2011 WL 12586141 (N.H.) (Appellate Brief)
Supreme Court of New Hampshire

LIBERTY ASSEMBLY OF GOD & the Northern New England District Council of the Assembly of God,

v.

CITY OF CONCORD.

No. 2011-0368.
December 28, 2011.

Argued by Danielle L. Pacik

Brief for City of Concord Respondent-Appellee

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V *RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

72:6 Real Estate.

All real estate, whether improved or unimproved, shall be taxed except as otherwise provided.

72:23 Real Estate and Personal Property Tax Exemption.

The following real estate and personal property shall, unless otherwise provided by statute, be exempt from taxation:

***

III. Houses of public worship, parish houses, church parsonages occupied by their pastors, convents, monasteries, buildings and the lands appertaining to them owned, used and occupied directly for religious training or for other religious purposes by any regularly recognized and constituted denomination, creed or sect, organized, incorporated or legally doing business in this state and the personal property used by them for the purposes for which they are established.

IV. The buildings and structures of schools, seminaries of learning, colleges, academies and universities organized, incorporated or legally doing business in this state and owned, used and occupied by them directly for the purposes for which they are established, including but not limited to the dormitories, dining rooms, kitchens, auditoriums, classrooms, infirmaries, administrative and utility rooms and buildings connected therewith, athletic fields and facilities and gymnasiums, boat houses and wharves belonging to them and used in connection therewith, and the land thereto appertaining but not including lands and buildings not used and occupied directly for the purposes for which they are organized or incorporated, and the personal property used by them directly for the purposes for which they are established, provided none of the income or profits are divided among the members or stockholders or used or appropriated for any other purpose than the purpose for which they are organized or established ....

V. The buildings, lands and personal property of charitable organizations and societies organized, incorporated, or legally doing business in this state, owned, used and occupied by them directly for the purposes for which they are established, provided that none of the income or profits thereof is used for any other purpose than the purpose for which they are established.

***vi 72:23-c Annual List**

I. Every religious, educational and charitable organization ... shall annually, on or before April 15, file a list of all real estate and personal property owned by them on which exemption from taxation is claimed, upon a form prescribed and provided by the board of tax and land appeals, with the selectmen or assessors of the place where such real estate and personal property are taxable. If any such organization or corporation shall willfully **neglect** or refuse to file such list upon request therefor, the selectmen may deny the exemption. ...

II. City assessors, boards of selectmen, and other officials having power to act under the provisions of this chapter to grant or deny tax exemptions to religious, educational, and charitable organizations shall have the authority to request such materials concerning the organization seeking exemption including its organizational documents, nature of membership, functions, property and the nature of that property, and such other information as shall be reasonably required to make determinations of exemption of property under this chapter. Such information shall be provided within 30 days of a written request. Failure to provide information requested under this section shall result in a denial of exemption unless it is found that such requests were unreasonable.

72:23-m Applicability of Exemptions.

The exemptions afforded by RSA 72:23 or 72:23-a through 72:23-k, as well as exemptions granted by other provisions of law, shall be construed to confer exemption only upon property which meets requirements of the statute under which the exemption is claimed. The burden of demonstrating the applicability of any exemption shall be upon the claimant.

72:34-a Appeal From Refusal to Grant Exemption, Deferral, or Tax Credit.

Whenever the selectmen or assessors refuse to grant an applicant an exemption, deferral, or tax credit to which the applicant may be entitled under the provisions of RSA 72:23, 23-d, 23-e, 23-f, 23-g, 23-h, 23-i, 23-j, 23-k, 28, 29-a, 30, 31, 32, 35, 36-a, 37, 37-a, 37-b, 38-a, 38-b, 39-a, 39-b, 41, 42, 62, 66, or 70 the applicant may appeal in writing, on or before September 1

following the date of notice of tax under RSA 72:1-d, to the board of tax and land appeals or the superior court, which may order an exemption, deferral, or tax credit, or an abatement if a tax has been assessed.

74:17 Inspection of Property.

If the selectmen or assessing officials are unable to obtain consent to enter property for the purpose of obtaining information necessary to complete any inventory under this chapter or appraisal under RSA 75, they may obtain an administrative inspection warrant under RSA 595-B.

***vii ISSUES PRESENTED**

1. Whether the Board of Tax and Land Appeals ("BTLA") properly held that RSA 72:23, III (2003 & Supp. 2011) required the property owned by Liberty Assembly of God and the Northern New England District Council of the Assembly of God (collectively, "AOG") to be used and occupied directly for a religious purpose in order to be exempt from taxation.

2. Whether the BTLA properly held that the City of Concord's assessment, which was based on its allocation between taxable and exempt portions of AOG's property for calendar year 2008, was appropriate.

3. Whether the BTLA properly concluded that the City of Concord's inspection and taxation of AOG's property did not constitute an unconstitutional entanglement of government with religion.

****1 STATEMENT OF THE CASE***

In this tax abatement action, AOG appeals a decision of the BTLA denying a petition for tax abatement because certain portions of its property did not qualify for a religious organization tax exemption for the calendar year 2008. [1] The property consists of 26.13 acres of land with a two story main building, free standing barn, parsonage and associated garage. Brief of Petitioner-Church ("Brief) at 42. The City fully exempted the parsonage and associated garage used by the full-time pastor. *Id.* at 35. The City also exempted the free standing barn after receiving information that it was used to store AOG's property. *Id.*

The main building on the property, which is approximately 21,000 square feet, is not a typical house of worship, but rather, had its origins as a bull breeding barn that was subsequently converted to educational and dormitory uses before being acquired by AOG. *Id.* at 34. The City concluded that approximately 60% of the main building was exempt from taxation. *Id.* at 37. The City exempted the portions of the first floor of the main building that were being used directly for religious purposes, which included the sanctuary, church offices, children's playroom, prayer room, recreation room, kitchen, fellowship hall, library, classroom, food pantry, storage rooms and first floor restrooms. *Id.* at 36, 42.

