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April 16, 2007

Paul Smith, Appointed Assessor  
Town of New Hartford  
111 New Hartford Street  
New Hartford, New York 13413

Re: Preswick Glen - Town of New Hartford

Dear Mr. Smith:

You have asked this firm for an opinion of counsel as to the exemption status of the Preswick Glen property located in the Town of New Hartford. Based upon our review of the applicable law and relevant documents provided by Preswick Glen, Inc., it is our opinion that the real property owned by Preswick Glen, Inc. is not exempt under Real Property Tax Law § 420-a for the 2007 Town assessment roll.

Prior to March 1, 2007, Preswick Glen submitted an application with the assessor for the renewal of the existing exemption on the subject property. The application indicated that neither the ownership nor the use of the subject property had changed from the previous year. The Assessor reviewed the application and requested a number of documents from Preswick Glen to clarify issues related to the status of the property and its status. In response, Preswick Glen provided a copy of its Offering Plan and Amendments; a schedule of construction costs; and a copy of what Preswick Glen considers to be its "charitable policy."

**THE SUBJECT PROPERTY**

According to the Offering Plan and the five subsequent amendments to the plan that were filed with the New York State Attorney General and provided to the Town by Preswick Glen's counsel, the subject property is a retirement community consisting of 124 units and common areas at 172 Clinton Road in the Town of New Hartford. The land upon which the improvements are being constructed is owned by Presbyterian Homes Foundation; the improvements are owned by Preswick Glen Inc. Both entities are recognized as 501 (c)(3) corporations by the Internal Revenue Service.

The subject property is listed as exempt on the Town's 2006 assessment roll. As of taxable status date for that roll (March 1, 2006), the subject property consisted solely of vacant land. The Town of New Hartford issued a building permit on June 5, 2006. As

of taxable status date 2007 (March 1, 2007) substantial construction had been performed to erect the improvements that will house the retirement community. According to Amendment No. 4 of the Offering Plan, which was filed with the New York State Attorney General on June 16, 2006, Preswick Glen was projecting completion of the construction of the subject property in Fall 2007.

Preswick Glen Inc. is not a licensed health care provider and does not provide such services to residents. See Offering Plan, Page 68. The Offering Plan specifically states that the subject property is not a Continuing Care Retirement Community, but that residents will be given priority access over non-residents to affiliates of Preswick Glen, presumably to a related nursing home or assisted living facility.

No certificate of occupancy had been issued by the Town as of taxable status date, March 1, 2007. The assessor conducted an inspection of the subject property on or about taxable status date and determined that the property was partially completed. Amendment No. 5 to the Preswick Glen Offering Plan, which was filed with the New York State Attorney General on October 23, 2006, indicates that Preswick Glen Inc. had received and accepted reservations and deposits for 91 units or 73 percent of the 124 units at the subject property.

The Offering Plan for the subject property states an approximate value of the property of \$14,582,785. A schedule of construction costs provided by Preswick Glen indicated that as of March 1, 2007, \$11,726,164.49 had been spent to build the subject property. The construction of the subject property is financed with a tax-exempt bond issued through the Dormitory Authority of the State of New York. According to Amendment No. 1, filed with the Attorney General on September 28, 2004, Preswick Glen Inc. projected that \$19,387,000 would be collected in entrance fees, and that those monies would be used to pay for construction costs and operating expenses. See Amendment No. 1, Exhibit C. Total monthly service fee income, including double occupancy of unit, totals \$1,936,930. The entrances fees are placed in an escrow account, which earns interest income for Preswick Glen. The estimate of the total interest income is approximately \$110,024.

### **RESIDENCY CRITERIA**

The subject property consists of 84 apartments and 40 cottages, which will house residents over 60 years old. Potential residents complete a confidential data application related to their financial assets and physical status. Those residents that are accepted must pay an Entrance Fee; the Offering Plan provides for a Traditional or 0% Refund Option Plan that is available on a limited basis; a 50% Limited Refund option that is offered on a limited basis; and a 90% Refund Option. The amount of the refund is based upon the length of occupancy. Residents who terminate their Residency Agreement (including termination upon death of resident) receive their refund 60 days after their unit is re-let by Preswick Glen.

