

ORIGINAL

In the
Supreme Court of Ohio

INNKEEPER MINISTRIES, INC.,	:	
	:	Case No. 2014-0490
	:	
Appellee,	:	
	:	
v.	:	Appeal from Ohio Board of Tax Appeals
	:	
JOSEPH W. TESTA,	:	
TAX COMMISSIONER OF OHIO	:	Case Nos. 2010-2803
	:	
Appellant.	:	

APPELLANT TAX COMMISSIONER'S MERIT BRIEF

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Private residential property is not used exclusively for charitable purposes where there is no overriding public benefit to overcome the personal and private use of the residence.

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INTRODUCTION

In this appeal, Innkeeper Ministries, Inc. (“Innkeeper,” the appellee herein) claims charitable real property tax exemption for tax years 2008 through 2010 for two buildings that are used rent-free as the residential homes of the co-founders of Innkeeper Ministries, Robert and Jan Hartenstein. Indeed, the property at issue in this case (the “subject realty” or “subject property”) contains the *private* residential home of the Hartensteins, as situated upon an otherwise vacant 71-acre tract of land. Robert Hartenstein lives there with his wife Jan, and other Hartenstein family members including Mr. Hartenstein’s sister Debbie and his mother-in-law. Hr. Tr. 22, 26-29, Supp. 7-8.¹

Largely due to the exclusively private use of the property, the subject realty is not used in a manner that provides a *public* benefit to mankind in general or to those with a particularized

¹ For purposes of this brief, the statutory transcript of evidence certified by the appellee Tax Commissioner to the Board of Tax Appeals pursuant to R.C. 5717.02 will be referred to as “S.T. ___”; the transcript of the Board of Tax Appeals hearing of additional evidence will be referred to as “Hr. Tr. ___”; the appendix to this brief will be referred to as “Appx. ___,”; and the appellant Commissioner’s supplement will be referred to as “Supp. ___.”

Separately, Mr. Hartenstein’s mother-in-law lived on the property from November 2011 until her death in October 2012. Hr. Tr. 26, Supp. 7.

need. Consequently, the subject realty is not used charitably within the longstanding definition of “charity” set forth by this Court in *Planned Parenthood Assn. v. Tax Commissioner* nearly fifty years ago. 5 Ohio St.2d 117, syllabus, 120 (1966). And, because the residential property is not used for charitable purposes, let alone “exclusive” charitable use, the property does not qualify for charitable exemption pursuant to R.C. 5709.12 and R.C. 5709.121. For these reasons, and several others discussed below, this Court must reverse the BTA’s unreasonable and unlawful decision below holding that Innkeeper is entitled to exemption for its 71 acres of residential property and vacant land.

In addition to the Hartensteins’ private residential use, the use and control of the subject property is a Hartenstein family affair in other ways as well. For funding, Innkeeper relies upon close friends and family of the Hartensteins, if not Mr. and Mrs. Hartenstein themselves. In fact, roughly 60 percent of Innkeeper’s funding comes from the Hartenstein family business, Hartco, Inc. Hr. Tr. 60-61, Supp. 16. In this appeal, Innkeeper has failed to show that anyone other than Hartco and the Hartensteins themselves provide funding to Innkeeper. The only evidence in the record of donations to Innkeeper from non-Hartenstein sources is an isolated donation of wood flooring and, potentially, a few isolated monetary gifts. S.T. 14, Supp. 58. Mr. Hartenstein even testified at hearing that Innkeeper does not engage in any fund-raising activities. Hr. Tr. 21, Supp. 6.

By their own personal choice, Mr. and Mrs. Hartenstein invite persons of their own choosing and religious persuasion, specifically the Christian faith, to stay as guests at their residences. The extent to which the homes were and are actually used by any such guests, however, is a matter of pure speculation. Neither through testimony or documentary evidence has Innkeeper Ministries ever quantified the extent of any such ancillary use of the homes by any

such invited guests of the Christian faith during the tax years at issue. Innkeeper has not, for example, identified how many guests visit Innkeeper during the tax years at issue or the length of their stay. Nor does the evidentiary record reflect that any of the invited guests of the Christian faith, by reason of their lack of financial means, had a particularized need for residential shelter.

When guests visit the Hartensteins on the subject property, they use it for *private* daily living activities, just as the Hartensteins use the property as their personal residence. In addition to everyday living amenities, the subject realty contains such amenities as biking and jogging paths, “stocked ponds” for fishing, a swimming pool and hot tub, a basketball court, space for a campfire. S.T. 32, Supp. 9 (website); S.T. 73-74, Supp. 117-18 (application for exemption). For evenings in, Innkeeper has DVDs and videos “for a theatre night,” board games, a library, and even an indoor exercise facility. S.T. 32, Supp. 76.

Against this background, the subject realty is not used exclusively for charitable purposes pursuant to R.C. 5709.12 or R.C. 5709.121 and the BTA’s unreasonable and unlawful decision to the contrary must be reversed. The private residential use of the property by the Hartensteins and their invited Christian guests is characteristically non-charitable under this Court’s well-settled decisional law. The BTA further erred in its application of R.C. 5709.121 and principles of “charity” when it determined that Innkeeper is a “charitable institution” that uses of the property is “in furtherance or incidental to” charitable purposes. First of all, Innkeeper is not a charitable institution because its sole activities are the private residential uses of the property, which are not charitable in the first place.

More fundamentally, the BTA erred in failing to apply a “strict construction” standard to construe the tax exemption statute at issue here, R.C. 5709.121. Indeed, the “in furtherance or incidental to” standard under R.C. 5709.121(A)(2) must be given a strict construction *against*

exemption because tax exemption statutes are a matter of legislative grace in derogation of the rights of all other taxpayers. R.C. 5715.271 (“the burden of proof shall be placed on the property owner to show that the property is entitled to exemption”); *Anderson/Maltbie Partnership v. Levin*, 127 Ohio St.3d 178, 2010-Ohio-4904, ¶ 16. Had the BTA properly applied a strict construction standard, the non-charitable use of the property and Innkeeper’s failure to sustain its burden to show entitlement to exemption is evident.

Still further, the BTA erred in failing to find that the vacant non-residential portions of the “71.066 acres comprised of vacant land, two houses and various other amenities” are not entitled to charitable exemption. *Innkeeper Ministries, Inc. v. Levin*, BTA Case No. 2010-2803, Feb. 28, 2014, at 2, Appx. 2 (hereinafter “BTA Decision & Order”). To be sure, the failure to actively use real property *cuts against* entitlement to charitable tax exemption. Sparsely used, vacant and/or undeveloped property is not used for an exempt purpose because it is not actively used at all. Thus, vacant land, including the subject reality in this case, not only fails to be affirmatively used charitably, *i.e.* to benefit mankind in general or those with a particularized need, but also serves a non-charitable purpose because vacant property may be held for future sale. *American Chemical Soc. v. Kinney*, 69 Ohio St. 2d 167, 172-173 (1982) (Brown, J., dissenting). By holding property with a view to profit, the property is not used “without the hope or expectation of profit,” which is another required element of charity under *Planned Parenthood*.

For these reasons, and those articulated below, the Commissioner respectfully requests that this Court reverse the BTA’s decision below, wherein the BTA unreasonably and unlawfully held that Innkeeper is entitled to exemption for the residential property and vacant land at issue herein.

STATEMENT OF THE CASE AND FACTS

A. Statement of Relevant Facts

Robert and Jan Hartenstein founded and incorporated Innkeeper Ministries, Inc. as an Ohio non-profit corporation on October 26, 2000. Innkeeper, however, did not engage in any activities until 2002, when, as the first order of business, Innkeeper acquired the Hartenstein's own personal residence in Preble County, including five acres of land and a seven bedroom building referred to as the "Chesed Inn." Hr. Tr. 22, Supp. 7. Indeed, the subject realty contains the *private* residential home of the Hartensteins, where Robert Hartenstein lives with his wife Jan, and other Hartenstein family members including Mr. Hartenstein's sister Debbie and his mother-in-law. Hr. Tr. 22, 26-29, Supp. 7-8.²

Innkeeper went on to acquire the remainder of the 71 acre subject property in this case through three additional acquisitions from 2003 to 2007. Hr. Tr. 13-14, Supp. 4-5; S.T. 73, Supp. 117. The 71 acres are improved with two buildings, including the "Chesed Inn" and another three-bedroom dwelling that the Hartensteins refer to as "the Manor." S.T. 39, 43, Supp. 83, 87 (auditor records).³ Otherwise, the subject realty consists of vacant land. *BTA Decision & Order*, at 1, Appx. 1.

