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Authorities will be able to guarantee open space without themselves buying land, regardless of the owner's economic loss, as long as the remaining allowable uses are reasonable. The power to zone will be limited only insofar as it permits public access to the open space that results in a physical invasion. The result may be that while a city or state can guarantee open space for public viewing, it cannot guarantee public access to that open space without paying the landowner.

ALVIN W. ROHRS

## PARTIAL EXEMPTION FROM PROPERTY TAXES

### *Barnes Hospital v. Leggett*<sup>1</sup>

Barnes Hospital (Barnes), a tax exempt organization, owned and used Queeny Tower, a seventeen-story building, for the tax exempt purpose of treating patients and providing them with care and services.<sup>2</sup> Part of Queeny Tower was leased to Washington University Medical School, whose teaching facilities were located within the Barnes Hospital complex and whose faculty members comprised the medical staff of the hospital.<sup>3</sup> Washington University subleased offices in Queeny Tower to its part-time faculty for use in their private practices. Because the portions subleased were used for commercial office space, the City of St. Louis placed Queeny Tower on its assessment rolls for 1978. The city asserted that the building had not been used exclusively<sup>4</sup> for tax exempt purposes and therefore was

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1. 589 S.W.2d 241 (Mo. En Banc 1979).

2. *Id.* at 242.

3. An exemption is not lost when one tax exempt entity leases a portion of its building to another tax exempt entity, provided the building is still used for exempt purposes. *See, e.g.*, *Christ The Good Shepherd Lutheran Church v. Mathiesen*, 81 Cal. App. 3d 355, 146 Cal. Rptr. 321 (1978); *Childrens Dev. Center, Inc. v. Olson*, 52 Ill. 2d 332, 288 N.E.2d 388 (1972); *Department of Revenue v. Central Medical Laboratory, Inc.*, 555 S.W.2d 632 (Ky. 1977); *Community Hosp. Linen Servs., Inc. v. Commissioner of Taxation*, 309 Minn. 447, 245 N.W.2d 190 (1976); *Sisters of Charity v. County of Bernalillo*, 93 N.M. 42, 596 P.2d 255 (1979).

4. MO. CONST. art. X, § 6 states, "[A]ll property, real and personal, not held for private or corporate profit and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for agricultural and horticultural societies may be exempted from taxation by general law."

RSMO § 137.100(5) (1978) exempts from taxation "[a]ll property, real and personal, actually and regularly used exclusively for religious worship, for schools

not entitled to a tax exemption.<sup>5</sup> Barnes brought suit in the Circuit Court of the City of St. Louis, arguing that the doctors' offices, although operated for a commercial purpose, were incidental to the primary charitable use of the building and were necessary for the efficient functioning of a modern hospital. The trial court found for Barnes, holding that the office rental did not cause the building to lose its tax exempt status.<sup>6</sup> On appeal, the Missouri Supreme Court held that "property" could mean a portion of a building, concluding that for reasons later discussed, buildings should no longer be treated as indivisible entities. Queeny Tower, therefore, could receive a partial tax exemption and should be assessed for the value of the doctors' offices.<sup>7</sup> The court overruled a long line of prior decisions which stated that buildings must be treated as indivisible entities for tax purposes: they must be either fully taxed or fully exempt.<sup>8</sup> The court also overruled cases that allowed buildings used only incidentally for nonexempt purposes to receive a full exemption.<sup>9</sup>

The *Barnes* decision will affect significantly the tax exempt status of dual use buildings, *i.e.*, buildings that are used for both exempt and nonexempt tax purposes. The decision places Missouri among the majority of states, which recognizes partial exemption of buildings from taxation.<sup>10</sup> It also appears that dual use buildings that received an exemption

and colleges, or for purposes purely charitable and not held for private or corporate profit . . . ."

5. 589 S.W.2d at 242. Queeny Tower was built in 1965, and in 1966, offices were leased to Washington University faculty members. The tower was assessed by the City of St. Louis in 1966 because of the office rental. Taxation of the tower was denied in *Trustees of Barnes Hosp. v. Sansone*, No. 1966-262 (Mo. State Tax Comm'n 1967). Queeny Tower was assessed once again by the city in 1978. It asserted that *St. John's Mercy Hosp. v. Leachman*, 552 S.W.2d 723 (Mo. En Banc 1977) supported the assessment. In *St. John's*, the supreme court denied exemption to a hospital that used 56% of its floor space for private medical practice.

6. 589 S.W.2d at 243.

