

OFFICIAL OPINION NO. 88-21, Tax exempt status of congregate housing

June 27, 1988

Mr. Ronald J. Schreiner
Secretary of Revenue
700 Governors Drive
Pierre, South Dakota 57501

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Tax exempt status of congregate housing

Dear Mr. Schreiner:

You have requested my official opinion on several matters arising from the enactment in 1988 of House Bill 1311 as it pertains to congregate housing units.

Concerning this you have presented the following factual situation:

FACTS:

County assessment officials are getting applications for exemption from property tax by what appears to be apartment complex units owned and operated by non-profit hospitals and nursing homes. These apartment or congregate housing units may or may not be located in close proximity to the licensed health care facility. Often such units are connected only by means of an electronic device capable of summoning a nurse or employee to investigate calls for assistance by occupants of the housing unit.

The concern is some units are being granted tax exempt status in certain counties and denied exemption in others due to a general lack of direction on the part of the enacted legislation.

You have asked the following questions:

QUESTIONS:

1. To qualify under the requirement for the "ability to provide health care", must the congregate housing unit staff a full time licensed professional such as a doctor or nurse? _

2. If the answer to question # 1 is no, would including an electronic call device allowing residents of a congregate housing unit to summon a nurse or employee from a licensed health care facility be sufficient to meet the requirements of this section?
3. If electronic call capabilities are sufficient (if the answer to # 2 is yes), must the licensed health care facility be located in close proximity to the congregate housing unit, in the same city, county, state or would it matter?
4. To include a food service which provides a balanced nutrition program, must the congregate housing unit contain kitchen facilities and the ability to provide three balanced meals per day under the direction of a nutritionist?
5. If the answer to # 4 is no, would the capacity to permit at least one meal per day served by an outside provider, such as Meals on Wheels, at a cost to the residents, be sufficient to meet the requirements of this section?
6. If each residential apartment unit contains cooking facilities such as a kitchen, kitchenette or hot plate, are the requirements to include a food service met?
7. How does the last sentence of SDCL 10-4-9.3 as amended by the 1988 legislature relate to congregate housing units? "Such health care facility _must admit all persons for treatment consistent with the facility's ability to provide medical services required by the patient until such facility is filled to its ordinary capacity and must conform to all regulations of and permit inspections by the South Dakota department of health."

Does this mean that congregate housing units accept all applicants until filled to its ordinary capacity?

8. May congregate housing units administer financial means tests to qualify or eliminate residents? If a candidate cannot demonstrate a level of financial independence acceptable to housing administrators and is denied admittance, is this in violation of the statute?
9. Must congregate housing units conform to all regulations of and permit inspections by the South Dakota Department of Health?

Background Discussion and Statutes

SDCL 10-4-9.3 was enacted originally as Section 4 of Chapter 83, Laws of 1983, an Act to revise certain provisions relating to tax exempt property. The Act is originally enacted and as now amended reads:

10-4-9.3. Property owned by any corporation, organization or society and used primarily for human health care and health care related purposes is exempt from taxation. Such corporation, organization or society must be nonprofit and recognized as an exempt organization under section 501(c)(3) of the United States Internal Revenue Code of 1954, as amended, and in effect on January 1, 1986, and may not have any of its assets available to any private interest. Such property may be a hospital, sanitarium, orphanage, mental health center or adjustment center regulated under chapter 27A-5, asylum, home, resort, congregate housing or camp. Congregate housing is health care related if it is an assisted, independent group-living environment operated by a health care facility licensed under chapter 34-12 which offers residential accommodations and supporting services primarily for persons at least sixty-two years of age or disabled as defined under chapter 10-6A. Supporting services must include the ability to provide health care and must include a food service which provides a balanced nutrition program. Such a health care facility must admit all persons for treatment consistent with the facility's ability to provide medical services required by the patient until such facility is filled to its ordinary capacity and must conform to all regulations of and permit inspections by the South Dakota department of health.

The original act referred to "health care related purposes" but in the context of the meaning of "congregate housing" the original definition was deficient in that it did not state how congregate housing by and of itself was health care related, it merely defined congregate housing. In 1987 the State Board of Equalization, in a case before it, refused to accept congregate housing as being health care related without a change in the law by the Legislature. Thus the apparent purpose of House Bill 1311 as stated in its title, was to clarify the property tax exemption status of congregate housing units.

Several things must occur before congregate housing may enjoy a tax exempt status.

(a) The property must be owned by a nonprofit corporation, organization or society which is recognized as an exempt organization under Section 501(c)(3) of the Internal Revenue Code.

(b) That organization may not have any of its assets available to any private interest.

(c) The housing facility must be operated by a health care facility licensed under Chapter 34-12 by the South Dakota Department of Health.