Admission to Preswick Glen is available to residents over 60 years old who are not in need of continual health care services. Application for Residency, Pages 186-187; Amendment No. 1, Exhibit D. Residency is available only to those who "have assets and income that will be sufficient under foreseeable circumstances to pay the financial obligation of the Prospective Resident . . . and to meet ordinary living expenses of the Prospective Resident." Application for Residency, Pages 187; Amendment No. 1, Exhibit D. Preswick Glen has the right to terminate any residency agreement if a resident defaults in the payment of rent; is declared bankrupt, adjudicated insolvent or makes an assignment for the benefit of creditors; or if a receiver, conservator, guardian, committee or trustee is appointed by any court for the resident. See Residency Agreement, Pages 102-103.

In the event that a resident is unable to cure such a default, Preswick Glen must bring an eviction proceeding to remove the tenant under Article 7 of the Real Property Actions and Proceedings Law. See Offering Plan, Page 102. Under such an eviction proceeding, the resident is obligated to pay Preswick Glen as additional rent for attorneys fees, expenses and other costs of the "dispossession proceedings". See Offering Plan Page 103.

The latest schedule of residency fees in Amendment No. 5 to the Offering Plan indicates a range in Entrance Fees between \$58,958 for the 0% Refund Option (available only for the eight available 825 square-foot Borwick model apartments) to \$269,000 for the two 1,844 square foot Ashford apartments with the 90% refund option. The monthly service fees range from \$2,050 to \$2,800.

### CHARITABLE POLICY

In response to your request, Preswick Glen's Chief Executive Officer has provided you with a six-page document that discusses Preswick Glen's "charitable policy." The "Statement of Charitable Uses" in that document states, in part:

"The housing and related services will be affordable to a significant segment of the elderly population in Oneida County and surrounding communities. Although residents of Preswick Glen will be required to meet certain *initial* financial requirements, Preswick Glen is committed to making the services and facilities of Preswick Glen available to those residents who can no longer meet the financial obligations of residency at Preswick Glen, to the extent it is financially feasible to do so." (Italicized as in original; underscore supplied)

Neither the charitable policy document nor any of Offering Plan or Amendments provides a definite charitable policy indicating either the criteria for such assistance, or the "extent" to which Preswick Glen is financially capable of providing such assistance.

The "charitable policy document" later states that a "Subsidization Program" will be established:

“Preswick Glen will establish a discretionary fund which, among other things, is intended to subsidize residents who are unable to meet all or part of their payment obligations necessary to maintain residency at the residential retirement community. To establish the fund, Preswick Glen intends to use amounts directly paid to it by initial residents when they purchase their units, to set aside reasonably prudent reserves from its monthly fee income and to solicit charitable contributions from residents and members of the greater community. This fund will help assure that residents who encounter financial hardship will be able to remain in their residential units when they would otherwise be financially unable to do so.

“If residents encounter financial hardship, Preswick Glen will inform them of public and private resources available to them. Preswick Glen will assist residents in obtaining aid from such sources and from the discretionary fund described above. If any resident is unable to obtain sufficient financial assistance from public or private resources (including the discretionary fund), he or she will be permitted to remain in his or her unit. The monthly service fee will be charged against their entrance fee. In the event that the entrance fee is exhausted, residents will receive a direct subsidy from Preswick Glen, as long as it is financially feasible for Presbyterian Homes Housing Entity to provide such subsidy.” (emphasis supplied)”

As of the taxable status date for 2007, the documents of Preswick Glen Inc. fail to indicate that it has created such a “discretionary fund” or that such a policy is in place. The Residency Agreements that are signed by residents do not include any reference to such a policy or fund, nor do the Residency Agreements or Offering Plan and Amendments indicate that a portion of the Monthly Service Fees will be segregated and treated as reserves for the purpose of providing subsidies for those who can no longer afford to live at Preswick Glen. As noted above, the Residency Agreements do include a statement that a default by a resident in the payment of rent will result in the commencement of an eviction proceeding to remove a resident.

Under the “Charitable Policy” of Preswick Glen, Inc., subsidization of existing residents who can no longer afford their rent remains a remote possibility lying solely at the discretion of Preswick Glen, whose options include the termination of the residency agreement. Preswick Glen’s Offering Plan is premised upon full occupancy by residents who can afford such residency. The “Charitable Policy” does not indicate any intention on the part of Preswick Glen to house or provide services for a large percentage of elderly residents who cannot otherwise afford such services.