The balance of the main building, which included five apartments and additional dormitory rooms used for housing, were deemed taxable by the City. *Id.* at 42-44. One of the apartments was occupied by the caretaker and his family. *Id.* at 43. The room for the live-in ***2** caretaker was a convenience for AOG and the caretaker, but not necessary for the church to continue its religious functions. *Id.* at 45. A dormitory room was also occupied by a young man who was the grandson of a member of AOG's advisory board. *Id.* at 43. The remaining apartments and dormitory rooms were unoccupied and unused during calendar year 2008. *Id.*

With respect to the land, 20.13 acres had been placed in current use as agricultural and forest land. *Id.* at 35, 41. AOG stated that a "prayer trail" around the parameter of the property had been created by a fanner, who at the time hayed the fields to feed his cows. Tr. 10/28/10. The City taxed all of the land designated under current use because the religious use of the land

was negligible. *Id.* at 41. Of the remaining six acres, the City exempted one of the six acres as land "appertaining" to the main building and parish house. *Id.* at 35. The remaining five acres not in current use were taxable at 40%, based on the taxable portion of the main building. *Id.* at 35-36.

AOG appealed the City's denial of the request for a religious exemption for calendar year 2008. On October 28, 2010 and November 8, 2010, the BTLA held a hearing at which extensive testimony and exhibits were presented. *Id.* at 32; Transcript ("Tr.") of Hearings dated October 28, 2010 and November 8, 2010; City Exs. A-M; AOG 1, Tabs 1-33.[2] Following the hearing, the BTLA found that AOG failed to meet its burden to demonstrate that the entire property was entitled to a religious tax exemption. *Id.* at 30. The BTLA also held that the methodology utilized by the City to inspect the premises was appropriate, and that the apportionment between exempt and non-exempt uses of the main building and land was proper. *Id.* at 32, 35. This appeal followed.

3** ***STATEMENT OF FACTS

AOG is a religious organization which owns property located at 339 Mountain Road, Concord, New Hampshire. Brief at 42. In 2008, AOG experienced a decline in membership which resulted in less than forty members. Ex. l, Tab 12. The property consists of 26.13 acres of land with a main building, free standing barn and the parsonage and associated garage. Brief at 35. The main building was originally a bull farm, and was then converted for use as a school and dormitory. *Id.* at 34. The main building consists of two stories, and is approximately 21,000 square feet. *Id.* at 35. With respect to the surrounding land, 20.13 acres are under current use assessment as agricultural and forest land. *Id.* at 35; Exhibit 11.

The City was contacted about the property on June 23, 2008 by a parishioner to determine whether AOG could cultivate a portion of its property to grow and then sell vegetables from a farm stand without impacting its tax exempt status. Exs. E, F. On June 30, 2008, the Director of Real Estate Assessments, Kathryn Temchack, notified AOG that the cultivating and sale of crops on the property would not be a religious use of the property, and, therefore, the portion of the land used and occupied for such purposes would be taxable. Ex. F. Ms. Temchack also notified AOG that the land designated under current use as agricultural and forest would also be taxable under the current use designation. *Id.*

While evaluating this matter, Ms. Temchack reviewed the property records. *Id.* The City's records indicated that the property consisted of a dormitory, a lean to, a single family home, a garage and barn, and there were no records describing a religious use of the various buildings for the property. *Id.* Ms. Temchack asked AOG to provide a written description of the use and occupancy of each building on April 1, 2008, and, to the extent other structures or land were being used, to describe their uses. *Id.* Ms. Temchack also asked AOG to contact Robert Lakeman, the former Deputy Assessor, to schedule a physical inspection of the buildings. *Id.* ***4** The purpose of the inspection was to confirm that the physical description on the City's property records was accurate, as well as to determine the manner in which the buildings were being used. *Id.*; Ex. G at 34.

On July 30, 2008, Mr. Lakeman conducted an inspection of the property. Ex. G at 8. Richard Bagnell, the caretaker of the church, accompanied Mr. Lakeman during the inspection. *Id.* at 9-11, 42. Mr. Lakeman observed the parsonage and accompanying garage, which were used by the pastor. *Id.* at 42-43. Mr. Lakeman also observed the free-standing barn. *Id.* at 43. Mr. Lakeman did not inspect the barn, but was originally informed by Mr. Bagnell that it was used to store church pews, a tractor and private belongings of church members who leased storage space.[3] *Id.* at 12,43.

Mr. Lakeman also inspected the rooms in the main building, during which time he took several notes, measurements and photographs. *Id.* at 11, 41 and Exs. 1-2, attached thereto. Mr. Lakeman observed that the first floor of the main building included a lobby, sanctuary, church offices, children's playroom, prayer room, recreation room, kitchen, classrooms, food pantry, kitchen

and laundry room. *Id.* at 43-51. The first floor also had an apartment and an additional room available for missionaries on furlough. *Id.* at 67-71. There were no missionaries in calendar year 2008 who used those rooms. Tr. 10/28/10 at 59-60, 213.

Mr. Lakeman also inspected the second floor of the main building, which included four additional apartments. Ex. G at 14; Ex. l,Tab 3. One of the apartments was occupied by Mr. Bagnell and his family, who lived there for approximately four years before moving out in January 2010. Tr. 10/28/10 at 36-39. Mr. Bagnall and his wife did not pay rent for the ***5** apartment, and they both worked. *Id.* at 33-34, 60. Mr. Bagnall would typically leave for work at 5:00 a.m. and would return at approximately 4:30 to 5:00 p.m. *Id.* at 33-34. Mr. Bagnall assisted in maintaining the premises after work and on weekends, which involved mowing the grounds, plowing snow and routine maintenance. *Id.* at 11; Ex. C at 12-13. There were also other volunteers at the church who assisted with snowplowing and other maintenance. *Id.* at 35, 81. Mr. Bagnall provided some "after hours" security to ensure that the premises were locked and that no vandalism occurred, although there was also a full-time pastor living in the parish house during most of that time period. *Id.* at 11-12, 36-37. [4]

In addition to the apartments, there were also a number of dormitory rooms on the second floor. One of the dormitory rooms was occupied by Christopher Bergeron, the grandson of the secretary/treasurer of AOG during 2008. *Id.* at 49, 71, 80. Mr. Bergeron had been living with his parents before they moved out of New Hampshire. *Id.* at 65. Mr. Bergeron was employed at a grocery store, and infrequently attended services. *Id.* at 82-85; Ex. C at 59-62. Mr. Bergeron was not a member of AOG's church. *Id.* at 80.