² For purposes of this brief, the statutory transcript of evidence certified by the appellee Tax Commissioner to the Board of Tax Appeals pursuant to R.C. 5717.02 will be referred to as "S.T. ___"; the transcript of the Board of Tax Appeals hearing of additional evidence will be referred to as "Hr. Tr. ___"; the appendix to this brief will be referred to as "Appx. ___,"; and the appellant Commissioner's supplement will be referred to as "Supp. ___."

Separately, Mr. Hartenstein's mother-in-law lived on the property from November 2011 until her death in October 2012. Hr. Tr. 26.

³ There is also a chapel on the property that, like the rest of the subject property, is not open to the general public. Hr. Tr. 48, Supp. 92.

Innkeeper holds title to the subject property, but Innkeeper's regular activities other than the daily living activities of the Hartensteins, if any, remain unclear. In fact, Innkeeper has failed to provide evidence to quantify when guests visit the two residences or how the other areas are used. That is, Innkeeper failed to provide any evidence or testimony to quantify ancillary uses of the property aside from the primarily use as the Hartensteins' personal residence.

There is no dispute that the subject property is *not* open to the public. At the BTA hearing, Robert Hartenstein provided clear and unambiguous sworn testimony admitting that only "pastors and Christian leaders" are invited to stay at the Hartenstein's home. Hr. Tr. 15-16, Supp. 7. Even then, whether a Christian leader is invited to the property depends upon the subjective decision-making of Jan Hartenstein, who is described as the "reservation boss" on Innkeeper's website. Hr. Tr. 18-19, Supp. 7-8; S.T. 29, 35, Supp. 73, 79 (excerpt from Innkeeper website). As Robert Hartenstein explained, his wife Jan "screens" pastors and other Christian leaders to determine whether she "perceive[s] some type of [unidentified] need." Hr. Tr. 18-19, Supp. 63-64. In addition, Mr. Hartenstein's sister Debbie lives on the property and pays rent to Innkeeper. Hr. Tr. 27, Supp. 71. Thus, access to the property is left entirely to Jan Hartenstein's subjective perception and judgment, subject only to the objective rule that non-Christians may not stay on the property.

For funding, Innkeeper relies upon close friends and family of the Hartensteins, if not Mr. and Mrs. Hartenstein themselves. In fact, roughly 60 percent of Innkeeper's funding comes from the Hartenstein family business, Hartco, Inc. Hr. Tr. 60-61, Supp. 104-05. Hartco is a manufacturer of vinyl coated products that Mr. Hartenstein founded in 1981 and handed over the company to his son Christopher in 2000. S.T. 10, Supp. 54. Innkeeper has not demonstrated that anyone other than Hartco and the Hartensteins' themselves provide Innkeeper with funding.

The only evidence in the record of donations to Innkeeper from non-Hartenstein sources is an isolated donation of wood flooring and, potentially, a few isolated monetary gifts. S.T. 14, Supp. 58. Mr. Hartenstein even testified at hearing that Innkeeper does not engage in any fund-raising activities. Hr. Tr. 21, Supp. 6.

When guests visit the Hartensteins on the subject property, they use it for characteristically *private* purposes, including private rest and leisure activities. As Innkeeper boasts through its website, the subject property contains such amenities as biking and jogging paths, “stocked ponds” for fishing, a swimming pool and hot tub, a basketball court, space for a campfire. S.T. 32, Supp. 76 (website); S.T. 73-74, Supp. 117-18 (application for exemption). Of course, Innkeeper provides daily living amenities as well, including basic amenities and leisurely amenities such as board games and a library. S.T. 32, Supp. 76.

Despite the quintessentially private use of the property, Innkeeper argues that the property is used exclusively for charitable purposes because the Hartensteins allegedly provide “counseling” to their guests. Hr. Tr. 38-47, Supp. 11-13. While Innkeeper hosts an unknown number of guests, the Hartensteins contend that they counsel roughly 45-50 percent of such guests. Hr. Tr. 17, Supp. 5. But it is unclear what Innkeeper means by “counseling,” as there are no mental health professionals on the property. Mr. Hartenstein claimed that “counseling” occurs on the property only because he believes that “the Bible tells us that all of us are trained counselors.” Hr. Tr. 38, Supp. 11. For instance, Mr. Hartenstein claims that he is a “counselor,” yet his only credential is a “class certificate” from an eight-day class he attended at a church in Springboro, Ohio. Hr. Tr. 39, Supp. 11. Thus, the so-called “counseling” on the property amounts to little more than spiritual personal conversations between the Hartensteins and their guests of their own choosing.

Against this background, the subject property is a personal residence of the Hartenstein's that, like any other residence, is closed to the public, funded by the family residing there, and open only to the invited guests of the family. Furthermore, the property is *not* used exclusively for charitable purposes where the primary use of the property is the Hartensteins' daily living activities. Hr. Tr. 47, Supp. 13. Pursuant to the strict standards for charitable exemption set forth under this Court's uniform body of case law, the property is not used exclusively for charitable purposes.

B. Procedural Posture

On April 14, 2008, Innkeeper, through Robert Hartenstein, applied for real property tax exemption for tax year 2008. S.T. 62-63, Supp. 106-07. Innkeeper specifically applied for charitable exemption pursuant to R.C. 5709.12 and R.C. 5709.121(A) and exemption as a house of public worship under R.C. 5709.07(A). S.T. 63, Supp. 107. Through his final determination dated August 9, 2010, the Commissioner denied exemption because the property is not used exclusively for public worship or charitable purposes. The Commissioner found that property must be used in a charitable manner to qualify for charitable exemption, and further, that the private residence at issue here does not provide the public benefit required to satisfy the definition of "charity" under Ohio law. S.T. 4, Supp. 48.

Upon appeal to the BTA, Innkeeper sought only charitable exemption, having abandoned its claim to exemption as a house of public worship upon appeal the BTA and this Court. Then on February 28, 2014, despite the purely private and primary use of the subject property as the permanent residential home of the appellee's co-founders Robert and Jan Hartenstein and other immediate family members, the BTA held that the land and family home qualified for real property tax exemption under R.C. 5709.121(A)(2), as "used exclusively for charitable

purposes.” *BTA Decision & Order*, at 4-5, Appx. 4-5. In its decision, the BTA committed several errors.

First, the BTA erroneously determined that Innkeeper is a “charitable institution” pursuant to R.C. 5709.121 because “Innkeeper’s year round use of the subject property, in providing a place of respite for the physical and spiritual renewal of Christian leaders, without charge, to be sufficiently charitable in nature to fall within the definition of charity set forth in *Planned Parenthood*.” *BTA Decision & Order*, at 4, Appx. 4.

Second, having erroneously determined that Innkeeper has a charitable purpose, the BTA wrongly concluded that the use of the residential property is “in furtherance of or incidental to its charitable * * * purposes and not with the view to profit.” *BTA Decision & Order*, at 5, Appx. 5. The BTA made this finding solely on the basis that the “use of the property is related to [Innkeeper’s] stated mission of providing ‘a place of [S]abbath rest for full-time [C]hristian servants.” *BTA Decision & Order*, at 5, Appx. 5. The BTA ultimately held, unreasonably and unlawfully, that the 71 acre subject property consisting of the Hartensteins’ personal residence and vacant land is exempt for exclusive charitable use pursuant to R.C. 5709.121(A)(2).