#### **THE MUNICIPAL SERVICES AGREEMENT**

Pursuant to a Municipal Services Agreement dated March 24, 2004 between representatives of Preswick Glen and the Town, Preswick Glen, Inc. is entitled to make

annual payments in the amount of \$55,000 in lieu of taxes as long as certain conditions are met, which include that Preswick Glen Inc. must "continue to provide on a non-profit, charitable basis a continuum of care of services of the elderly of the town of New Hartford and County of Oneida, and that they otherwise will continue to provide charitable services to individuals in such services"; and that Preswick Glen will otherwise meet the requirements of RPTL § 420-a. See MSA, page 4. Real Property Tax Law §420-a requires that an application be submitted by the owner of the property, and that the a determination be made by the assessor as to whether the property is taxable or exempt. Under the terms of the Municipal Services Agreement, Preswick Glen Inc has submitted an application to the assessor, and the assessor is now charged with making a determination on that application.

As is set forth within this opinion letter, based upon the applicable facts and law, Preswick Glen is not providing charitable services to the elderly of the Town of New Hartford or the County of Oneida through the mere provision of housing to healthy elderly residents who can afford the same. As the real property owned by Preswick Glen does not qualify for exemption under RPTL § 420-a, the subject property should thus be treated as taxable under the terms of the Municipal Services Agreement.

On February 15, 2007, representatives from the Town, County and School District met with Raymond Garrett, the Chief Executive Officer of Preswick Glen Inc., and counsel for Preswick Glen. During that meeting, Preswick Glen's representatives indicated that it would be relying upon a recent decision, *Carousel Center Company v. City of Syracuse*, 11 Misc. 3d 1061 (A), 816 N.Y.S.2d 694 (Onondaga County Supreme Court 2006) to challenge any denial of exempt status for the subject property. The facts and circumstances of the Preswick Glen property and the Municipal Services Agreement are entirely distinct and distinguishable from *Carousel Center*.

In *Carousel Center*, the trial court had to perform an analysis as to whether real property was exempt pursuant to the terms of a PILOT agreement that included conditions precedent. Among those conditions precedent was the occurrence of a closing by a certain date, and that title to the subject property was to be conveyed to an entity. The trial court performed an analysis of the facts and circumstances in light of the agreement and the timing of the closing to determine whether the contingencies had been met, and the agreement could be enforced. It is notable that the trial court relied upon expert opinions in affidavit form in reaching its conclusion. By contrast, the Municipal Services Agreement with the Town of New Hartford includes express provisions that require the subject property to be operated in a charitable manner consistent and to meet the requirements of Real Property Tax Law §420-a. The facts and circumstances set forth in Preswick Glen's documents, and the applicable case law interpreting the availability of a charitable exemption clearly show that Preswick Glen is not being operated in a charitable manner for the following specific reasons:

- Residency at Preswick Glen is limited to healthy senior citizens who can afford to live at the facility. Residents at Preswick Glen who can no longer afford to live there are subject to an eviction policy.

- The Offering Plan, Residency Agreement and related documents indicate that there is no definite policy in place that provides charity, subsidies or assistance for residents who cannot afford to live at Preswick Glen
- The subject property operated by Preswick Glen does not provide services or housing to a large percentage of residents on government assistance, nor does it provide such assistance or subsidies to a large percentage of its residents.

### LEGAL ANALYSIS

Generally, the burden of proof is upon the taxpayer who seeks to have real property exempt from the assessment roll. New York Botanical Garden v. Assessors of Town of Washington, 55 N.Y.2d 328, 334-335, 449 N.Y.S.2d 467 (1982). However, where a municipality removes an existing real property tax exemption, the burden shifts to the municipality to prove that the taxpayer is longer entitled to said exemption. Miriam Osborn Memorial Home Ass'n. v. Assessor of the City of Rye, 275 A.D.2d 714, 715, 713 N.Y.S.2d 186 (2d Dept 2000).

It is our opinion that the subject property is not entitled to an exemption from Real Property Taxes under Real Property Tax Law § 420-a, and it should be placed upon the taxable portion of the assessment roll.

