good will who, by donations of money and time, attempt to alleviate a pressing social issue. Taxation policies are almost always controversial because the re-distributive consequences of taxing and providing exemptions means there are net gainers and net losers. In the case of providing a charitable exemption for low-income housing, society gains for the same reasons that it gains when the state provides food

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\(^{120}\) Housing Act of 1949, ch. 338, § 2, 63 Stat. 413 (1949).

\(^{121}\) UNITED STATES CATHOLIC CONFERENCE, No. 216-0, HOMELESSNESS AND HOUSING: A HUMAN TRAGEDY, A MORAL CHALLENGE, 3 (1988).

stamps and free public education.\textsuperscript{123} Even if the government does not have a constitutionally mandated obligation to provide low-income housing, the very least it can do is to take steps to provide incentives to those truly charitable entities that are organized solely to do so.\textsuperscript{124}

\begin{quote}
\textsuperscript{123} In the author's view, the promotion of the common good is a sound criterion by which to judge the wisdom of legislation. Political theorists may debate this point, but the author's belief is that the state does not properly fulfill its role merely by creating a level playing service for private actors and by providing for "common goods" such as sewer services, roads, and parks.

\textsuperscript{124} A commonly recited rationale for granting the charitable tax exemption is that a subsidy is provided to private organizations for doing activity that the government would otherwise be required to do (the \textit{quid pro quo} theory of tax exemption). Given the Nebraska legislature's consistent and demonstrated concern for those of low-income and the availability and affordability of housing, the granting of tax exempt status to institutions like Mercy Crestview Village would be entirely consistent with past legislative activity for over fifty years.
\end{quote}