On March 31, 2014, the Commissioner appealed to this Court, to contest the BTA’s unreasonable and unlawful holding that the Innkeeper’s residential property is exempt pursuant to R.C. 5709.121(A)(2). For the reasons that follow, the Commissioner respectfully requests that this Court reverse the BTA’s decision holding that the 71 acres of residential property and vacant land at issue in this case are entitled to charitable exemption.

LAW AND ARGUMENT

Proposition of Law No. 1:

Property owners claiming tax exemption carry an affirmative burden to show that the use of the property satisfies the elements for the claimed exemption.

First Baptist Church of Milford v. Wilkins, 110 Ohio St.3d 496, 2006-Ohio-4966, ¶ 10, followed.

For well over one hundred years, the Ohio Supreme Court has uniformly held that charitable tax exemption is applicable only where there is a public benefit sufficient to justify the loss of general tax revenue. As early as the 1850, the Ohio Supreme Court recognized that tax exemption burdens non-exempt property and taxpayers, as follows: “If property, employed in one kind of business, is exempted from taxation, the burden will necessarily fall more heavily on property employed in other pursuits.” *Cincinnati College v. State*, 19 Ohio 110, 115 (1850). Because tax exemption places a burden on other property owners, tax exemption is only appropriate where there is a public benefit sufficient to justify loss in revenue.

The Court has long adhered to *Cincinnati College* by uniformly recognizing in its real property tax exemption decisions that tax exemption statutes are in “derogation of the equal rights of all other taxpayers,” and thus must be “strictly construed,” with any doubt as to the application of the exemption to be resolved *against* the exemption claimant. *Bethesda Healthcare, Inc. v. Wilkins*, 101 Ohio St.3d 420, 2004-Ohio-1749, ¶ 19; *Anderson/Maltbie Partnership v. Levin*, 127 Ohio St.3d 178, 2010-Ohio-4904, ¶ 16; *The White Cross Hospital Ass’n v. BTA*, 38 Ohio St.2d 199, 203-204 (1974).

Accordingly, real property owners claiming tax exemption bear the burden to show that the property is clearly entitled to exemption, including the burden to show that the claimed exempt use of the property provides a public benefit sufficient to justify the loss of tax revenue.

R.C. 5715.271 (“the burden of proof shall be placed on the property owner to show that the property is entitled to exemption”); *Anderson/Maltbie Partnership*, at ¶ 16.

Proposition of Law No. 2:

Private residential property is not used exclusively for charitable purposes where there is no overriding public benefit to overcome the personal and private use of the residence.

First Baptist Church of Milford v. Wilkins, 110 Ohio St.3d 496, 2006-Ohio- 4966, at ¶ 21, quoting *Western Reserve Academy v. Bd. of Tax Appeals*, 153 Ohio St. 133, 136 (1950)

Purely *private* residential use of a permanent residence is the very antithesis of charity because it does not provide a *public* benefit. *First Baptist Church of Milford v. Wilkins*, 110 Ohio St.3d 496, 2006-Ohio-4966, ¶ 10, citing *White Cross Hosp. Ass’n v. Bd. of Tax Appeals*, 38 Ohio St.2d 199, 201 (1974) (“[t]he rationale justifying a tax exemption is that there is a present benefit to the general public *** sufficient to justify the loss of tax revenue.”).

Residential use is *primarily* personal and private rather than public. As this Ohio Supreme Court has held, most recently in *First Baptist Church of Milford*, residential property is not exempt because it is used privately, as follows:

Residence in a dwelling with a family must necessarily be a private use of the premises. Where the exercise of such **private rights** constitutes the primary use of property, *** such property is no longer used exclusively for charitable purposes.

110 Ohio St.3d 496, 2006-Ohio- 4966, at ¶ 21, quoting *Western Reserve Academy v. Bd. of Tax Appeals*, 153 Ohio St. 133, 136 (1950) (emphasis added). In *Columbus Metro. Housing Auth. v. Thatcher*, this Court vividly reiterated this principle by holding “[t]hat every man’s house is his castle has not yet been erased from our laws.” 140 Ohio St. 38 (1942).

Activities occurring in a family residence generally provide benefits that primarily inure to an individual or family rather than public generally. For example, private residential activities

include personal hygiene activities attended to in bathrooms, cooking meals and preparing food in kitchens, sleeping in bedrooms, and leisure in living areas. *Youngstown Metro. Housing Auth. v. Evatt*, 143 Ohio St. 268, 278 (1944) (“It seems to us clear that where dwellings are leased to family units for the purposes of private homes, the use of such dwellings is private and not public.”) (internal citations omitted). These types of personal activities are not charitable.

Indeed, this Court has consistently and uniformly upheld the requirement that exemption requires a public benefit. In *Philada Home Fund v. Bd. of Tax Appeals*, residential apartments provided to aged and needy persons at below-cost rent failed to qualify for charitable exemption because *private* residential use, in and of itself, does not provide the public benefit necessary to justify tax exemption. 5 Ohio St.2d 135, 139 (1966). Many other cases have likewise denied charitable exemption for residential facilities. *NBC-USA Housing, Inc.-Five v. Levin*, 125 Ohio St.3d 394, 2010-Ohio-1553, ¶22; *Jewish Hospital Ass’n v. BTA*, 5 Ohio St.2d 179, 181 (1966); *Cogswell Hall, Inc. v. Kinney*, 30 Ohio St.3d 43, 44 (1987); *Case W. Res. Univ. v. Wilkins*, 105 Ohio St.3d 276, 2005-Ohio-1649, at ¶ 31; *Denison Univ. v. Bd. of Tax Appeals*, 173 Ohio St. 429, syllabus (1962); *Doctors Hosp. v. Bd. of Tax Appeals*, 173 Ohio St. 283 (1962).

Despite the primarily private use of residential property, ancillary public benefits are sometimes present, for example assisting aged and needy persons to alleviate poverty and social welfare concerns. But ancillary benefits generally do not rise to the level of exempt use where there is primarily private residential use. Even a parsonage, for example, fails to qualify for exemption though it serves an ancillary purpose that is *essential* to the exempt use of public worship, namely providing the shelter needs of a priest. *Watterson v. Halliday*, 77 Ohio St. 150, 177-78 (1907), quoting *Gerke v. Purcell*, 25 Ohio St. 229, 248 (1874) (“Instead of its being used exclusively for public worship, [a parsonage] becomes a place of *private* residence. Nor does it

make any difference that, by the usages of the church, the presence of a priest or pastor is essential to conduct the services of public worship.”) (emphasis added). The primary use of the property as a residence thus controls the analysis and defeats exemption.

To be sure, residential property may be exempt under the “charitable” exemption in extraordinary situations where the General Assembly has set forth specific criteria statutorily required for exemption. The content of those specific requirements function to expressly limit the scope of the exemption only to those conducted as “charitable” activities. For example, pursuant to R.C. 5709.12 and R.C. 5701.13 (defining “homes for the aged”), the General Assembly has carved out a narrow “homes for the aged” exemption for qualifying residential nursing facilities. *Ohio Presbyterian Homes v. Kinney*, 9 Ohio St.3d 90, 93 (1984) (“[t]he purpose of R.C. 5701.13(B) is to ensure that a home for the aged is to some extent operated in a charitable manner[.]”).

Indeed, to meet the criteria for exemption as a “home for the aged,” among other stringent requirements, the facility must guarantee the “services for the life of each resident *without regard to the resident’s ability to continue payment* for the full cost of the services (emphasis added).” R.C. 5701.13(B)(1)(e). This requirement is a characteristically “charitable” one. By providing that all residents must be provided the facility’s services without regard to the patients’ ability to pay for them, R.C. 5701.13(B)(1)(e) incorporates a key component of the *Planned Parenthood* definition of “charity” quoted directly under this Proposition of Law No. 2. Specifically, under the *Planned Parenthood* definition of “charity,” charitable activity must be provided to recipients without regard to the ability of the recipients “to supply that need from other sources.” *i.e.*, to pay for the services.