The remaining apartments and dormitory rooms on the second floor were either vacant or used for insignificant storage during the 2008 calendar year. Tr. 10/28/10 at 43, 43, 140-44; Tr. 11/8/10 at 15-16; Ex. C at 58-59, 62; Ex. G at 79 and Photos #13-14, attached thereto. Other than Mr. Bagnall's apartment, the entire second floor was heated to 60 degrees in the winter. [5] Ex. C at 70. There was also a bathroom on the second floor which existed to serve potential occupants of the second floor dormitory rooms, as the congregation's activities occurred on the first floor. Tr. 10/28/10 at 144-46; 11/8/10 at 20.

***6** According to AOG, the apartments and dormitory rooms on the second floor were made available for missionaries and the homeless or needy. Tr. 10/18/10 at 66-67, 154-56, 158. There were no missionaries, homeless or needy persons who resided on the property in calendar year 2008. Tr. 10/28/10 at 59-60, 213. Moreover, there was only one occasion when homeless or needy persons resided at the property. Tr. 10/28/10 at 144-46. That situation involved a couple who belonged to the congregation whose house burned down, and they stayed at the property for six months during calendar year 2007. *Id.*; Brief at 39. AOG's property had never been placed on the homeless shelter list, and it was not one of the identified churches or shelters providing immediate or short term housing for needy people in the Concord area. Tr. 10/28/10 at 182-90.

Based on the information obtained about the property, the City fully exempted the free standing barn, and parsonage and associated garage. *Id.* at 35; Ex. G at 42-43; Ex. 1, Tabs 12-14, 18. The City also exempted the portions of the first floor of the main building that was being used directly for religious purposes, which included the sanctuary, church offices, children's playroom, prayer room, recreation room, kitchen, fellowship hall, library, classroom, food pantry, storage rooms and first floor restrooms. [6] Brief at 36, 42. The balance of the main building, which included the five apartments and other dormitory rooms, were deemed taxable by the City. *Id.* With respect to the surrounding land, the City exempted one of the six acres not in current use as land "appertaining" to the parsonage, garage and barn. *Id.* at 35. The remaining five acres not in current use were taxable at 40% based on the proportion of tax exempt usage of the main building. *Id.* at 35-36.

This appeal followed.

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7 *SUMMARY OF THE ARGUMENT

The BTLA's decision should be upheld. RSA 72:6 provides that "[a]ll real estate, whether improved or unimproved, shall be taxed except as otherwise provided." In a tax abatement case, taxpayers have the burden of demonstrating that property meets the requirements of the statute under which the exemption is claimed for the year under appeal. RSA 72:23-m; Tax 204.05. AOG requested an exemption pursuant to RSA 72:23, III, which states that the following shall be exempt from property taxation:

Houses of public worship, parish houses, church parsonages occupied by their pastors, convents, monasteries, buildings and the lands appertaining to them *owned, used and occupied directly for religious training or for other religious purposes* by any regularly recognized and constituted denomination, creed or sect, organized, incorporated or legally doing business in this state ....

(Emphasis added). The BTLA found that AOG failed to meet its burden to demonstrate that portions of its property, which included five residential apartments and additional dormitory rooms used for housing, were entitled to a religious tax exemption under RSA 72:23, III. Brief at 32. The BTLA also held that the methodology utilized by the City to inspect and assess the premises was appropriate and constitutional. *Id.*

Despite the fact that New Hampshire law requires all religious buildings to be used directly for a religious purpose, AOG contends that the phrase "owned, used and occupied directly for religious training or other religious purposes" only modifies the words "buildings and lands appertaining to them." Brief at 14-15. Based on that interpretation, AOG incorrectly reasons that the buildings identified in RSA 72:23, III, which include houses of public worship, parish houses, church parsonages occupied by their pastors, convents and monasteries, do not need to be "owned, used and occupied directly for ... a religious purpose." *Id.* AOG's suggestion that a "house of public worship" is entitled to an automatic exemption, without consideration for the use and occupancy of the building, is contradicted by the plain language of ***8** the statute and this Court's precedent. Moreover, such a rule would lead to an absurd result, because a large church, synagogue or mosque which diverted a section of its building for purely secular purposes, such as a restaurant, health club, business offices or residential apartments, would be permitted to avoid taxation on those portions of the premises.

The BTLA also upheld the allocation of the main building between taxable and exempt portions. Brief at 32. With respect to housing, RSA 72:23, III sets forth the specific types of housing which will be entitled to an exemption from taxes, and those properties are "church parsonages occupied by their pastors, convents [and] monasteries." It is well established that, other than the enumerated properties listed in RSA 72:23, III, other types of housing serve a secular purpose, even if the housing is owned by a religious organization and used to further an overall religious mission. *See, e.g., Emissaries of Divine Light*, 140 N.H. 552, 554 (1996) (holding that residential housing for members of religious organization was taxable). The rationale underlying that rule is that housing is a private secular activity. The BTLA also concluded that there was insufficient evidence that the caretaker needed to live on the property for the efficient functioning of the church. Brief at 38, 45.

AOG also argues that the inspection and assessment of its property constituted an unconstitutional entanglement of government with religion, because its stated religious beliefs should be sufficient to satisfy the requirement that all of its property was used for a religious purpose. Brief at 23-25. This Court and other jurisdictions have consistently rejected such arguments, explaining that an organization is not entitled to a tax exemption by characterizing an otherwise secular activity as a religious belief. The BTLA properly concluded that the City's inspection of the property and review of documents did not constitute unconstitutional entanglement. Brief at 32, 35.

9 *ARGUMENT

A. Standard of Review

In a tax abatement case, taxpayers have the burden of demonstrating that property meets the requirements of the statute under which the exemption is claimed for the year under appeal. RSA 72:23-m; Tax 204.05. An appeal from the BLTA is governed by RSA chapter 541. *Appeal of City of Nashua*, 155 N.H. 443, 444 (2007). The New Hampshire Supreme Court "will uphold the board's ruling unless the taxpayer proves that the board's decision was clearly unreasonable or unlawful."' *Emissaries of Divine Light*, 140 N.H. at 554-55 (quotations omitted). "All findings of the board upon all questions of fact shall be deemed to be prima facie lawful and reasonable." *Id.* (quotations and brackets omitted). The decision may only be set aside to the extent the BTLA misapprehended or misapplied the law, or if the taxpayer establishes by a preponderance of the evidence that such order was unjust or unreasonable. *Appeal of City of Nashua*, 155 N.H. at 444.