7. *Id.* at 244.

8. *Id.* at 243. Partial exemption was denied in the following cases: *St. John's Mercy Hosp. v. Leachman*, 552 S.W.2d 723, 726 (Mo. En Banc 1977) (no exemption when 56% of hospital was leased to doctors for private offices); *Evangelical Lutheran Synod v. Hoehn*, 355 Mo. 257, 269-70, 196 S.W.2d 134, 143-44 (1946) (use of profits from leased portion of building is not controlling; entire property must be used for tax exempt purposes); *Wyman v. City of St. Louis*, 17 Mo. 335, 337-38 (1852) (entire building assessed when part of school was leased for commercial purposes). See text accompanying note 15 *infra*. For a more detailed discussion of these cases, see *Partial Tax Exemption of Charitable Organizations in Missouri*, 49 U.M.K.C. L. REV. 127, 127-29 (1980).

9. 589 S.W.2d at 244. See notes 16-18 and accompanying text *infra*.

10. The following cases interpreted express "used exclusively" language or its equivalent and allowed partial exemption: *Greater Anchorage Area Borough v. Sisters of Charity*, 553 P.2d 467 (Alaska 1976); *Cedars of Lebanon Hosp. v.*

County of Los Angeles, 35 Cal. 2d 729, 221 P.2d 31 (1950); Hanagan v. Rocky Ford Knights of Pythias Bldg. Ass'n, 101 Colo. 545, 75 P.2d 780 (1938); Hartford Hosp. v. City & Town, 160 Conn. 370, 279 A.2d 561 (1971); State *ex rel.* Cragor Co. v. Doss, 150 Fla. 491, 8 So. 2d 17 (1942) (Florida now has statutory provisions for partial exemption. FLA. STAT. ANN. § 196.196(2) (West Cum. Supp. 1981)); Smith v. Board of Review, 305 Ill. 38, 136 N.E. 787 (1922); Trustees of Iowa College v. Baillie, 236 Iowa 235, 17 N.W.2d 143 (1945); Grand Lodge v. City of New Orleans, 44 La. Ann. 659, 11 So. 148 (1891); County Comm'rs v. Sisters of Charity, 48 Md. 34 (1878); Detroit Young Men's Soc'y v. Mayor of Detroit, 3 Mich. 172 (1874); Christian Business Men's Comm. v. State, 228 Minn. 549, 38 N.W.2d 803 (1949); Board of Supervisors v. Vicksburg Hosp., Inc., 173 Miss. 805, 163 So. 382 (1935); Northwestern Improvement Co. v. Rosebud County, 129 Mont. 412, 288 P.2d 657 (1955); YMCA v. Lancaster County, 106 Neb. 105, 182 N.W. 593 (1921); Congregation Gedulath Mordecai v. City of New York, 135 Misc. 823, 238 N.Y.S. 525 (1929); New Haven Church of Missionary Baptist v. Board of Tax Appeals, 9 Ohio St. 2d 53, 223 N.E.2d 366 (1967) (Ohio now has statutory provisions dealing with partial exemption. OHIO REV. CODE ANN. § 5713.04 (Page 1980)); Oklahoma County v. Queen City Lodge, 195 Okla. 131, 156 P.2d 340 (1945); Parker v. Quinn, 23 Utah 332, 64 P. 961 (1901); Columbia Hosp. Ass'n v. City of Milwaukee, 35 Wis. 2d 660, 151 N.W.2d 750 (1967); Independent Order of Odd Fellows v. Scott, 24 Wyo. 544, 163 P. 306 (1917). *See also* Piedmont Memorial Hosp. v. Guilford, 218 N.C. 673, 680, 12 S.E.2d 265, 269 (194<sup>0</sup>) (partial tax credit allowed) (North Carolina now has statute addressing partial exemption. N.C. GEN. STAT. § 105-278.3 (e)-(g) (1979)); City of Columbia v. Tindal, 43 S.C. 547, 22 S.E. 341 (1895) (sheriff enjoined from selling city hall, which had been used, in part, for nonexempt purposes).