In addition to the “home for the aged” exemption, a narrow line of cases holds that property may be “used exclusively for charitable or public purposes” under R.C. 5709.121 where property houses “on-call” employees who are available to provide their services around-the-clock, as a necessary and integral component of the entity’s exempt public or charitable activities. *Cincinnati Nature Center Ass’n v. BTA*, 48 Ohio St.2d 122, 123 (1976) (charitable exemption for “housing to the center’s naturalists who were required to be ‘on call’ 24-hours-a-day in order to prevent damage to the property by hunters, motorcyclists and other trespassers.”); *Warman v. Tracy*, 72 Ohio St.3d 217 (1995) (charitable exemption for residences of nuns working at a hospital were “on-call twenty-four hours a day, every day of the year”); *Wellsville v. Kinney*, 66 Ohio St.2d 136, (1981) (public purpose exemption for the residence of an on-call caretaker of a public cemetery).

But these “on-call” cases narrowly apply to situations where a residence is necessary to house someone critical to charitable use of the property. And, the “on-call” exception is inapplicable to Innkeeper in any event, since the Hartensteins are not on call in support of a charitable activity. Rather than support a charitable activity, the Hartensteins live their daily lives at their home and occasionally invite guests. Nor are the Hartensteins on call at all; they frequently take vacations, leaving the property without their presence and demonstrating that there is no need for them to be there around-the-clock. See, Commissioner Exhibit 1, discussing Robert Hartensteins’ motorcycle trip to Montana and a mission trip to Mexico, Supp. 165.

Similarly, this Court’s decision in *True Christianity Evangelism v. Zaino* is wholly consistent with this Court’s uniform body of case law denying charitable exemption to property used for private residential purposes. 91 Ohio St.3d 117 (2001). In *True Christianity*, this Court held that realty is not used exclusively for charitable purposes when it is used to prepare and

disseminate materials of a general spiritual nature, rather than religious materials directed to a particular denomination. The *True Christianity* Court determined that the subject property was *not* used as a residence at all; instead, the primary use was the preparation and dissemination of religious materials to the general public. (“No one resides at the house.”). *Id.* at 117, 119.

By contrast to *True Christianity*, the primary use of Innkeeper’s residential property here is the ordinary living activities of Robert and Jan Hartenstein and their close family members, which, of course, fails to qualify as charitable. Moreover, the Hartensteins’ use of Innkeeper’s property is clearly distinct from the *True Christianity* case because Innkeeper does not use the property to benefit mankind in general or make its property open to the public. Instead, guests may visit Innkeeper only when they survive Jan Hartenstein’s subjective screening process.

Given the distinctly non-exempt and private use of the Innkeeper property, including the Chesed Inn and the Manor, the subject property here fits within the line of cases denying exemption for residential property. *Gerke v. Purcell*, 25 Ohio St. 229, 248 (1874); *Watterson v. Halliday*, 77 Ohio St. 150, 177-78 (1907); *First Baptist Church of Milford v. Wilkins*, 110 Ohio St.3d 496, 2006-Ohio-4966, ¶ 10, citing *White Cross Hosp. Ass’n v. Bd. of Tax Appeals*, 38 Ohio St.2d 199, 201 (1974). Such longstanding and well-settled law should not be overturned.

For this reason alone, *i.e.* the purely private use of Innkeeper’s residential property and vacant land, this Court must find that the BTA’s decision below is unreasonable and unlawful.

Proposition of Law No. 3:

Permanent residences used by residents and their personally invited guests are not “used exclusively for charitable purposes” because private use of a personal residence does not amount to “charity” as it fails to provide a benefit to “mankind in general” or to those with a particularized need for shelter.

Planned Parenthood Ass’n v. Tax Commissioner, 5 Ohio St.2d 117, syllabus, 120 (1966) (“charity is the attempt in good faith, spiritually, physically, intellectually, socially and economically to advance and benefit **mankind in general, or those in need of advancement and benefit in particular**, without regard to their ability to supply that need from other sources and without hope or expectation, if not with positive abnegation, of gain or profit by the donor or by the instrumentality of the charity.”) (Emphasis added); see e.g. *First Baptist Church of Milford v. Wilkins*, 110 Ohio St.3d 496, 2006-Ohio-4966, ¶ 21.

Innkeeper is not entitled to charitable exemption for the Hartensteins’ permanent residence and vacant land because the property is not used within the definition of “charity” under *Planned Parenthood*. Whether this exemption is analyzed under R.C. 5709.12 or R.C. 5709.121, the charitable exemption ultimately requires “charity.” *First Baptist Church of Milford, Inc. v. Wilkins*, 110 Ohio St.3d 496, 2006-Ohio-4966, ¶¶ 15, 20-21 (“R.C. 5709.121 has no application to non-charitable institutions seeking tax exemption under R.C. 5709.12”). And because the property is not used for charitable purposes here exemption must be denied.

The definition of “charity” in Ohio reflects the long-held principle that tax exemption is appropriate only where there is a *general* public benefit to justify the loss of tax revenue. *First Baptist Church of Milford v. Wilkins*, 110 Ohio St.3d 496, 2006-Ohio-4966, ¶ 10. More specifically, *Planned Parenthood* teaches that charity is present only where there is a legally cognizable benefit to “mankind in general,” or, to a sub-class of those of the general public with a particularized need. *Planned Parenthood Ass’n v. Tax Commissioner*, 5 Ohio St.2d at 120.

Here, the Hartensteins' permanent residence does not provide either a benefit to "mankind in general" or those with a particularized need for shelter.

First, Innkeeper does not use the property to provide benefit to mankind in general. The Hartensteins' permanent residence is not used exclusively for charitable purposes because the buildings are available only to the Hartensteins' and invited guests of their own subjective choosing. As Robert Hartenstein admitted through his sworn BTA hearing testimony, only "pastors and Christian leaders" are invited to stay at the Hartenstein's home. Hr. Tr. 15-16, Supp. 5. Even then, whether a Christian leader is invited to the property depends upon the subjective decision-making of Jan Hartenstein, who is listed as the "reservation boss" on Innkeeper's website. Hr. Tr. 18, Supp. 6; S.T. 29, 35, Supp. 73, 79 (excerpt from Innkeeper website). Robert Hartenstein further explained that his wife Jan "screens" pastors and other Christian leaders to determine whether she subjectively "perceive[s] some type of need." Hr. Tr. 18, Supp. 6. But there are no objective criteria other than the strict rule that non-Christians are ineligible to stay at Innkeeper.

Where an institution closes its property to the public and fails to provide a benefit to mankind in general, such property is not used exclusively for charitable purposes and the institution is not a charitable one. In *Olmsted Falls Bd. of Educ. v. Tracy*, for example, the Ohio Supreme Court denied exemption for private property held by a fraternal group called Donauschwaben for its German American Cultural Center. 77 Ohio St.3d 393, 398 (1997). The property carried hallmarks of privately used property, including a kitchen, rathskeller, dining room, locker rooms, auditorium, small rooms, pool and billiard room, bowling alleys and a large gymnasium. *Id.* The Court even reviewed the taxpayer's activities calendar and made note of the numerous "social and fraternal events, such as dinners and dances, fish fries, carnivals,

Oktoberfests, and balls.” *Id.* at 397. But “Donauschwaben [did] not advance or benefit mankind in general or those in need of advancement or benefit in particular; it benefit[ted] its members.” *Id.* As a consequence, the Court held that Donauschwaben was not a charitable institution and, as such, did not qualify for charitable exemption under R.C. 5709.121.

In *Planned Parenthood* itself, the Court held that the Planned Parenthood Association of Columbus was “an institution for purposes only of public charity” in large part because its services were available to the general public, “irrespective of race, religion, or financial level.” 5 Ohio St.2d at 120. To buttress its holding, the *Planned Parenthood* Court further cited *Vick v. Cleveland Memorial Hospital Medical Foundation* with approval. *Planned Parenthood*, 5 Ohio St.2d at 121-22. *Vick*, in turn, holds that charity requires charitable services to be available to the public generally, specifically “to those in need, without regard to race, creed, color or ability to pay.” *Vick v. Cleveland Memorial Hospital Medical Foundation*, 2 Ohio St.2d 30, 32 (1965).