This case also involves the interpretation of a statute. In matters of statutory interpretation, the New Hampshire Supreme Court is the "final arbiter [] of the legislature's intent as expressed in *the* words of the statute considered as a whole." *Id.* at 445. When examining the language of the statute, the Court ascribes the plain and ordinary meaning to the words used. *Id.* The Court interprets "legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." *Id.* The Court will "not look to the legislative history of a tax exemption statute unless its language is ambiguous or more than one reasonable interpretation exists." *Town of Ossipee v. Whittier Lifts Trust*, 149 N.H. 679, 682 (2003). In construing a religious exemption statute, the Court will "adopt neither a liberal attitude because it is charity, nor a hostile attitude because it seeks exemption from taxation." *Appeal of City of Nashua*, 155 N.H. at 445.

***10 B. The City Was Permitted Under RSA 72:23, III To Apportion Between The Exempt And Non-Exempt Uses In The Property**

AOG argues on appeal that RSA 72:23, III prohibits a municipality from assessing any taxes on a "house of public worship," regardless of whether the property is owned, used and occupied directly for a religious purpose. Brief at 14-15. RSA 72:23, III provides that the following shall be exempt from property taxation:

> Houses of public worship, parish houses, church parsonages occupied by their pastors, convents, monasteries, buildings and the lands appertaining to them *owned, used and occupied directly for religious training or for other religious purposes* by any regularly recognized and constituted denomination, creed or sect, organized, incorporated or legally doing business in this state and the personal property used by them for the purposes for which they are established.

(Emphasis added). AOG contends that the phrase "owned, used and occupied directly for religious training or other religious purposes" only modifies the words "buildings and lands appertaining to them." Brief at 14-15. Based on that interpretation, AOG incorrectly reasons that the specifically enumerated buildings set forth in RSA 72:23, III, which include houses of public worship, parish houses, church parsonages occupied by their pastors, convents and monasteries, do not need to be "owned, used and occupied directly for ... a religious purpose." *Id.* AOG's argument should be rejected for the following reasons.

As an initial matter, AOG's statutory construction argument is not supported by the plain language of the statute. A widely accepted rule of statutory construction is "to read, and examine the text of a statute and draw inferences concerning its meaning from its composition and structure." *Glick v. Town of Ossipee*, 130 N.H. 643, 645 (1988). Here, the composition and structure of RSA 72:23, III demonstrate that the qualifying phrase "owned, used and occupied directly for religious training or other religious purposes" was intended to modify all of the specifically enumerated structures set forth in RSA 72:23, III. The specific types of buildings ***11** referenced before the more generic "buildings and the lands appertaining to them" are separated by commas. When viewing the paragraph as a whole, the inevitable legal conclusion is that use of the words "buildings and the lands appertaining to them" was not intended to announce the beginning of a different test or analysis regarding ownership, use and occupancy. It instead merely continues the list of properties that would also have to meet the test of being "owned, used and occupied directly for religious training and for other religious purposes."

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AOG's interpretation is also contradicted by the Court's construction and application of other statutory provisions set forth in RSA 72:23, which require facts supporting direct use and occupancy in order to qualify for an exemption. *See, e.g.*, RSA 72:23, IV (exemptions for educational institutions); RSA 72:23, V (exemptions for charitable organizations). All educational and charitable organizations must demonstrate that their property is being directly used for an exempt purpose, regardless of whether it involves a type of facility specifically enumerated in the statute, such as an educational institution's dormitories, dining rooms or athletic fields. For example, the case *St. Paul's School v. City of Concord*, 117 N.H. 243, 351-52 (1977) addressed whether portions of a donnitory used for faculty housing would be entitled to an exemption from taxes. The Court did not allow a blanket exemption simply because a "dormitory" is specifically enumerated in RSA 72:23, V.

Similar to those other statutes, RSA 72:23, III also requires that all property must be owned, used and occupied directly for the purposes for which they were established. Although RSA 72:23, III references specific types of buildings, such as houses of public worship, parishes and monasteries, there is no basis for the suggestion that the legislature intended those types of buildings to be entitled to a full exemption from taxes, regardless of whether significant portions of those buildings are only used incidentally for religious purposes. Indeed, the term "house of ***12** public worship" is not defined by statute, but has been described to broadly include buildings such as churches and meeting houses in which "religious services are the primary use of the building." *St. Paul's Church v. City of Concord*, 75 N.H. 420, 425 (1910) (discussing parish house); *Sisters of Mercy v. Town of Hooksett*, 93 N.H. 301, 308 (1945) (discussing chapel). The purpose of using the term "house of public worship" was to promote religious worship, and not to discourage it by limiting the exemption to the very small number of church buildings in the state. *St. Paul's Church*, 75 N.H. at 424. There is no indication, however, that the legislature intended to provide a blanket exemption for all buildings used as a "house of public worship."[7] Indeed, such a rule would lead to an absurd result, because a large church, synagogue or mosque which diverted a section of its building for purely secular purposes, such as a restaurant, health club, business offices or residential apartments, would be permitted to avoid taxation on those portions of the premises.

AOG's suggestion that a "house of public worship" is entitled to an automatic exemption, without consideration for the use of the building, is also contradicted by this Court's precedent. For example, in *St. Paul's Church*, the Court undertook a detailed analysis of a parish house to determine whether it was a "house of public worship." 75 N.H. at 420-21. That property "was fitted with benches seating about 250 persons, with kneeling boards, a rack containing hymnals and prayer books, a stage equipped with lectern, kneeling stool, and other ecclesiastical furniture ...." *Id.* Although the parish, house was used for some secular purposes such as lectures and nonreligious concerts, the Court concluded that "[t]here is no evidence of a practical ***13** abandonment of the house to secular uses." The Court did note, however, that the result would be different in the event portions of the building were "appropriated to other uses in the sense of a substantial exclusion of the religious use." *Id.* at 426. It is apparent that a municipality has authority to tax portions of religious buildings, including houses of religious worship, that are not substantially used for religious purposes.