The following cases allowed partial exemption, but the provisions interpreted did not include the "used exclusively" language or its equivalent: Massenburg v. Grand Lodge, 81 Ga. 212, 7 S.E. 636 (1888); Sahara Grotto & Styx, Inc. v. State Bd. of Tax Comm'rs, 147 Ind. App. 471, 261 N.E.2d 873 (1970); City of Louisville v. Board of Trade, 90 Ky. 409, 14 S.W. 408 (1890); City of Lewiston v. All Maine Fair Ass'n, 138 Me. 39, 21 A.2d 625 (1941); Milton Hosp. & Convalescent Home v. Board of Assessors, 360 Mass. 63, 271 N.E.2d 745 (1971); Trustees of Phillips-Exeter Academy v. Exeter, 90 N.H. 472, 27 A.2d 569 (1940); Sisters of Charity v. County of Bernalillo, 93 N.M. 42, 596 P.2d 255 (1979); Philadelphia v. Barber, 160 Pa. 123, 28 A. 644 (1894); Wilson's Modern Business College v. King County, 4 Wash. 2d 636, 104 P.2d 580 (1940).

Hawaii, Idaho, and Nevada have no cases regarding partial exemption, but they do have statutory provisions allowing partial exemption. HAWAII REV. STAT. § 246-32(d) (Supp. 1980); IDAHO CODE § 63-105c (Cum. Supp. 1980); NEV. REV. STAT. § 361.135(3) (1979).

The following cases interpreted express "used exclusively" language or its equivalent and did not allow partial exemption: State v. Bridges, 246 Ala. 486, 21 So. 2d 316 (1945); Defenders of Christian Faith v. Board of County Comm'rs, 219 Kan. 181, 547 P.2d 706 (1976); Borough of Cresskill v. Northern Valley Evangelical Free Church, 125 N.J. Super. 585, 312 A.2d 641 (App. Div. 1973); *In re* City of Pautucket, 24 R.I. 86, 52 A.2d 679 (1902); State *ex rel.* Hayes v. Board of Equalization, 16 S.D. 219, 92 N.W. 16 (1902); Morris v. Lone Star Chapter, 68 Tex. 698, 5 S.W. 519 (1887); State v. McDowell Lodge, 96 W. Va 611, 123 S.E. 561 (1924).

in the past, because their nonexempt use was incidental to their exempt use, now will be taxed on the nonexempt portion of the building.<sup>11</sup> The *Barnes* decision leaves unanswered, however, the questions of the extent to which a lien attaches to partially exempt property<sup>12</sup> and the valuation method to assess partially exempt property.<sup>13</sup>

Both the Missouri Constitution and the Revised Statutes of Missouri require that for property to be exempt, it must be "used exclusively" for exempt purposes.<sup>14</sup> When the property is a lot or acreage that can be divided easily and separately assessed, this requirement has led to few problems. The difficulties arise when a building is used for dual purposes. The Missouri Supreme Court, when first confronted with the question of partial exemption, held that any nonexempt use of a building rendered the entire building subject to taxation on its full value.<sup>15</sup> This strict interpretation of the used exclusively clause was relaxed in later decisions, which allowed total exemption for dual use buildings when the nonexempt use was incidental to the exempt use.<sup>16</sup> This less stringent interpretation of the used exclusively requirement was identified as the "principal use" rule in a noted tax treatise<sup>17</sup> and is identified as the *Spillers'* rule or "dovetails into or rounds out" rule by Missouri courts.<sup>18</sup> The principal use rule is thought to be consistent with a legislative intent to encourage charitable, educational, and religious activities, and has been adopted in states with statutes similar to Missouri's.<sup>19</sup>

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11. See notes 29 & 30 and accompanying text *infra*.

12. See notes 37-53 and accompanying text *infra*.

13. See notes 54-57 and accompanying text *infra*.

14. See note 4 *supra*.

15. *Wyman v. City of St. Louis*, 17 Mo. 335, 337-38 (1852).

16. *City of St. Louis v. State Tax Comm'n*, 524 S.W.2d 839, 846 (Mo. En Banc 1975) (occasional rental for non-profit purposes does not cause building to lose its tax exempt status); *Bethesda Gen. Hosp. v. State Tax Comm'n*, 396 S.W.2d 631, 635 (Mo. 1965) (residences of key hospital personnel within hospital are incidental to charitable purpose); *State ex rel. Spillers v. Johnston*, 214 Mo. 656, 663, 113 S.W. 1083, 1085 (1908) (headmaster's residence within school building did not cause school to lose tax exempt status) (overruled by *Barnes*).

17. 2 T. COOLEY, TAXATION 658, 686 (4th ed. 1924).

18. *St. Louis County v. Christian Hosp. Northwest St. Louis County*, 589 S.W.2d 246, 248 (Mo. En Banc 1979).