But here, Innkeeper does not use the subject property including the Hartensteins’ permanent residence to benefit mankind in general because the property is *not* open to the public nor used in a way to benefit the general public. Members of the public at-large do not enjoy the residential amenities available at Innkeeper. As in *Olmsted Falls Bd. of Ed.*, the use of the residential buildings and vacant land does not constitute “charity” and Innkeeper is not a charitable institution because the realty is made available only to the Hartensteins’ close family members and their invited guests.

Second, Innkeeper’s residential property is not used exclusively for charitable purposes because it does not provide a benefit to those with a particularized need. *Olmstead Falls Bd. of Ed. v. Tracy*, 77 Ohio St.3d 393, 397 (1997) (“[the taxpayer] does not advance or benefit

mankind in general or those in need of advancement or benefit in particular; it benefits its members.”).

Innkeeper has not claimed, let alone shown, that the Hartensteins, their invited guests, or anyone else staying or visiting the subject property has a particularized need for shelter. Conceptually, there is great difficulty identifying situations where there is a particularized need for shelter because shelter is a basic necessity of human life. As a necessity of life, shelter is something that is common to all without clear application “to those in need of advancement and benefit in particular” under *Planned Parenthood*.

Innkeepers’ claim to provide shelter to “wounded and weary pastoral couples” is especially tenuous because Innkeeper has not satisfied its burden to show the number of guests that visit the property, how frequently, or how long they stay. S.T. 73-74, Supp. 117-18 (application for exemption referring to “wounded and weary pastoral couples”). In fact, Innkeeper presented no testimony before the BTA regarding the number of guests visiting Innkeeper, when, for how long, etcetera. There are a few passing references to the number of guests visiting Innkeeper in material submitted to the Commissioner, but those figures refer to years prior to the 2008 through 2010 years at issue here. S.T. 7, 13, 60, Supp. 51, 58, 104. And as of 2008, Innkeeper quit hosting group guests, remodeled the residences on the property, and limited their guests to pastoral couples. S.T. 13, Supp. 57.

Innkeeper has made no showing that the allegedly “wounded and weary” pastoral couples have a particularized need for shelter. As Robert Hartenstein explained through his BTA hearing testimony, whether a Christian leader is invited to the property depends upon the subjective decision-making of his wife Jan Hartenstein, who is described as the “reservation boss” on Innkeeper’s website. Hr. Tr. 18-19, Supp. 6; S.T. 29, 35, Supp. 73, 79 (excerpt from Innkeeper

website). Jan Hartenstein “screens” pastors and other Christian leaders to determine whether she “perceive[s] some type of need.” Hr. Tr. 18-19, Supp. 6. On this record, however, whether those needs are financial are a matter of pure speculation. Innkeeper has done nothing to explain or document whether its guests *actually* have a particularized need; there is no evidence about Innkeeper’s guests to sustain such a finding. Certainly there is no evidence to show that Innkeeper guests have a particularized need for shelter.

Similarly, Innkeeper has not shown that it provides services to individuals with a particularized need for counseling services, or that Innkeeper or the Hartensteins are even competent to provide such services. Again, the record reflects that there are no objective criteria for determining who may visit Innkeeper, and furthermore, no documentation to show that visitors have a particularized need for shelter, counseling services, or any other need. The invitation to stay at Innkeepers turns entirely on the subject judgment of Jan Hartenstein. For the 2008 tax year years thereafter, the evidentiary record does not reflect the number of visitors to Innkeeper or the length of their stay.

In any event, the evidentiary record shows that Innkeeper is not competent to provide counseling services in any event. The Hartensteins claim to counsel roughly 45-50 percent of their visitors. Hr. Tr. 17, Supp. 5. But it is unclear what Mr. Hartenstein is speaking to when he refers to “counseling,” as there are no mental health professionals on the property. Mr. Hartenstein claims that “counseling” occurs on the property only because he believes that “the Bible tells us that all of us are trained counselors.” Hr. Tr. 38, Supp. 11. For instance, Mr. Hartenstein claims that he is a “counselor,” yet his only credential is a “class certificate” from an eight-day class he attended at a church in Springboro, Ohio. Hr. Tr. 39, Supp. 11. To Mr.

Hartenstein, “a ten-minute encounter” is a counseling session, even though he is not a mental health professional and ten-minutes is little more than a short conversation. Hr. Tr. 43, Supp. 12.

Thus, the alleged counseling on the property amounts to little more than personal, spiritual conversations between the Hartensteins and their guests and cannot be considered a charitable activity. Innkeeper has not satisfied its burden under R.C. 5715.271 to show that it provides shelter or counseling to those with a particularized need; in fact, the record reflects that they do not. *Anderson/Maltbie Partnership v. Levin*, 127 Ohio St.3d 178, 2010-Ohio-4904, ¶ 16 (tax exemption statutes are to be strictly construed against the claim of exemption).

Taken together, Innkeepers’ failure to use its realty to benefit mankind in general and failure to benefit those with a particularized need defeats charitable exemption pursuant to the meaning of “charity” set forth in *Planned Parenthood*.

Proposition of Law No. 4:

For property to qualify for charitable exemption pursuant to R.C. 5709.121(A)(2), it must be made available under the direction or control of a charitable institution for a substantial and essential use in furtherance or incidental to the owner’s charitable purpose.

In the absence of charitable activity, exemption fails under both Ohio statutes providing for charitable real property tax exemption, R.C. 5709.12 and R.C. 5709.121. Nonetheless, the BTA erroneously determined that Innkeeper’s privately used residential property is exempt pursuant to R.C. 5709.121(A)(2). Contrary to the BTA’s unreasonable and unlawful holding, exemption is unavailable in this case because charitable activity is completely lacking on the property. In addition, the BTA must be reversed in this case for another reason: the BTA did not apply the “strict construction” standard for exempt charitable use required to qualify for exemption under R.C. 5709.121. As detailed below, property must be made available under the direction or control of a charitable institution for a substantial and essential use in

furtherance or incidental to the owner's charitable purpose in order to qualify for exemption under R.C. 5709.121(A)(2). Innkeeper does not meet that strict construction standard here.

A. In situations where ownership and claimed exempt use of property do not coincide in the same entity, property must qualify for exemption, if at all, pursuant to R.C. 5709.121. *Dialysis Clinic, Inc. v. Levin*, 127 Ohio St.3d 215, 2010-Ohio-5071, ¶¶ 23-24.

For property to be held exempt solely under the longstanding charitable real property tax exemption in Ohio, R.C. 5709.12(B), ownership and use of property for charitable purposes must coincide in the same entity. R.C. 5709.12(B); *First Baptist Church of Milford v. Wilkins*, 110 Ohio St.3d 496, 2006-Ohio-4966, ¶ 12, quoting *Zangerle* (1929) and *Lincoln Mem. Hosp., Inc.* (1968). In other words, exemption applies under R.C. 5709.12 alone only when the *owner* also *uses* the property exclusively for charitable purposes.

In situations where ownership and claimed exempt use of property *do not* coincide in the same entity, another more recently enacted statute, R.C. 5709.121, provides for charitable exemption. *First Baptist Church of Milford, Inc.* at ¶¶ 13, 16 (“The title of Am.Sub.H.B. No. 817 stated that it was to ‘clarify the exemption from taxation of property belonging to a charitable institution, the state or its political subdivisions and used by another charitable institution for exempt purposes.’”); *Dialysis Clinic, Inc. v. Levin*, 127 Ohio St.3d 215, 2010-Ohio-5071, ¶¶ 23-24.