The more recent case *Appeal of City of Nashua* also contradicts AOG's statutory construction argument. In *Appeal of City of Nashua*, the Court evaluated a church owned by the Roman Catholic Bishop of Manchester. 155 N.H. at 445. The Court explained that "ownership is only one part of the tax exemption inquiry. We must also determine whether the premises were being used and occupied directly for religious purposes." *Id.* The Court then reviewed the manner in which the church was being used, and it determined that the church was not entitled to a tax exemption because it was only being used for storage. *Id.* at 445-46. The *Appeal of City Nashua* decision sets forth the requirement that, regardless whether a religious organization owns a church or other type of house of public worship, the building must be actively and directly used and occupied for religious purposes to receive an exemption.

Finally, it should be noted that this Court has consistently allowed an allocation between exempt and taxable portions of religious properties. As the Court explained in *Emissaries of Divine Light*, it has "consistently utilized apportionment when appropriate .... [and there is] nothing in the language of the religious exemption statute to suggest that the legislature intended to treat religious exemptions different than other tax exemption statutes." 140 N.H. at 553. Towards that end, there is an unbroken line of precedent that municipalities are permitted to inspect and assess taxes on religious buildings and land that are not used directly for a religious purpose. Those cases include *Appeal of Emissaries of Divine Light*, 140 N.H. at 553 (holding ***14** that residences,

agricultural land, support buildings and vacant land owned by a religious organization were taxable), *East Coast Conference of Evangelical Covenant Church of America v. Town of Swanzey*, 146 N.H. 658, 664 (2001) (analyzing uses of residential buildings, campsite areas, bathroom facilities, dining hall and other amenities to determine which property was entitled to a religious tax exemption), *Alton Bay Camp Meeting Ass'n v. Town of Alton*, 109 N.H. 44, 50 (1968) (requiring a "division of value" between the taxable and tax-exempt uses of a rooming building) and *Franciscan Fathers v. Town of Pittsfield*, 97 N.H. 396, 397-402 (1952) (analyzing uses of house, barn, caretaker's house, shed and surrounding land to determine which portions of property were entitled to a religious tax exemption).

Based on the foregoing, the BTLA properly concluded that it was appropriate to tax the portions of the main building that were not being used for religious purposes. Brief at 34.

C. The City Properly Taxed The Portions Of AOG's Property That Were Not Being Used Directly For A Religious Purpose

RSA 72:23, III requires a use and occupancy of real estate "*directly* for religious training or other religious purposes." (Emphasis added). This Court, as well as other jurisdictions, has distinguished between religious and secular uses of real estate for purposes of analyzing tax exemptions.

With respect to housing, RSA 72:23, III sets forth the specific types of housing which will be entitled to an exemption from taxes, and those properties are "church parsonages occupied by their pastors, convents [and] monasteries." It is well established that, other than the enumerated properties listed in RSA 72:23, III, other types of housing are considered a non-religious and secular function, even if the housing is owned by a religious organization and used for the purpose of furthering an overall religious mission. *Emissaries of Divine Light*, 140 N.H. at 557-58 (residential housing for communal living by members of religious organization was ***15** taxable); *Alton Bay Camp Meeting*, 109 N.H. at 49-50 (holding that cottages and other rooms occupied by church members who promised to attend religious activities at camp were taxable because the use of property for housing is a "purely secular purpose"); *Christian Camps & Conferences v. Town of Alton*, 118 N.H. 351, 354-55 (1978) (explaining that that camp for young children had not qualified for religious exemption because the "[r]eligious activity is slight and subordinate relative to the camping activity" and the "activities were primarily secular in nature"); *East Coast Conference*, 146 N.H. at 664 (holding that cabins and townhouses at religious camp were taxable because housing is not a religious purpose).

In this matter, the BTLA's decision should be upheld as reasonable and in keeping with the principles this Court has enunciated in its precedent. The City determined that portions of the main building, namely five apartments and additional dormitory rooms, were taxable because they were adapted solely for a personal, private residential use and were used either for that purpose or were unoccupied. Those portions of the property are discussed as follows:

1. *The Apartment Occupied By The Caretaker*

Out of the five apartments, the only apartment occupied at the property during calendar year 2008 was used by Richard Bagnall, the caretaker. The apartment was used as his personal, private residence, and it allowed Mr. Bagnall to take care of the church property in a more convenient fashion. The evidence did not support a conclusion, however, that having a person in the apartment as a caretaker was necessary for AOG to fulfill its religious purpose. The following evidence was submitted during the hearing with respect to the caretaker apartment:

· Mr. Bagnall and his family used the apartment as their home. Tr. 10/28/10 at 34. Mr. Bagnall lived there for approximately four years. *Id.* at 34, 36; Ex. C at 70,

· Mr. Bagnall and his family did not pay any rent to live in the apartment. Tr. 10/28/10 at 60. Mr. Bagnall was not required to perform caretaking duties in exchange for the rent-free apartment. *Id.*

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***16** · Mr. Bagnall had a full-time job in Seabrook, New Hampshire while living in the apartment, and his wife also worked. *Id.* at 33-34.

• Mr. Bagnall would leave the premises to go to work at 5:00 a.m., and he would return at 4:30 p.m. or 5:00 p.m. *Id.* at 33-34.

• Mr. Bagnall assisted in maintaining the premises after work and on weekends, which involved mowing the grounds, plowing snow and routine maintenance. *Id.* at 11; Ex. C at 12-13. Those responsibilities could be performed by persons not living there. Tr. 10/28/10 at 34-36; Ex. C at 13.

• Mr. Bagnall previously rented a home in Manchester, New Hampshire before moving into the apartment. Tr. 10/28/10 at 34. While living in Manchester, Mr. Bagnall also assisted with the caretaking duties at AOG on an as-needed basis, which primarily involved emergency repairs. *Id.* at 34-35.

· Other volunteers who lived in their own homes assisted in caretaking duties such as plowing snow, cleaning the building and ordering supplies for the church. *Id.* at 35, 81.

• Mr. Bagnall provided some "after hours" security to ensure that the premises were locked and that no vandalism occurred. *Id.* at 11-12, 36-37. A pastor lived full-time on the same property in the parsonage and, therefore, it was possible for the pastor to monitor the property as needed. *Id.* at 37-38.