Real Property Tax Law § 420-a states:

"1. (a). Real Property owned by a corporation or association organized or conducted exclusively for religious, charitable, hospital, educational or moral or mental improvement of men, women or children purposes, or for two or more such purposes, and used exclusively for carrying out thereupon one or more such purposes either by the owning corporation or association or by another such corporation as hereinafter provided shall be exempt from taxation as provided in this section." RPTL § 420-a.

Tax exemption statutes must be strictly construed since they are in derogation of the sovereign authority, and a heavy burden is placed upon the taxpayer to establish that it was the legislative intent to exempt the property from taxation. Newsday Inc. v. Town of Huntington, 103 Misc. 2d 406, 426 N.Y.S. 2d 409 *aff'd* 82 A.D. 2d 245, 441 N.Y.S. 2d 689 *aff'd* 55 N.Y. 2d 272, 449 N.Y.S. 2d 689 (1980). If ambiguity or uncertainty occurs in construing a tax exemption statute, all doubts must be resolved against the exemption and in favor of the sovereign. *Id.*

There is a two-part test to determine whether property is entitled to an exemption under Real Property Tax Law §420-a: first, it must be determined whether the owner of the real property is organized or conducted exclusively, or primarily, for an exempt purpose; second, it must be determined whether the real property for which the exemption is sought is used primarily for an exempt purpose. Monhonk Trust v. Board of Assessors of Town of Gardiner, 47 N.Y. 2d 476, 418 N.Y.S. 2d 763 (1979); Adirondack

*Land Trust Inc. v. Town of Putnam*, 203 A.D. 2d 861, 611 N.Y.S. 2d 332 (3d Dept. 1994).

No exemption will be granted by doubtful implication. The right to the exemption must be clearly established according to the statutory provisions, and if a doubt exists, then the doubt should be resolved in favor of taxation. See *Lawrence-Smith School Inc. v. City of New York*, 280 N.Y. 805 (1939) as quoted in 5 Opinion of Counsel SBEA #92. If there are questions that arise as to the use of real property consistent with the statute, the assessor must perform a thorough investigation, which includes inspection of the real property. See 5 Opinion of Counsel SBEA #92.

In the instant matter, Preswick Glen submitted its 2007 exemption application with references to a "charitable policy". The assessor, based upon his previous inspections of the subject property, had questions regarding the degree of completion of construction, the amount spent by petitioner to construct the subject facility, and the amount of entrance fees that were collected by the subject property. Consistent with his statutory duty, the assessor submitted a request for further information to Preswick Glen Inc. On March 27, 2007, the assessor received responses to his request, and he personally met with Raymond Garrett, the Chief Executive Officer of Preswick Glen Inc.

Real Property Tax Law § 420-a (3) states that "Such real property from which no revenue is derived shall be exempt though not in actual use therefor by reason of the absence of suitable buildings or improvements thereon if the construction of such buildings or improvements is in progress or is in good faith contemplated by such corporation or association". *Id.* On the relevant taxable status date, March 1, 2007, such construction was in progress with the intent of Preswick Glen Inc. to complete and operate the subject senior housing facility. There is little doubt that the subject property meets the test articulated by the courts that there is a "good faith contemplation" to construct the subject property, notwithstanding the lack of a certificate of occupancy on taxable status date.

In addressing the lack of a certificate of occupancy in *Miriam Osborn Memorial Home Association v. Assessor of Rye*, 275 A.D. 2d 716, 713 N.Y. S.2d 201 (2<sup>nd</sup> Dept. 2000) the Appellate Division affirmed Westchester County Supreme Court's award of summary judgment to the petitioner senior housing facility where the subject property had been operated as a home for aged, indigent women for the 90 years prior to the taxable status date, and the assessor had removed the exemption upon the construction of improvements that changed the nature of the subject property (See subsequent treatment of the same facility at *Miriam Osborn Memorial Home Association v. Assessor of Rye*, 14 Misc. 3d 1209 A (Westchester County Supreme Court 2006).