R.C. 5709.121 is not an independent charitable use exemption, but instead provides a definition of “used exclusively for charitable purposes” to be applied under R.C. 5709.12(B) in situations where ownership and use do not coincide. *Bethesda Healthcare, Inc. v. Wilkins*, 101 Ohio St.3d 420, 2004-Ohio-1749, ¶ 21. Because R.C. 5709.121 is a definitional statute for exemption under R.C. 5709.12, principals regarding “charity” and charitable use from caselaw

applying R.C. 5709.12 also apply to R.C. 5709.121. See, e.g., *Dialysis Clinic, Inc.*, at ¶22; *Bethesda Healthcare, Inc.*, at ¶21; *Planned Parenthood*.

R.C. 5709.121 specifically provides as follows:

(A) Real property and tangible personal property belonging to a charitable or educational institution or to the state or a political subdivision, shall be considered as used exclusively for charitable or public purposes by such institution, the state, or political subdivision, if it meets one of the following requirements:

(1) It is used by such institution, the state, or political subdivision, or by one or more other such institutions, the state, or political subdivisions under a lease, sublease, or other contractual arrangement:

* * *

(b) For other charitable, educational, or public purposes.

(2) It is made available under the direction or control of such institution, the state, or political subdivision **for use in furtherance of or incidental to its charitable, educational, or public purposes** and not with the view to profit.

(Emphasis added).

Among other statutory requirements, then, property must be “use[d] in furtherance or incidental to” a charitable institution’s charitable purposes in order to qualify for as property used exclusively for charitable purposes under R.C. 5709.121(A)(2). Under this standard, Innkeeper’s residential property and vacant land fails to qualify for exemption because there is no “charity” or charitable activities conducted on the property. Use cannot be “in furtherance or incidental to charitable purposes” when there are no charitable activities in the first place.

But more fundamentally, the BTA erred in failing to apply a strict standard to determine whether Innkeeper’s property is “used exclusively for charitable purposes” under R.C. 5709.121. Tax exemption statutes, of course, must be strictly construed because they are a matter of

legislative grace and in derogation of the rights of all other taxpayers. To liberally construe R.C. 5709.121 not only runs counter to this bedrock principle, but also runs the risk that a broad interpretation will swallow up other statutory language and tax exemption statutes that the General Assembly intended to have application.

B. Pursuant to bedrock principles of Ohio real property tax exemption law, a “strict standard” must be applied under R.C. 5709.121(A)(2) to determine the requisite “use” “in furtherance of or incidental to” a charitable institution’s purposes necessary to qualify as “used exclusively for charitable purposes.”

Under the bedrock principles set forth through this Court’s uniform body of case law, a “strict standard” must be applied to the required “use” “in furtherance or incidental to” another charitable institution’s purposes necessary to qualify for charitable exemption. See discussion in Proposition of Law No. I above. Under R.C. 5709.121(A)(2), property held by a charitable institution shall be considered used “exclusively” for charitable purposes when:

It is made available under the direction or control of such institution, the state, or political subdivision for use in furtherance of or incidental to its charitable, educational, or public purposes and not with the view to profit.

The “exclusive use” required under R.C. 5709.121(A)(2) to qualify for exemption is not just “any” “use in furtherance or incidental to an institution’s charitable purposes.” R.C. 5709.121 should not be read, as Innkeeper implicitly argues, to insert the word “any” before “use in furtherance of or incidental to.” In *Bethesda Healthcare, Inc. v. Wilkins*, for example, this Court affirmed the denial of exemption under R.C. 5709.121 even though a fitness center provided a small number of scholarships to persons who could not afford membership fees to the fitness center. 101 Ohio St.3d 420, 2004-Ohio-1749, ¶ 38. As the Court effectively held in *Bethesda*, the word “exclusive” simply cannot be read to mean “any.” Instead, a substantial “charitable” use is required to qualify as “exclusive charitable use.”

Nevertheless, the BTA in this case effectively inserted the word “any” in R.C. 5709.121(A)(2) before the phrase “use in furtherance or incidental to” when it held that Innkeeper met the requirements of R.C. 5709.121(A)(2). *BTA Decision & Order*, at 5, Appx. 5. That is, the BTA held that Innkeeper satisfied the R.C. 5709.121(A)(2) standard because the use of the property merely “[relates] to [Innkeeper’s] stated mission of providing ‘a place of [S]abbath rest for full-time [C]hristian servants.’”

The BTA ignored at least two key components of the statute.

First, and most fundamentally, property of course must be used for *charitable* purposes to be entitled to *charitable* exemption. *First Baptist Church of Milford v. Wilkins*, 110 Ohio St.3d 496, 2006-Ohio-4966, ¶¶ 15, 20-21 (“R.C. 5709.121 has no application to non-charitable institutions seeking tax exemption under R.C. 5709.12”). As discussed above in Propositions of Law Nos. 1 and 2, residential property that is closed to the public is not “charity” under *Planned Parenthood* because it does not provide a benefit to mankind in general or to those with a particularized need for shelter. To hold otherwise would be to contravene over 100 years of controlling Ohio Supreme Court precedent.

Second, a strict standard must be applied to the charitable use necessary to qualify as exclusive charitable use under R.C. 5709.121(A)(2). Merely “relating” to another institution’s purposes, as the BTA held sufficient, is not a sufficiently strict standard to qualify as “exclusive” charitable use. In fact, the BTA’s “relating to” standard is not a strict standard at all, but instead a very liberal and broad standard that contravenes the bedrock rule of law that tax exemption statutes are a matter of legislative grace to be strictly construed in favor of the rights of all other taxpayers. *Anderson/Maltbie Partnership v. Levin*, 127 Ohio St.3d 178, 2010-Ohio-4904, ¶ 16 (tax exemption statutes are to be strictly construed against the claim of exemption). In other

words, this Court must be mindful to construe R.C. 5709.121(A)(2) *against* exemption where there is any doubt as to whether the taxpayer has satisfied its burden. R.C. 5715.271.

R.C. 5709.121 must be read in a manner that harmonizes the statute with the entire statutory scheme for real property exemption and avoids absurd results. R.C. 1.47(B); *Church of God in N. Ohio, Inc.*, 2009-Ohio-5939, at ¶ 30 (“a property owner may not evade the limitations imposed with respect to a specific tax exemption by claiming exemption under a broad reading of other exemption statutes.”) If the phrase “in furtherance of or incidental to” were read as broadly as Innkeeper and the BTA suggest, then R.C. 5709.12 would forbid exemption for use by a property owner, but the same use would be the basis for exemption under R.C. 5709.121 if carried out by a third party instead. Through a shell game of sorts, landowners could secure exemption by simply organizing legal entities to hold their property and apply for exemption. This absurd result would hold form over substance and, more fundamentally, contravene the strict construction principles underlying Ohio real property tax exemption law.

In fact, if “in furtherance of or incidental to” were construed to set a *de minimus* use standard there would be no need for R.C. 5709.12(B) at all because R.C. 5709.121(A)(2) would then provide an exemption broader than R.C. 5709.12(B) in all respects. But, through its position that the Innkeeper’s residential property and vacant land meets the “in furtherance or incidental to” standard, Innkeeper implicitly argues for that position. Contrary to well-settled law, Innkeeper is effectively arguing for an interpretation of R.C. 5709.121(A)(2) that will swallow up R.C. 5709.12(B) and render R.C. 5709.12(B) meaningless. R.C. 1.47(B); *Church of God in N. Ohio, Inc.*, 2009-Ohio-5939, at ¶ 30.

And, if Innkeeper were correct that its property is exempt (they are not), then personal residences would be entitled to exemption. Such a holding would turn over a century of Ohio

real property tax exemption law on its head; exemption would be the rule, taxation the exception. *Seven Hills Schools v. Kinney*, 28 Ohio St.3d 186 (1986) (“Exemption is the exception to the rule and statutes granting exemptions are strictly construed.”); *Gerke v. Purcell*, 25 Ohio St. 229, 248 (1874) (denying exemption for a parsonage).