The law in New Hampshire and other jurisdictions support the BTLA's determination that, under the circumstances of this case, the caretaker's apartment was taxable. As already discussed, it is well established under New Hampshire law that housing is considered a non- religious and secular activity. [8] *See, e.g., Emissaries of Divine Light*, 140 N.H. at 557-58; *Alton Bay Camp Meeting*, 109 N.H. at 49-50; *Christian Camps & Conferences v. Town of Alton*, 118 N.H. 351, 354-55 (1978); *East Coast Conference*, 146 N.H. at 664. Moreover, when interpreting other statutes relating to tax exemptions, this Court has allowed housing to be tax exempt only ***17** when necessary to fulfill the charitable or educational mission of an organization. For example, in *St. Paul's School*, the maintenance staff's housing was deemed taxable because, while the twenty-four-hour-per-day availability of maintenance and service personnel was desirable and contributed to the efficient operation of the school, the record did not establish that the arrangement was "reasonably necessary to promote the school's purpose." 117 N.H. at 276-77. [9] Similarly, the BTLA determined that having a live-in caretaker for the property was a convenience for AOG and for the caretaker, but not critical or necessary for AOG to continue its religious functions. Brief at 45. AOG has not set forth any evidence on appeal to demonstrate that such a finding was unreasonable and/or not supported by the record.

Finally, it should be noted that other jurisdictions addressing caretaker housing have held that it is only entitled to an exemption to the extent required for the efficient functioning of the religious organization. *See, e.g., Wauwatosa Avenue United Methodist Church v. City of Wauwatosa*, 776 N.W.2d 280, 285 (Wis. App. 2009) (holding that caretaker's apartment was not reasonably necessary for the efficient functioning of a church); *St. Ann's Catholic Church v. Hampston Borough*, 14 N.J.Tax 88 (N.J.Tax 1994) (holding that property inhabited by church's part-time maintenance person was not necessary to carry out purposes of religious organization). Again, there was insufficient evidence submitted to demonstrate that the caretaker needed to live on the property for the efficient functioning of the church. Brief at 38, 45.

2. *The Dormitory Room Occupied By Mr. Bergeron*

The only other individual residing in the main building during calendar year 2008 was Christopher Bergeron, who occupied a dormitory room on the second floor. The dormitory room ***18** was used as a personal, private residence, and the occupation of the room was non-religious and secular. The following evidence was submitted during the hearing with respect to Mr. Bergeron's housing:

· Christopher Bergeron is the grandson of Maria Jenkins, the secretary/treasurer of AOG during 2008. Tr. 10/28/10 at 71, 80.

· Mr. Bergeron had been living with his parents before they moved out of New Hampshire, *Id.* at 65.

· AOG allowed Mr. Bergeron to live in a dormitory room on the second floor as "temporary" housing. *Id.* at 49.

• Mr. Bergeron was not a member of AOG's church. *Id.* at 80. He also infrequently attended services.[10] *Id.* at 82-85; Exhibit C at 59-62.

· Mr. Bergeron was primarily employed at a grocery store. *Id.* at 82-85; Exhibit C at 59-62.

AOG has nonetheless argued that Mr. Bergeron's residence at the property was being used to fulfill AOG's biblical mandate to provide housing for homeless and needy individuals. Brief at 21. That argument was rejected by the BTLA because there was insufficient evidence to demonstrate that Mr. Bergeron was "needy" or "homeless." Tr. 10/28/10 at 25. As the BTLA properly held, "Mr. Bergeron's occupancy was not so much the result of an expression of Liberty's intent to provide housing for the needy as it was a consequence of him being related to a member of AOG's advisory board and for the convenience of him by not having to find alternative housing." Brief at 39, 47. The BTLA's factual finding are *deemed prima facie* lawful and reasonable, and AOG has not referenced any portions of the record to overcome those findings.

19 3.** ***Apartments and Rooms Used By Missionaries

There were also apartments and rooms in the main building which AOG argues should be exempt from taxation because they were necessary to house missionaries while on furlough. Brief at 21-22. The following evidence was submitted during the hearing with respect to housing for missionaries:

• There were no apartments or rooms used by furloughed missionaries at any time during2008. Tr. 10/28/10 at 59-60.

• During the four year time period Mr. Bagnall resided at AOG, he could recall missionaries using those areas only three or four times. Ex. C at 20, 33; Brief at 36.

• The missionaries received funds in their budget to pay for rent when they returned for furlough. Tr. 10/28/10 at 153-54. The missionaries could choose to rent housing while on furlough. *Id.*

• Some missionaries chose to stay at AOG's property because their furlough was less than one year, and, therefore, it might be difficult to lease a house or apartment during that timeframe, *Id.* at 155.

• The missionaries typically stayed at the property for a few weeks or months, although some only stayed one to two nights. *Id.* at 62-63, 69.

• The missionaries typically donated $600 each month to reside in the apartment. *Id.* at 153-56.

The BTLA properly concluded that, regardless of whether the apartments used by the missionaries constituted a religious activity, the apartments and rooms were only used sporadically, and, therefore, the religious purpose was only "slight and insignificant."[11] *In re City of Concord*, 161 N.H. 344, 351 (2011). AOG has not set forth any facts to support a determination that the BTLA's finding was unreasonable.

***20** Even more importantly, although the BTLA did not address this issue, missionary housing is considered a secular and non-religious activity. *See, e.g., First Presbyterian Church of Chattanooga v. Tennessee Bd. of Equalization*, 127 S.W.3d 742, 748-49 (Tenn.Ct.App. 2003) (the use of property as temporary housing for the convenience of overseas missionaries was taxable because it was not "reasonably necessary to a missionary being able to accomplish the Church's religious purpose"); *City of Ventnor v. Interdenominational Foreign Missionary Soc'y Of New Jersey, Inc.*, 15 N.J.Tax 160, 163-64 (App.Div. 1994) (holding that cottages dedicated for use by missionaries on furlough were not exempt from taxation). AOG has failed to demonstrate that housing for missionaries should be entitled to a religious tax exemption. [12]

4. ***Apartments and Rooms Used By Homeless and Needy***

Lastly, AOG contends that the apartments and dormitory rooms in the main building were entitled to an exemption from taxes because they were available for individuals who are homeless or needy. Brief at 21. AOG has argued on appeal that the availability of housing constitutes a religious purpose because "the Pastor himself testified that the Bible mandated that the needy be cared for and he believed God would be angry with him if he did not use a part of the church-building in this way." *Id.* The BTLA held that the property was taxable, even under that theory, because there was no evidence of any recent or historical use for such a purpose. Brief at 39. The only "homeless or needy" persons who occupied the premises were a couple of congregation members who lived at the property in calendar year 2007 for six months after their house burned down. Tr. 10/28/10 at 67; Brief at 39. AOG also had never been identified as one ***21** of the churches or shelters providing immediate or short term occupancy in the Concord area. Tr. 10/28/10 at 39-40.