(d) The housing facility must offer residential accommodations and supporting services primarily for persons at least sixty-two years of age or disabled as defined under Chapter 10-6A. (Persons receiving or having qualified to receive monetary payments pursuant to Title II, X, XIV, or XVI of the Social Security Act in effect on January 1, 1981.) (§ 10-6A-1(1))

(e) The housing facility must have the ability to provide health care and must also have a food service which provides a balanced nutrition program.

Congregate housing itself in South Dakota is not considered a health care facility and it is not licensed under SDCL 34-12. The reference in § 10-4-9.3 to health care facilities means therefore those facilities which are licensed, recognized and regulated under that section as well as A.R.S.D. Ch. 44:04.

SDCL 34-12-1.1(3) defines health care facility as:

(3) any institution, sanitarium, maternity home, ambulatory surgery center, chemical dependency treatment facility, hospital, nursing home, supervised personal care facility, place, building or agency in which any accommodation is maintained, furnished or offered for the hospitalization, nursing care or supervised care of the sick or injured.

The definition of "health care facility" lends itself to the meaning of the words "health care" in the requirement that it be a service provided to residents of congregate housing. "Health care service" then is the service of hospitalization, nursing care, or supervisory care of sick or injured persons.

While licensed health care facilities provide selective levels of care, it should be noted that health department regulation A.R.S.D. 44:04:01:05(3) provides that nursing personnel essential to maintaining adequate staff of the health care facility may not leave a licensed facility during their tour of duty in the facility to provide services to persons who are not residents of the facility with the exception of providing emergency care on premises contiguous to the facility's property. Emergency care is defined in A.R.S.D. 44:04:01:01(12) as professional health services immediately necessary to preserve life or stabilize health due to the sudden, severe, and unforeseen onset of illness or accidental bodily injury.

It is my opinion the phrase "health care" contained in § 10-4-9.3 means more care than "emergency care" covered in the Administrative Rules.

IN RE QUESTION NO. 1:

A congregate housing unit does not have to have a doctor or nurse as a full-time staff member. As a matter of fact to do so would constitute the unit a health care facility subject to licensure as such. The operator must offer an alternative program to the residents such as an independent home health care service or a similar service provided by the facility, but not operated by the staff of the facility. This should provide a full range of health care services, which may include emergency care.

IN RE QUESTION NO. 2:

An electronic call device would not be sufficient to meet the "health care" requirements of the exemption statute. A nurse or employee from a licensed health care facility may not leave that facility during his or her tour of duty, except in response to an emergency call from a congregate care unit which is contiguous to the facility. In my opinion the residents of the care unit must be offered a full range of health care services which may include emergency care.

IN RE QUESTION NO. 3:

The only significance of the proximity of the licensed health care facility and the congregate housing unit is that a facility which is contiguous to a unit's property may permit its nurses to provide more than solely emergency services to persons residing in the unit.

IN RE QUESTION NO. 4:

SDCL 10-4-9.3 before amendment, provided that the supporting service must include a "full-food service." The word "full" was stricken in 1988 and the proviso now states there must be "food service which provides a balanced nutrition program." The statute does not require that the "food service" be physically located at or operated by either the congregate care unit or the health care facility, only that there be such a service and that it provide a program of balanced nutrition. How this is to be done is a question of fact which will vary with each case. The care unit does not have to have a kitchen on the premises, nor a nutritionist.

IN RE QUESTION NO. 5:

A "balanced nutrition program" of necessity contemplates more than one meal per day. The extent of the "program" is a question of fact which must be determined in each instance.

IN RE QUESTION NO. 6:

It is my opinion that the mere presence of cooking facilities on the premises of the individual resident would not constitute a balanced nutrition food service program.

IN RE QUESTIONS NO. 7-9:

The last sentence of SDCL 10-4-9.3 relates to "health care facilities" and not "congregate housing units". It is the facility itself which must admit applicants until filled to its ordinary capacity and must conform to all regulations and permit inspections by the South Dakota Department of Health. Congregate housing units are in no way licensed, regulated or controlled by the Department of Health. At the present time they do not come under any special state health laws or regulations of the Department of Health.

Our Supreme Court has held that when it is called on to interpret a statute granting an exemption, a deduction, or a credit that the statute is strictly construed against the taxpayer. *Burlington Northern Railroad Co. v. Strackbein*, 398 N.W.2d 144 (S.D. 1986), but that such construction must not be strained and must always be reasonable and not applied to defeat the expressed intent of the Legislature. *In Re: Application of Veith*, 261 N.W.2d 424 (S.D. 1978). The Legislature has declared that if any property is owned by a health care organization and is used partly by such health care organization for health care purposes and the remaining part is occupied, rented or used for other than health care purposes, such portion is to be taxed as other property of the same class is taxed. SDCL 10-4-12 sets forth the procedure by which the value for tax purposes of that portion shall be determined. This procedure should be followed if not all of a congregate care unit meets the criteria for exemption.

Respectfully submitted,

Roger A. Tellinghuisen
Attorney General