For the first time, a primarily private, residential purpose will be held exempt. See, e.g., *Gerke v. Purcell*, 25 Ohio St. 229, 248 (1874); *Watterson v. Halliday*, 77 Ohio St. 150, 178-180 (1907); *NBC-USA Housing, Inc.-Five v. Levin*, 125 Ohio St.3d 394, 2010-Ohio-1553, ¶22; *Philada Home Fund v. Bd. of Tax Appeals*, 5 Ohio St.2d 135, syllabus (1966); *Cogswell Hall, Inc. v. Kinney*, 30 Ohio St.3d 43, 44 (1987); *Case W. Res. Univ. v. Wilkins*, 2005-Ohio-1649 at ¶ 31; *Denison Univ. v. Bd. of Tax Appeals*, 173 Ohio St. 429, syllabus (1962).

For these reasons, the BTA’s unreasonable and unlawful holding that Innkeeper’s residential property and vacant land must be reversed. *De minimus* charitable use is not “used exclusively for charitable purposes.” R.C. 5709.121 cannot be read to mean “any” “use in furtherance of or incidental to” charitable purposes, if the statute is to be read consistently with this Court’s longstanding and controlling precedent.

C. A charitable institution must use property for a substantial and essential use in furtherance or incidental to the property owner’s charitable purpose in order to qualify for exemption pursuant to R.C. 5709.121(A)(2).

This Court has applied a “strict construction” standard to real property tax exemption statutes that are worded similarly to the statutes in this case. Most notably, this Court’s decisions under the “house of public worship” exemption in R.C. 5709.07(A)(2) establish that a strict use requirement applies to real property tax exemption statutes. *Faith Fellowship Ministries, Inc. v. Limbach*, 32 Ohio St.3d 432, 437-38 (1987); *Church of God in N. Ohio, Inc. v. Levin*, 124 Ohio St.3d 36, 2009-Ohio-5939, ¶ 29.

In those cases, the Court adopted a strict use requirement for the “house of public worship exemption” under R.C. 5709.07(A)(2) -- in the absence of express statutory language providing any such strict qualitative standard. At issue in both was the following language of R.C. 5709.07(A)(2):

[H]ouses used exclusively for public worship, the books and furniture therein, and the ground attached to such buildings necessary for the proper occupancy, use, and enjoyment thereof, and not leased or otherwise used with a view to profit * * * shall be exempt from taxation.

Following an extensive discussion of the “use” requirements for exemption, the Court in *Faith Fellowship Ministries* articulated a strict qualitative and quantitative standard that renders exempt only property “used in a *principal, primary and essential* way to facilitate public worship.” 32 Ohio St.3d at 437 (citing *Ace Steel Baling v. Porterfield*, 19 Ohio St.2d 137, 140-141(1969)) (italics added.).

Then in *Church of God in N. Ohio, Inc.* the Court reiterated that established standard, holding as follows:

Our cases have recognized and effectuated the limited character of that exemption, holding that to qualify under that provision property "must be used in a *principal, primary, and essential* way to facilitate the public worship" and that accordingly "uses which are merely supportive of public worship may not be exempted." *Faith Fellowship Ministries*, 32 Ohio St.3d 432, 436, 436, and paragraph two of the syllabus.

Church of God in N. Ohio, Inc. 2009-Ohio-5939 at ¶ 29. Today it is well-settled that the “house of public worship” exemption requires that property be used in a principal, primary, and essential way to support exemption to be entitled to exemption.

Likewise, this Court has applied a strict construction of similar language in “public colleges” exemption statute. In *Case Western Reserve Univ. v. Wilkins*, the Court interpreted former R.C. 5709.07(A)(4), which provides real property tax exemption for the following:

[p]ublic colleges * * * and all buildings *connected with* them, and all lands *connected with* public institutions of learning, not used with a view to profit.

(Emphasis added). In this case, this Court was faced with interpretation of the phrase “in connection with” in the context of exemption for residential housing owned by a public college and leased to a third party (a sorority house). In adopting a strict use requirement, the Court emphasized that the phrase “connected with” under R.C. 5709.07(A)(4) must be qualified.

For the *Case Western* Court, “connected with” (a phrase even broader than the “in furtherance of or incidental to” standard at issue here) means more than merely “any” connection. Instead, the Court explained that “we think it was the purpose to exempt all buildings that were with *reasonable certainty used in furthering or carrying out the necessary objects and purposes of the college.*” *Id.* (italics in original). This is so, even absent express statutory language. The *Case Western* Court went on to hold that residential student housing does not meet the strict standard because housing is not a *necessary* object or purpose for a university’s educational purposes. *Case Western Reserve Univ.*, at ¶ 45.

Against this foundation, a strict standard must be applied to determine whether a charitable use is sufficiently “in furtherance or incidental to” a charitable institution’s purposes. Strictly construing R.C. 5709.121(A)(2) to support the rights of all non-exempt real property taxpayers, exempt “use” “in furtherance of or incidental to” the owner’s charitable purposes must be understood to embrace only such use of property that is *reasonably certain to advance the necessary objects and purposes* of the owner, not merely “any” use.

This Court's recent holding in *Cincinnati Community Kollal v. Testa* does not disturb the bedrock principle of strictly construing tax exemption statutes against exemption. 135 Ohio St.3d 219, 2013-Ohio-396. There, this Court stated that the BTA improperly applied the standard for "exclusive" charitable use under R.C. 5709.121 and remanded to the BTA to review the evidence and determine "whether the subject property was used in furtherance of the kollole's educational purposes." *Id.* at ¶¶ 25-33. The *Kollal* Court did not determine the exempt status of the property or discuss the need qualifying language for tax exemption statutes as the Court did in *Faith Fellowship Ministries* and *Case Western Reserve*. Certainly the Court in *Kollal* did not hold that "any" "use in furtherance of or incidental to" an institution's charitable purposes qualifies as "exclusive use"; the standard for exemption remains a strict construction standard under bedrock principles of Ohio real property tax exemption law.⁴

In this case, Innkeeper does not use its realty for charitable purposes in a manner that is reasonable certain to advance the necessary charitable purposes and objects. As discussed under Proposition of Law No. 2 above, the private residential use of the property by the Hartensteins' close family members and their invited guests is not a charitable use at all, let alone a use that is substantial and essential to charitable activity. Given the private residential use of the property, moreover, there is certainly no showing that the principal and primary use of the property is a charitable one.

And, as discussed under Proposition of Law No. 3 above, Innkeeper does not use the property to provide a benefit to "mankind in general" or to those with a "particularized need."

⁴ In *Kollal*, this Court cited *Galvin v. Masonic Trust*, 34 Ohio St.2d 157, 159-60 (1973), that "there is no primary-use or principal-use test set forth under R.C. 5709.121." *Kollal*, at ¶ 26. However, neither *Galvin* or *Kollal* identify the proper standard for determining "exclusive" charitable use that is considered "use in furtherance of or incidental to" an institution's charitable purposes under R.C. 5709.121 and R.C. 5709.12.

To the contrary, the record reflects that Hartensteins' personal residence is not used to benefit anyone with a particularized need for shelter or anyone with a particularized need for counseling services. Innkeeper has failed to sustain its burden to show, among other things, who visits the property and what their needs are, how many guests visit the property, how long they stay, and how frequently. There is simply no basis for finding that charitable activity occurs on the property, let alone that charitable use is substantial and essential to the use of the property, or that the property is essential to charitable activity.

Accordingly, Innkeeper's realty is not used for a principle, primary, and essential use "in furtherance of or incidental to" any charitable purposes under R.C. 5709.121(A)(2) and this Court should reverse the BTA's unreasonable and unlawful holding that the property is used exclusively for charitable purposes.

D. Independently, exemption defeated under R.C. 5709.121 in this case because Innkeeper is not a "charitable institution."

Independently, charitable exemption pursuant to R.C. 5709.121 is defeated in this case because that statute is applicable only to property held by charitable institutions and Innkeeper is not a charitable institution. In the proceedings below, the BTA unreasonably and unlawfully held that Innkeeper is a charitable institution because it provides "a place of respite for the physical and spiritual renewal of Christian leaders, without charge[.]" *BTA Decision & Order*, at 4, Appx. 4. As already explained above in Propositions of Law Nos. 2 and 3, however, the distinctly residential and private use of the subject property does not constitute "charity" under Ohio law; the property is not used to provide a benefit to mankind in general or to those with a particularized need for shelter or counseling services.