19. *Cedars of Lebanon Hosp. v. County of Los Angeles*, 35 Cal. 2d 729, 221 P.2d 31 (1950); *First Unitarian Soc'y of Hartford v. Town of Hartford*, 66 Conn. 368, 34 A. 89 (1895); *Illinois Inst. of Technology v. Skinner*, 49 Ill. 2d 59, 273 N.E.2d 371 (1971); *State ex rel. Cunningham v. Board of Assessors*, 52 La. Ann. 223, 26 So. 872 (1898); *Webb Academy v. City of Grand Rapids*, 209 Mich. 523, 177 N.W. 290 (1920); *Christian Business Men's Comm. v. State*, 228 Minn. 549, 38 N.W.2d 803 (1949); *Lincoln Woman's Club v. City of Lincoln*, 178 Neb. 357, 133 N.W.2d 455 (1965); *St. Paul's Church v. Concord*, 75 N.H. 420, 75 A. 531 (1910); *Township of Princeton v. Tenacre Foundation*, 69 N.J. Super. 559, 174 A.2d 601 (App. Div. 1961); *Pace College v. Boyland*, 4 N.Y.2d 528, 151 N.E.2d 900, 176 N.Y.S.2d 356 (1958); *Willamette Univ. v. State Tax Comm'n*, 245 Or.

The *Barnes* court discarded the principal use rule, even though adoption of the partial exemption rule did not necessitate such an action. The rules are not mutually exclusive and have been employed simultaneously in other states.<sup>20</sup> Additionally, the court did not indicate how to deal with the assessment of or a lien against partially exempt property even though those two problems had been cited as primary reasons for the rejection of partial exemption prior to *Barnes*.<sup>21</sup> Any doubt that *Barnes* abandoned the principal use rule, however, was dispelled by *St. Louis County v. Christian Hospital Northwest St. Louis County*,<sup>22</sup> a companion to the *Barnes* case. In *Christian Hospital*, the court allowed a dual use building to receive total exemption based on the principal use rule, but stated that the result would have been different if *Barnes* had been retroactive.<sup>23</sup>

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342, 422 P.2d 260 (1966); *Engineers & Scientists of Milwaukee, Inc. v. City of Milwaukee*, 38 Wis. 2d 550, 157 N.W.2d 572 (1968); *Hardin v. Rock Springs Lodge*, 23 Wyo. 522, 154 P. 323 (1916). *But see* *Greater Anchorage Area Borough v. Sisters of Charity*, 553 P.2d 467, 468, 469-70 (Alaska 1976) (any portion of property exempted must be used entirely for exempt purposes; doctor's offices not exempt even though incidental to purpose of hospital); *Township of Teaneck v. Lutheran Bible Inst.*, 20 N.J. 86, 90-91, 118 A.2d 809, 810-11 (1955) (faculty residences not incidental to educational purpose of school; all doubts resolved against taxpayer).

20. *Illinois Inst. of Technology v. Skinner*, 49 Ill. 2d 59, 273 N.E.2d 371 (1971); *Christian Business Men's Comm. v. State*, 228 Minn. 549, 38 N.W.2d 803 (1949); *Pace College v. Boyland*, 4 N.Y.2d 528, 151 N.E.2d 900, 176 N.Y.S.2d 356 (1958); *Multnomah School of the Bible v. Multnomah County*, 218 Or. 19, 343 P.2d 893 (1959); *Hardin v. Rock Springs Lodge*, 23 Wyo. 522, 154 P. 323 (1916).

The following cases allowed exemption when the nonexempt use is a necessary use: *Cedars of Lebanon Hosp. v. County of Los Angeles*, 35 Cal. 2d 729, 736-37, 221 P.2d 31, 35-37 (1950) (residences of hospital staff members necessary to efficient function of modern hospital and, therefore, tax exempt); *Hartford Hosp. v. City & Town*, 160 Conn. 370, 377-78, 279 A.2d 561, 563-64 (1971) (apartments rented to doctors used for hospital purpose); *Township of Princeton v. Tenacre Foundation*, 69 N.J. Super. 559, 565, 174 A.2d 601, 605 (App. Div. 1961) (residence of sanatorium director necessary to function of sanatorium and, therefore, tax exempt); *Columbia Hosp. Ass'n v. City of Milwaukee*, 35 Wis. 2d 660, 672-73, 151 N.W.2d 750, 756-57 (1967) (hospital living quarters for interns and doctors necessary to function of the hospital and, therefore, tax exempt). *But see* *Doctors Hosp. v. Board of Tax Appeals*, 173 Ohio St. 283, 284-85, 181 N.E.2d 702, 704 (1962) (quarters supplied to married interns and residents not tax exempt); *Warren, Krattenmaker & Snyder, Property Tax Exemptions for Charitable, Educational, Religious and Governmental Institutions in Connecticut*, 4 CONN. L. REV. 181, 243 (1971).