Significantly, even if there was more evidence that the property was occupied by homeless or needy persons, as claimed by AOG, such housing might be a *charitable purpose* but it would not qualify for the religious exemption under well-settled law in this state. *See, e.g., Christian Camps & Conferences*, 118 N.H. at 354-55 (holding that religious camp for young children could seek a charitable exemption, but it was not entitled to a religious exemption because camping was primarily a secular activity); *Appeal of C.H.R.I.S.T., Inc.*, 122 N.H. 982, 983 (1982) (rehabilitation center with a religious emphasis was not entitled to religious exemption, but it could seek a charitable exemption); *see also Fairview Haven v. Department of Revenue*, 506 N.E.2d 341, 349 (Ill. App.3d 1987) (holding that practice of service work and care for the **elderly** is encouraged by religious organizations, but "it cannot be stated that they are religious purposes within commonly accepted definitions of the word"). The use of a residential apartment, even by the homeless or needy, is secular because it is being used for the personal, private living needs of the occupant. AOG could pursue a charitable exemption, but it was not entitled to receive a religious exemption because the space was not being used for a religious purpose.

5. ***The Second Floor Storage Rooms, Second Floor Bathrooms and Surrounding Land***

AOG does not provide any factual and legal arguments regarding the BTLA's decision to allow taxation on the (1) the two storage rooms on the second floor of the main building; (2) the second floor men's bathroom; or (3) the undeveloped land in current use which had a "prayer trail" mowed around the perimeter of the land. By failing to address those issues, AOG should be deemed to have waived any arguments relating to those portions of its property. ***22** *In the Matter of Aube*, 158 N.H. 459, 466 (2009) (holding that issues are waived when not developed sufficiently to warrant); *In re Estate of King*, 149 N.H. 226, 230 (2003) (any issues raised in the notice of appeal, but not briefed, are deemed waived).

However, to the extent those portions of the property are considered, the BTLA properly concluded that those areas were taxable. Brief at 51. The storage rooms and second floor bathrooms were taxable because the religious use was "slight, negligible or insignificant." *Id.* The storage rooms were primarily vacant, and contained personal belongings of the individuals residing in the main building. Tr. 10/28/10 at 43, 140-44; Tr. 11/8/10 at 15-16; Ex. C at 58-59, 62; Ex. G at 79 and Photos #13-14, attached thereto. The second floor men's bathroom was only infrequently used by members of the church because there were restrooms on the first floor of the property. Tr. 10/28/10 at 144-46; 11/8/10 at 20. AOG's land in current use also was not entitled to an exemption from taxes because it was primarily used for agricultural and forestry purposes, and, even with the existence of

the prayer trail, was only minimally used for religious purposes. *See, e.g., Franciscan Fathers*, 97 N.H. at 401 (holding that twenty-six acre pond used by members to fish and thirty acres tract of land was not entitled to religious tax exemption because “use of land, which is part of a larger tract, must be more than negligible to give reasonable effect to the demand of the statute that it be occupied”).

D. The Methodology Utilized By The City To Inspect AOG's Property Did Not Constitute An Unconstitutional Entanglement Of Government With Religion

AOG also argues that the inspection and allocation of its property constituted an unconstitutional entanglement of government with religion. Brief at 23. More specifically, AOG contends that “the Church's use of the church building serves its religious purpose as mandated by the Bible and the Lord Himself and the City should not be second guessing a ***23** legitimate church's opinion on the matter.” *Id.* at 23. For the following reasons, that argument should be rejected.

The First Amendment of the United States Constitution provides that government “shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. CONST. amend. I. The United States Supreme Court has recognized that States may grant tax exemptions to religious organizations without offending the establishment clause, provided that the purpose of the exemption “is not aimed at establishing, sponsoring, or supporting religion,” *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970), and the exemption does not create an “excessive government entanglement with religion.” *Id.; see also Appeal of Emissaries of Divine Light*, 140 N.H. at 558. With those principles in mind, this Court has held that RSA 72:23, III is facially valid because the statute grants exemptions to all religious organizations and to charitable and educational organizations as well. *Appeal of Emissaries of Divine Light*, 140 N.H. at 558. The statute also requires “only a minimal and remote involvement between church and state, and therefore does not create the excessive entanglement that the Constitution prohibits.” *Id.* (quotations and citations omitted). Accordingly, RSA 72:23, III does not offend the establishment clause of the United States Constitution.

There is also no merit to AOG's argument that its stated religious beliefs should be sufficient to satisfy the requirement that property be directly used for a religious purpose. Brief at 25. This Court rejected a similar argument in *Appeal of Emissaries of Divine Light*, 140 N.H. at 556, explaining that a taxpayer's religious beliefs are inadequate to determine whether land is being used for a religious purpose. Other courts reviewing this issue have also rejected such arguments. *In re Tax Exemption Application of Westboro Baptist Church*, 189 P.3d 535, 553-54 (Kan. App.2d 2009) (holding that an organization is not entitled to a tax exemption by characterizing an otherwise secular activity as a religious belief); *Faith Builders Church, Inc. v Department of Revenue*, 882 N.E.2d 1256, 1264 (Ill. App.3d 2008) (explaining that “in a sense, everything a deeply devout person does has a religious belief. But if that formulation determined the exemption from property taxes, religious identity would effectively be the sole criterion”); *Appeal of Open Door Baptist Church*, 437 A.2d 1291 (Pa. Cmwlth. 1981) (explaining that tract of land owned by religious organization was taxable despite belief that it had been dedicated to the “Lord Jesus Christ” because “[n]owhere has it yet been held that one may, solely by virtue of his religious beliefs, exonerate himself from the payment of taxes”).