Indeed, the private use of the property benefits Innkeeper, the Hartensteins, and the Hartensteins' close friends and family. Innkeeper is fails to qualify as a charitable institution

under R.C. 5709.121 because it “[does] not advance or benefit mankind in general or those in need of advancement or benefit in particular; it benefit[ted] its members.” *Olmsted Falls Bd. of Educ. v. Tracy*, 77 Ohio St.3d 393, 398 (1997).

Moreover, Innkeeper is not a charitable institution because its core activities are not charitable. In *Dialysis Clinic, Inc. v. Levin*, the Ohio Supreme Court held that “[a]n institution is ‘charitable’ under R.C. 5709.121 only if its core activities qualify as charity under the standards for determining the charitable use of property pursuant to R.C. 5709.12.” 127 Ohio St.3d 215, 2010-Ohio-5071, at Subheading B. Whether an institution is a “charitable institution” under R.C. 5709.121 depends upon “the charitable activities on the taxpayer seeking exemption.” *OCLC Online Computer Library Ctr., Inc. v. Kinney*, 11 Ohio ST.3d 198, 201 (1984). “Activities have been deemed charitable if they accord with the standard of charity that [the Ohio Supreme Court has] developed when determining the charitable use of property directly under R.C. 5709.12(B). *Dialysis Clinic*, at ¶27 (citing *Northeast Ohio Psych. Inst. v. Levin*, 121 Ohio St.3d 292, 2009-Ohio-583, ¶11).

Here, Innkeepers’ sole activities, *i.e.* its core activities, are the use of the subject realty and those activities are not charitable. Again, as discussed under Proposition of Law Nos. 2 and 3 above, the private residential use of the property by the Hartensteins’ close family members and their invited guests is not a charitable use at all, let alone a use that principle, primary, and essential to charitable activity. Furthermore, Innkeeper does not use the property to provide a benefit to “mankind in general” or to those with a “particularized need.” Since Innkeepers’ core activities are the use of the subject realty, and the use of the realty is not charitable, it follows that Innkeeper is not a charitable institution. For purposes of R.C. 5709.121, then, Innkeeper is

not a charitable institution and the BTA's holding granting exemption pursuant to R.C. 5709.121 must be reversed on this independent ground alone.

Proposition of Law No. 5:

Vacant and sparsely used land does not qualify for charitable exemption pursuant to R.C. 5709.12 or R.C. 5709.121.

Innkeeper has not sustained its burden to show exemption for its vacant land, which comprises most of the subject realty in this case. Nonetheless, the BTA unreasonably and unlawfully found exempt property described as "71.066 acres comprised of vacant land, two houses and various other amenities." *BTA Decision & Order*, at 2, citing the Commissioner's final determination, Appx. 2. However, sparsely used, vacant and/or undeveloped property is not used for an exempt purpose because it is not actively used at all. Instead, vacant land is used to be held for future sale. That is, institutions may hold exempt property with a view to profit merely by holding it tax-free as it appreciates in value and later realizing a profit upon its sale. *American Chemical Soc. v. Kinney*, 69 Ohio St. 2d 167, 172-173 (1982) (Brown, J., dissenting).

Thus, vacant property, including the subject realty in this case, not only fails to be affirmatively used charitably, *i.e.* to benefit mankind in general or those with a particularized need, but also serves a non-charitable purpose because vacant property may be held for future sale. By holding property with a view to profit, the property is not used "without the hope or expectation of profit," which is an additional element of charity under *Planned Parenthood*. Simply put, vacant land is not used exclusively for charitable purposes.

The subject realty in this case contains two residential facilities but otherwise sits almost entirely vacant. If the property were to appreciate in value, or even if Innkeeper merely holds the property for sale, such use does not constitute exempt use. Instead, the property is held for sale and with a view to profit. Such use does not comport with the definition of charity under

Planned Parenthood that requires charity to be “without the hope or expectation, if not positive abnegation, of gain or profit.” Under R.C. 5709.121, moreover, exemption is defeated because that statute expressly prohibits charitable exemption in cases where property is held with a view to profit. *Cincinnati Nature Center Assn. v. Bd. of Tax Appeals*, 48 Ohio St.2d 122, 125 (1976).

And, in *American Jersey Cattle Club v. Glander*, the Ohio Supreme Court held that nonprofit property owners such as Innkeeper may profit *as an entity*, even if the profit is reinvested elsewhere rather than distributed to individuals. 152 Ohio St. 506, 510 (1950) (“The fact, that a corporation is one not for profit, does not mean that its enterprises may not be conducted for gain, profit or net income. It is necessary to distinguish between gain, profit or net income to the incorporators or members and gain, profit or net income to the corporation as a legal entity.”).

Fundamentally, the use of the property controls the analysis as to whether property is used exclusively for charitable purposes. *Hubbard Press v. Tracy*, 67 Ohio St.3d 564, 566 (1993) (“It is only the use of property in charitable pursuits that qualifies for tax exemption, not the utilization of receipts or proceeds that does so.”); *Benjamin Rose Institute v. Myers*, 92 Ohio St. 252, 266 (1915); *Seven Hills Schools v. Kinney*, 28 Ohio St.3d 186 (1986).

To the extent that non-residential portions of the property are actively used, still the property is used for non-charitable recreational use that is *not* open to the public. Hr. Tr. 15-16, Supp. 5. Indeed, the subject realty contains such amenities as biking and jogging paths, “stocked ponds” for fishing, a swimming pool and hot tub, a basketball court, space for a campfire. S.T. 32 (website), Supp. 76; S.T. 73-74, Supp. 117-18 (application for exemption). But again, these amenities are not open to the public and do not benefit mankind in general or those with a particularized need.

The evidentiary record even supports a finding that the non-residential portions of the property are or have been previously used for non-exempt agricultural purposes. As Robert Hartenstein testified, from 2002 through 2007, the subject property enjoyed current agricultural use valuation (“CAUV”). S.T. 66, Supp. 110 (CAUV Renewal Application); Hr. Tr. 54-56, Supp. 15. CAUV provides reduced real property tax valuation for property used exclusively for agricultural purposes, here for a tree farm. R.C. 5713.30, Appx. 37; Hr. Tr. 55, Supp. 15. Prior to applying for exemption in 2008, however, Innkeeper paid back taxes owed as if the property had not enjoyed the benefit of CAUV for 2005, 2006, and 2007. Hr. Tr. 57, Supp. 15. Nonetheless, the prior history of CAUV shows that to the extent Innkeeper’s non-residential property is used, it has actual or potential value for non-exempt agricultural use.

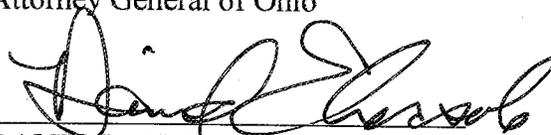
On this record, Innkeeper has not sustained its burden to show that the non-residential portions of the subject property are not held with a view to profit. Thus, Innkeeper has failed to show that the property is held “without the hope or expectation . . . of gain or profit” under *Planned Parenthood*. Similarly, Innkeeper has failed to satisfy its burden under R.C. 5709.121(A)(2) to show that the property is not held with a view to profit. Based upon the record, and in the absence of an active use, the non-residential portions of the subject realty are not used exclusively charitable purposes.

CONCLUSION

Based upon the foregoing, this Court should reverse the Board of Tax Appeals’ unreasonable and unlawful decision holding that appellee Innkeeper’s residential property and vacant land is entitled to charitable exemption. Under this Court’s well-established precedent, the subject realty fails to qualify for charitable exemption pursuant to R.C. 5709.12 and R.C. 5709.121.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "David D. Ebersole", written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Appellee Tax Commissioner's Merit Brief was served upon the following by U.S. regular mail on this 2nd day of September, 2014:

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