21. *See generally* *Wyman v. City of St. Louis*, 17 Mo. 335, 337-38 (1852).

22. 589 S.W.2d 246 (Mo. En Banc 1979).

23. *Id.* at 249. In *Christian Hospital*, the court stated that the "dovetails into or rounds out" rule that had first been employed in *State ex rel. Spillers v. Johnston*, 214 Mo. 656, 663, 113 S.W. 1083, 1085 (1908), had been overruled in the *Barnes* decision. *Barnes*, however, was not applied retroactively and the

In *Barnes*, the court stated that it recognized the effect of modern technology on property ownership and was reacting to the resulting change in the utilization of buildings by adopting the partial exemption rule.<sup>24</sup> With the adoption of the partial exemption rule, a charitable organization no longer loses its tax exempt status if it rents one floor of a multi-story building to a commercial enterprise. The court reasoned that the partial exemption rule accurately reflects the legislative intent behind tax exemption legislation.<sup>25</sup> Tax exempt organizations now may build efficiently and utilize vertical as well as horizontal space without losing tax exemption of portions of their property used for exempt purposes.

It can be argued that although the court recognized legislative intent when it accepted the partial exemption rule, it controverted legislative intent when it rejected the principal use rule. States other than Missouri that allow partial exemption are split in their treatment of the principal use rule. Alaska allows exemption of portions of a building only if each portion is used exclusively for an exempt purpose.<sup>26</sup> Some states allow exemption of a portion when the use of the nonexempt portion is necessary to the function of the exempt purpose of the rest of the building.<sup>27</sup> Several states simply have allowed partial exemption without changing the principal use rule previously recognized in the state.<sup>28</sup>

Entities that occasionally rent portions of their exempt buildings for nonexempt activities will suffer a tax disadvantage under the *Barnes* decision unless Missouri fills the gap left by the repudiation of the principal use rule. If *Barnes* is strictly interpreted, the occasional rental of building space for nonexempt uses will cause the rented portions to lose their tax exempt status<sup>29</sup> because these portions will not be used exclusively for exempt

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dovetail rule governed the *Christian Hospital* case. 589 S.W.2d at 249. Christian Hospital leased 2.6% of its hospital floor space to its staff doctors for private office use. The supreme court ruled that the lease of offices was incidental to the charitable use of the hospital and, therefore, entitled the entire property to a tax exemption. *Id.* at 247, 249.

24. 589 S.W.2d at 243-44.

25. *Id.* at 244. Although it acknowledged that changes in the law should be made by the legislature rather than the courts, the Oklahoma Supreme Court changed the law and allowed partial exemption. It stated that its prior decisions disallowing partial exemption obviously were incorrect and that the needed change required an interpretation of the state constitution, which the legislature could not change. *Oklahoma County v. Queen City Lodge*, 195 Okla. 131, 152, 156 P.2d 340, 358 (1945). Partial exemption is recognized in the majority of states. See note 10 *supra*.

26. *Greater Anchorage Area Borough v. Sisters of Charity*, 553 P. 2d 467 (Alaska 1976).

27. See cases cited note 20 *supra*.

28. See *id.*

29. Any organization that previously relied on the principal use rule to gain statutory tax exemption now will have to qualify for that exemption on another basis.

purposes, even if the occasional rental is *de minimis*.<sup>30</sup>

To prevent the complete loss of the rented portion's tax exempt status, Missouri could assess the property at the value of the time spent for nonexempt uses.<sup>31</sup> To fill the gap left by the absence of the principal use rule, Missouri also could expand the definition of the exempt use of the building. Thus, if "purpose" is broadened, the "used exclusively" requirement will be easier to meet.<sup>32</sup> Additionally, it could be argued that taxa-

30. The *Barnes* court stated that property must meet the following provisions, first enunciated in *Franciscan Tertiary Province of Mo., Inc. v. State Tax Comm'n*, 566 S.W.2d 213 (Mo. En Banc 1978), in order to qualify for tax exemption:

it [property] must be actually and regularly *used exclusively* for purposes purely charitable as "charity" is defined in *Salvation Army v. Hoehn*, 354 Mo. 107, 114, 115, 188 S.W.2d 826, 830 (1945); (2) it must be owned and operated on a not-for-profit basis; and (3) the dominant use of the property must be for the benefit of an indefinite number of people and must directly or indirectly benefit society generally.