Finally, there is also no basis for AOG's argument that the methodology utilized by the City to inspect the property was inappropriate. Brief at 35. A municipality has the authority to inspect properties, and to request records concerning requests for exemptions. RSA 74:17 (2003 and Supp. 2010) (inspections); RSA 72:23-c, II (2003 and Supp. 2010) (records). [13] This Court routinely analyzes the information obtained during inspections to determine whether property is entitled to a religious tax exemption. *See, e.g., City of Nashua*, 155 N.H. at 444 (discussing specific items being stored at church); *Emissaries of Divine Light*, 140 N.H. at 557 (reviewing percentage of religious organization's members who lived on property during relevant tax year); *Alton Bay Camp Meeting*, 109 N.H. at 51 (evaluating percentage of meals served in cafeteria to determine entitlement to religious tax exemption); *East Coast Conference*, 146 N.H. at 660 (reviewing registration forms and other documents to determine entitlement to religious tax exemption). The BTLA properly concluded that the City's inspection of the property and review of documents was appropriate, and did not constitute unconstitutional entanglement.

**25 CONCLUSION*

For the foregoing reasons, the City respectfully requests that this Court affirm the decision of the BTLA.

ORAL ARGUMENT

Deputy City Solicitor Danielle Pacik requests to present oral argument on behalf of the City (15 minutes).
Respectfully submitted,

CITY OF CONCORD

By its attorney,

Date: December 28, 2011
By: <<signature>>

James Kennedy, Bar No. 15849

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Footnotes

1 RSA 72:23. III provides that the following shall be exempt from property taxation:
Houses of public worship, parish houses, church parsonages occupied by their pastors, convents, monasteries, buildings and the lands appertaining to them owned, used and occupied directly for religious training or for other religious purposes by any regularly recognized and constituted denomination, creed or sect, organized, incorporated or legally doing business in this state and the personal property used by them for the purposes for which they are established.

2 The BTLA record was transferred to the New Hampshire Supreme Court on September 23, 2011. AOG's exhibits were submitted as a presentation packet, and are listed as Exhibit 1. The presentation packet contains an exhibit list which identifies the individually marked exhibits at tabs 1-33.

3 The City originally intended to tax the barn based on that information, but it was subsequently notified in correspondence from AOG that the barn was only being used for storage by AGG. Ex. 1, Tabs 12-14. After receiving that correspondence, the City determined that the entire barn would be exempt from taxation. Ex. 1, Tab 18.

4 There was a period of time between June to November 2008 when a pastor was not living on the property due a transition in pastors. Tr.10/28/10 at 36-39. Except for that timeframe, there was always somebody living on the property. *Id.* at 38.

5 Mr. Bergeron was provided a space heater for his room. Ex. C at 70.

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6 The City originally taxed the recreation room because it had not received any information that it was being used for a religious purpose. Tr. 10/28/10 at 26, 210. The City later received discovery in the litigation which indicated that the recreation room was being used for weekly meetings. *Id.* Based on that information, the City determined that the recreation room was entitled to an exemption from taxes. *Id.*

7 Importantly, the BTLA never concluded that the main building should be considered a "house of public worship." AOG requested a rinding of fact that the "church building was a house of worship." Brief at 46. The BTLA "neither granted nor denied" that request *Id.* The BTLA noted that the building was not a typical "house of public worship" because of the unique history of the building, which had its origins as a bull breeding barn that was subsequently converted to educational and dormitory uses. Brief at 34. For that reason, the BTLA concluded that there was a "unique challenge of determining the proper extent of religious exemption due to the history and configuration of the main building." *Id.* at 34. This issue does not need to be resolved because, regardless of whether the building is a house of worship, it must be directly used for a religious purpose.

8 There is only one decision by this Court that mentions caretaker housing in the religious exemption context. The case *Franciscan Fathers* was decided in 1952, and it construed and applied a statutory phrase no longer found in the statute regarding a religious exemption for property occupied by "clergy in active service." 97 N.H. at 400, 402. The Court, in deciding what property was being occupied by "clergy in active service" briefly mentioned a caretaker residence on the property and held it was exempt since the caretaker was an "agent" for the clergy, based on its earlier decision in *Hedding Camp Meeting Ass'n v. Epping*, 88 N.H. 321 (1932). That portion of the *Franciscan Fathers* decision was no longer good law after the legislature dropped that language, and also began to require a "direct use" to qualify for an exemption. Laws 1957, Chapter 202; Laws 1994, Chapter 378.

9 That situation is distinguishable from that of faculty housing, which was deemed necessary to the educational mission of the institution because faculty were required to be available to students at all times. *Id.* at 251-53. It is also distinguishable from nurses and attendants whose residence was held to be exempt in the case *Wentworth Home v. City of Concord*, 108 N.H. 514 (1968), because they furnished care to persons with incurable conditions, and, therefore, housing was necessary to assure availability at all times. *Id.* at 517.

10 AOG argues that Mr. Bergeron's church attendance was overly scrutinized during the hearing, because the City reviewed the records "page by page" to demonstrate that Mr, Bergeron was often not present at services. Brief at 10, 25. However, a review of the transcript reveals that there was only a brief discussion relating to Mr. Bergeron's attendance records. *Id.* at 83-84. It should also be noted that AOG chose to introduce Mr. Bergeron's attendance records as one of its exhibits. Ex. 1, Tab 6.

11 AOG argues that this ruling was unreasonable because certain rooms in churches, such as baptismal rooms and sanctuaries, are used infrequently, Brief at 22. Although some rooms may not be used on a daily basis, at some point a room's use may be so "slight and insignificant" that it loses its religious purpose. The missionary rooms fell within this latter category.

12 On appeal, AOG contends that to the extent housing for missionaries is taxable, then parsonages, monasteries and convents should also be taxable. That argument ignores that the legislature chose to exempt certain types of religious residences in RSA 72:23, III. There are also important distinctions between such residences. The parsonage must be occupied by the pastor, who is the leader of the church. The monasteries and convents house religious members who have taken a vow of poverty.

13 AOG incorrectly suggests that the City used a heavy-handed approach by conducting "annual searches" of its property. Brief at 6, n.6. The City's tax assessors conduct inspections, not searches. Moreover, AOG requested the inspection that occurred on February 20, 2009 to identify recent modifications for purposes of the 2009 tax year. Ex. l, Tab 12-13.

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