In the 2000 Osborn Appellate decision, the trial court found that the condition of the subject property remained unchanged from the previous year, and that there was no basis for disturbing the exemption. *Id.*, 375 A.D. 2d at 717, 713 N.Y. 2d at 202. According to the petitioner in *Osborn* "its legal use of the subject property remained unchanged since it did not have certificates of occupancy for the Sterling Park addition as

of May 1, 1996, and thus, continued to use the subject property exclusively for charitable purposes pursuant to RPTL 420-a (1) (a)." *Ibid.*

This is distinguishable from the Preswick Glen matter. The subject property was not previously used as a functional senior residence, as was the Osborn facility. As of the 2006 taxable status date, the subject property was merely vacant land. As of the 2007 taxable status date, improvements were being constructed that indicated a substantial change in the use of the subject property. There was a good faith intention by Prewick Glen, Inc., set forth in its documents, to operate a fully functional senior housing determines.

As a matter of law, a housing complex that primarily serves the elderly that is owned by a not-for-profit corporation is not exempt from real property taxes under RPTL § 420-a, unless it meets the criteria of the statute by operating as an exempt charitable use. See, *Presbyterian Residence Center Corporation v. Wagner*, 66 A.D. 2d 998, 411 N.Y. sub2d 765 (4<sup>th</sup> Dept. 1978); See also *Greer Woodycrest Children's Services v. Fountain*, 74 N.Y. 2d 749, 545 sub2d 79 (1989) (Real property used as a "retirement community for middle income elderly" does not qualify for tax exemption under RPTL § 420-a); See also *Miriam Osborn Memorial Home Association v. Assessor of Rye*, *supra*.

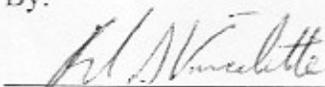
In order to be entitled to a RPTL §420(a) charitable use exemption, the property must be shown to limit its use to "persons in need". *Osborn, supra*, citing *Belle Harbor Home of the Sages, Inc. v. Tishelman*, 100 Misc.2d 911, 420 N.Y.S.2d 343 (Queens Sup.1981), *aff'd* 81 A.D.2d 886, 441 N.Y.S.2d 413 (2d Dept.1981); (*10 ORPS Opinions of Counsel No. 100* ). Within the context of residential health care facilities, nursing homes and adult homes, New York courts have consistently interpreted the exclusive charitable use requirement [which includes limiting the property's use to "persons in need"] to require occupancy by large percentages of persons receiving only governmental assistance or an appropriate equivalent of "charity care", "scholarship care" or subsidy provided by a facility to residents. See *Osborn, supra*. Courts in New York State have upheld the grant of a charitable exemption under RPTL §420-a only where a "large percentage" of the residents of a facility have received financial assistance or subsidies. See *Belle Harbor Home of the Sages, Inc., v. Tishelman*, 100 Misc.2d 911, 420 N.Y.S.2d 343 (Queens Sup.1979), *aff'd* 81 A.D.2d 886, 441 N.Y.S.2d 413 (2d Dept.1981)(90 percent of residents receiving governmental assistance); *Marino P. Jeantet Residence For Seniors, Inc. v. Comm. of Finance of the City of New York*, 105 Misc.2d 1080, 430 N.Y.S.2d 545, *aff'd* 86 A.D.2d 671, 449 N.Y.S.2d 933 (2d Dept. 1982)(97 percent of residents receiving assistance); see also *Adult Home at Erie Station, Inc., v. City of Middletown*, 36 A.D.3d 699, 828 N.Y.S.2d 459 (2d Dept. 2007); see also *10 ORPS Opinions of Counsel No. 100* : "it appears and remains our opinion that, for a housing project to be exempted pursuant to section 420-a, a large percentage of the clients (tenants) must be in need of and receive a real and substantial charitable benefit".

The documents submitted by Preswick Glen clearly indicate that the subject property is not intended to house a large percentage of residents who are either in need of or will receive a charitable benefit. Residency at Preswick Glen is limited to healthy individuals over the age of 60 who can afford the entrance and monthly fees charged by Preswick Glen. Under Real Property Tax Law §420-a, the subject property is not entitled to a charitable exemption.

Very truly yours,

**DANIEL G. VINCELETTE, PC**

By:

  
\_\_\_\_\_  
Daniel G. Vincelette, Esq.

cc: Gerald Green, Esq.

DGV/lc