589 S.W.2d at 244. Thus, to meet the first proviso of the qualification requirement, the statutory phrase "used exclusively" must be interpreted. Without the *Spillers'* definition of "used exclusively," the phrase could mean "solely" or "entirely."

In *City of St. Louis v. State Tax Comm'n*, 524 S.W.2d 839, 846 (Mo. En Banc 1975), the court held that the occasional rental of the exempt building for limited social gatherings did not destroy the exemption. Without *Spillers'* liberal interpretation of the exclusivity requirement, the statutory provisions for tax exemption would not have been fulfilled. There is a distinction, however, between buildings that are used infrequently for nonexempt purposes and those that are used, in part, solely for nonexempt purposes. Before *Barnes*, the principal use rule was applied in both situations. The former situation was what occurred in *Spillers* and the latter was the situation in *City of St. Louis v. State Tax Comm'n*, 524 S.W.2d 839 (Mo. En Banc 1975).

31. *Magnolia Petroleum Co. v. Carter County*, 175 Okla. 572, 573, 54 P.2d 155, 156 (1936) (pro rata taxation of oil and gas equipment used for exempt and nonexempt purposes). *But see* *Evangelical Covenant Church v. City of Nome*, 394 P.2d 882, 885 (Alaska 1964) (radio station used primarily to broadcast religious material denied tax exempt status when it also sold some commercial air time); *Hilger v. Harding College, Inc.*, 331 S.W.2d 851, 857 (Ark. 1960) (printing press not exempt from taxation since only 90% of printing was done for college).

32. For example, the restaurant and lodging facilities of a YMCA are money-making, commercial activities, yet they are not taxed in Missouri because they are supplemental to the charitable purpose of the organization. The primary purpose of the lodging and restaurant facilities is to provide for the welfare of young men; the commercial aspect of the facilities is secondary. *YMCA v. Sestric*, 362 Mo. 551, 564-65, 242 S.W.2d 497, 506 (Mo. En Banc 1951). Along the same lines, the exempt status of not for profit hospitals is not revoked when they charge patients. The definition of charity is expanded to allow necessary charges as long as indigents are also provided with services. *Jackson County v. State Tax Comm'n*, 521 S.W.2d 378, 383 (Mo. En Banc 1975).

tion of a nonexempt portion of a building is improper when the nonexempt use is necessary to the use of the rest of the building.<sup>33</sup>

It is also possible to argue that a portion of a building should be taxed when its use is devoted entirely to a nonexempt purpose, but that it should not be taxed if it is used for both exempt and nonexempt purposes, and the nonexempt use is merely occasional.<sup>34</sup> Taxation of a portion of a building thus would occur only in situations like *Barnes*, when the portion was used solely for nonexempt purposes. Exempt organizations could allow occasional nonexempt use of a portion of their building without fearing taxation on that portion, yet a portion that was continuously used for a nonexempt purpose would be taxed. Allowing the exemption of portions of exempt buildings used occasionally for nonexempt uses is recognized in other states,<sup>35</sup> and would conform to statements made in Missouri cases regarding the legislative intent behind tax exemption legislation.<sup>36</sup>

Although the *Barnes* decision to allow partial exemption was a step forward, its failure to describe the attachment of a tax lien to partially exempt property diminished the stride of this step. There are four ways to handle the tax lien problem: (1) allow no tax lien on any portion of partially exempt property,<sup>37</sup> (2) allow a lien on the entire property,<sup>38</sup> (3) allow a lien on an undivided part of the entire property,<sup>39</sup> or (4) allow a lien only on the nonexempt portion of the property.<sup>40</sup> Each approach creates problems that may be difficult to resolve without statutory provisions. No single approach is best for all situations. The lien problem is similar to that confronted by cotenants of houses who have a collateral agreement for time sharing.<sup>41</sup>

By statute, Missouri provides that all property subject to taxation is subject to a tax lien. The first way to handle the problem, therefore, is an unlikely solution because a lien will attach to partially exempt property in Missouri.<sup>42</sup> If the property can be divided in kind, however, it appears that

33. It is irrational to deny exemption of activities that are not themselves tax exempt but that are essential to a tax exempt activity; otherwise, the tax exempt activity becomes difficult. The problem can be alleviated by expanding the definition of tax exempt purpose or allowing exemption for necessary, nonexempt activities. See note 20 and accompanying text *supra*.

34. See note 30 *supra*.

35. See note 20 *supra*.

36. Essentially, this would mean recognizing the principal use rule in situations unlike *Barnes*, where the nonexempt use was only occasional. See note 30 *supra*.

37. See notes 42 & 43 and accompanying text *infra*.

38. See notes 44-46 and accompanying text *infra*.

39. See notes 47 & 48 and accompanying text *infra*.

40. See notes 49-53 and accompanying text *infra*.

41. See Comment, *Legal Challenges to Time Sharing Ownership*, 45 MO. L. REV. 423, 428-32 (1980).

42. RSMO § 137.085.2 (1978) (state lien on real property).

a lien would not attach to the exempt part of the property. When division in kind is possible, the property could be assessed separately.<sup>43</sup>

Courts in other states have been unwilling to protect dual use property from a tax lien and have chosen the second way to handle the problem. These courts have indicated that nonpayment of taxes will result in a lien attachment to the entire building.<sup>44</sup> The indication in those states is that partial exemption is but a tax reduction and that the entire property is still taxable. The partial exemption of a building acts only as a reduction of the total tax assessment of the entire building.<sup>45</sup> The attachment of a lien to an entire building when taxes of a portion of that building have not been paid can be compared to statutes allowing a judgment to create a lien against real property held by the judgment debtor. One court has stated, however, that it would be unconstitutional to allow a lien to attach to an entire property when a portion of it is tax exempt.<sup>46</sup>

The third way to handle the tax lien problem is to allow the lien to attach to an undivided part of the entire property.<sup>47</sup> The purchaser at the tax sale thus becomes a tenant in common with the owner of the exempt portion of the building.<sup>48</sup> The interest in the property acquired at the tax

43. There is no problem in separately assessing nonexempt property when it can be separated in a legal manner from exempt property. Only the nonexempt property would be listed on the assessment rolls and, therefore, be subject to a lien for nonpayment of taxes. Public policy dictates that as little property as possible be sold at tax sales. Sale of *part* of a nonexempt property to satisfy taxes due on the whole is preferred over sale of the whole property. Lots should not be lumped together and sold for nonpayment of taxes. Each lot should be sold individually so the fewest possible lots will be sold. *See generally* RSMO § 140.200 (1978) (sale when owner has several lots).

44. *See State ex rel. Cragor Co. v. Doss*, 150 Fla. 491, 495, 8 So. 2d 17, 18-19 (1942); *City of Lewiston v. All Maine Fair Ass'n*, 138 Me. 39, 43, 21 A.2d 625, 627 (1941); *Detroit Young Men's Soc'y v. Mayor of Detroit*, 3 Mich. 172, 182 (1854); *Hibernian Benevolent Soc'y v. Kelly*, 28 Or. 173, 196-97, 42 P. 3, 6 (1895). *But see* *YMCA v. Department of Revenue*, 268 Or. 633, 639, 522 P.2d 464, 466 (1974) (court held space used for commercial shops in YMCA could be assessed, indicating that lien would attach only to nonexempt portion).

45. This is analogous to homestead exemptions in some states where the assessed value of the property is reduced proportionately by the homestead exemption. *E.g.*, OKLA. STAT. ANN. tit. 68, § 2413 (West 1966). It is also similar to the cases that excluded oil and gas reserves from the assessed valuation of certain property. *See* 2 C. WILLIAMS & H. MEYERS, OIL AND GAS LAW § 213.3 (1981).

46. *Defenders of the Christian Faith v. Board of County Comm'rs*, 219 Kan. 181, 189, 547 P.2d 706, 712 (1976). The court did not state the nature of the constitutional problem. Selling exempt property could be viewed as an unauthorized taking of property without due process if partial exemption is not regarded as a form of assessment reduction.

47. *See* *Christian Business Men's Comm. v. State*, 228 Minn. 549, 558, 38 N.W.2d 803, 811 (1949).

48. *Id.* (by implication).

sale is equal to the proportion of the value that the nonexempt portion of the property bore to the value of the entire building. The purchaser can bring a suit in partition to liquidate his interest in the property. This power to liquidate avoids the difficulty of finding a purchaser for a single room or a single floor of a building. It can be argued, however, that it is unfair to sell a partial interest in an entire building when a specific part of the building is exempt from taxation because the result of a sale generally will be that the exempt owner of the building will lose his ownership interest.

The fourth way to handle the problem is to allow the lien to attach to the portion of the building that is not tax exempt.<sup>49</sup> A purchaser at a tax sale would buy only the nonexempt portion of the building. This is analogous to the result reached in Missouri when a lien is attached on a condominium. A condominium is a property made up of units that are owned individually and common areas that are owned jointly by all persons in the complex.<sup>50</sup> When the owner of a condominium does not pay taxes, a lien results against his unit but not against the entire building.<sup>51</sup> The purchaser at a tax sale becomes a tenant in common with the other owners only in hallways, stairways, elevators, and other common areas, and thus cannot force a sale of the entire building.<sup>52</sup> Also, because of this statutory provision, he could not force a partition sale of the common areas. This type of approach, *i.e.*, selling only a portion of a building, would protect the nondelinquent owner from a partition sale, but statutory provisions may be required to cover problems concerning ownership, upkeep, and combined use of common areas.<sup>53</sup>

Aside from failing to describe the attachment of a tax lien to partially exempt property, *Barnes* does not describe a valuation method for nonexempt portions of that property. The value of the taxable portion of the building must be determined before a tax can be collected.<sup>54</sup> The amount

49. See *Hospital Purchasing Serv. v. City of Hastings*, 11 Mich. App. 500, 509, 161 N.W.2d 759, 763 (1963). OHIO REV. CODE ANN. § 5713.04 (Page 1980) allows buildings owned by one person to be divided and separately assessed if such portion constitutes a "separate entity." A floor of a building is considered to be a separate entity. See *New Haven Church of Missionary Baptist v. Board of Tax Appeals*, 9 Ohio St. 2d 53, 57, 223 N.E.2d 366, 369 (1967).

50. See generally RSMO §§ 448.010-.220 (1978).

51. *Id.* § 448.100. See also KAN. STAT. ANN. § 58-3102 (1976) (provides that condominium unit may include enclosed space on floor if space has separate exit to public street or highway); UNIFORM CONDOMINIUM ACT § 1-105 (provides for separate assessment of unit owner's interest).

52. RSMO § 448.070 (1978).

53. See *Defenders of the Christian Faith v. Board of County Comm'rs.*, 219 Kan. 181, 188, 547 P.2d 706, 711 (1976); *Barnes Hosp. v. Leggett*, 589 S.W.2d at 245 (Rendlen, J., dissenting).

54. RSMO § 137.085.2 (1978) provides that a lien accrues after taxes are assessed and levied against a property. See *McAnally v. Little River Drainage Dist.*, 325 Mo. 348, 354, 28 S.W.2d 650, 651 (1930) (lien is established by assessment for taxes).

could be ascertained by determining the intrinsic value of the nonexempt portion<sup>55</sup> or by determining its rental value.<sup>56</sup> Alternatively, the value of the entire building could be determined and a tax assessed on the proportion of that amount that the area of the nonexempt part of the building bears to the total building.<sup>57</sup> By looking only at the space occupied by the nonexempt portion, the assessment does not take into account the possible improvements on the nonexempt portion or the portion's rental value. If taxes are assessed against the value of the unit itself, the form of assessment used in similar situations will be followed.

The *Barnes* decision is a mixed blessing for tax exempt entities. Because of the apparent abandonment of the principal use rule, the occasional use of an exempt building for a nonexempt purpose now may subject the entire building to taxation. On the other hand, adoption of the partial exemption rule will allow a tax exempt entity to rent a portion of its building to a commercial enterprise without subjecting the entire building to taxation. The *Barnes* court did not describe the attachment of a tax lien to a partially exempt building or the method of valuation to be used in assessing a portion of that building. Unless the legislature provides appropriate standards, the courts probably will reformulate this area of tax law on an ad hoc basis.

JANI LYNN SPURGEON

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55. See *First Methodist Episcopal Church v. City of Chicago*, 26 Ill. 482, 488-89 (1861); *City of Auburn v. YMCA*, 86 Me. 244, 248, 29 A. 992, 993 (1894); *City of Cambridge v. Middlesex County Comm'rs*, 114 Mass. 337, 339-40 (1874).

56. *Board of Home Missions v. City of Philadelphia*, 266 Pa. 405, 411-12, 109 A. 664, 665-66 (1920).

57. HAWAII REV. STAT. § 246-32(d) (Supp. 1980) provides for the pro rata taxation of partially exempt buildings based on the percentage of space occupied by the nonexempt part.