

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 No. 2010-2803
	:	
Appellant.	:	

APPELLANT TAX COMMISSIONER'S REPLY BRIEF

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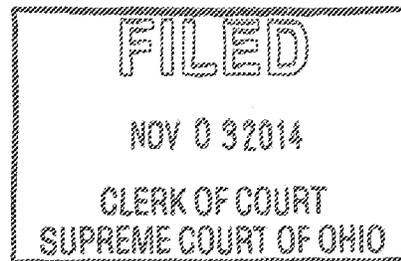


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INTRODUCTION

In this reply brief, the appellant Tax Commissioner has two main points to rebut regarding appellee Innkeeper Ministries, Inc.'s merit brief. *First*, Innkeeper's claim to exemption is defeated because of the Hartenstein family's private, residential use of the realty at issue. The *private* residential use of the realty by Robert and Jan Hartenstein, the Hartenstein family, and invited guests of the Hartensteins' own choosing is *not* "charitable" use.

This Court has long and uniformly held that use of realty for private residential purposes defeats real property tax exemption. In fact, this established principle is perhaps the most basic tenet of Ohio real property tax law, as evidenced by countless decisions of this Court at least as far back as *Gerke v. Purcell*, 25 Ohio St. 229 (1874) (which this Court recently followed with approval in *Anderson/Maltbie Partnership v. Levin*, 127 Ohio St.3d 173, 2010-Ohio-4904, ¶ 20), and as most recently reaffirmed in, *NBC-USA Housing, Inc.-Five v. Levin*, 125 Ohio St.3d 394, 2010-Ohio-1553, ¶ 13; and *First Baptist Church of Milford v. Wilkins*, 110 Ohio St.3d 496, 2006-Ohio-4966, ¶¶ 19-23. Innkeeper's brief provides no reasonable grounds for this Court to depart from its well-established precedent.

Here, the realty at issue is the Hartensteins' primary residence and is used *exclusively* for the benefit of the Hartensteins and their invited guests. There is no use of the property other than exclusive private residential use. There is no "charitable" use of the realty at issue at all, the same as is true of *millions* of other residential homes in this State. Thus, the Court would have to radically reverse its prior precedent, uniformly in effect for over the last 130 years, in order to affirm the decision of the Board of Tax Appeals.

Second, even if the Hartensteins' non-charitable use of the property as their own family home were ignored, Innkeeper's claim to exemption would still fail. Even assuming *arguendo*

that the Hartenstein's guests' private residential use of the Hartensteins' home somehow could be viewed as including a component of charitable activity, any such ancillary, unquantified charitable use of the property would not satisfy the strict construction standard for the "exclusive" charitable use required under R.C. 5709.12 and R.C. 5709.121.

Against this legal and factual foundation, Innkeeper has failed to satisfy its burden to show clear entitlement to charitable exemption for the Hartensteins' primary residence. Innkeeper's own merit brief tacitly concedes this point. Innkeeper absurdly argues that the BTA's decision finding the property to be exempt "shifts the evidentiary burden from Appellee [referring to the Innkeeper] to Appellant [referring to the Commissioner] rendering Appellant's oft mentioned strict construction argument inapplicable." Innkeeper Br. at 8.¹

Indeed, only by attempting to unlawfully shift the burden of proof could Innkeeper's own failure to show any "charitable" use of the property be explained. As detailed in the Commissioner's opening merit brief, for the tax years at issue, Innkeeper failed to quantify any actual use of the private residential property at issue for the benefit of any of the Hartensteins' guests. So, Innkeeper cannot "get to first base" in its claim that the use by its guests was "charitable" in nature, let alone that such use qualifies as the "exclusive" use of the property in furtherance of charitable purposes.

For these reasons, the BTA's decision and order finding the property exempt should be reversed as unreasonable and unlawful.

¹ Contrary to its novel "shifting of the burden" claim, Innkeeper unquestionably carries the burden to "show that the language of the statute 'clearly express[es] the exemption' in relation to the facts of the claim." *Anderson/Maltbie Partnership v. Levin*, 127 Ohio St.3d 178, 2010-Ohio-4904, ¶ 16; R.C. 5715.271. Tax exemption statutes must be strictly construed against exemption because "exemption is in derogation of the rights of all other taxpayers and necessarily shifts a higher burden upon the non-exempt." *Parma Hts. v. Wilkins*, 105 Ohio St.3d 463, 2005-Ohio-2818, ¶ 10.

ARGUMENT

I. Charitable exemption must be denied in this case because the private residential use of the property by the Hartensteins and their personally invited guests does not constitute “charitable” use, let alone exclusive charitable use.

Property must be used exclusively for “charitable” purposes in order to qualify for charitable exemption pursuant to R.C. 5709.121. *First Baptist Church of Milford, Inc. v. Wilkins*, 110 Ohio St.3d 496, 2006-Ohio- 4966, ¶ 15 (“R.C. 5709.121 has no application to non-charitable institutions seeking tax exemption under R.C. 5709.12.”). Put differently, charitable exemption, of course, requires “charity.” And, the same definition of “charity” applies consistently to both Ohio charitable property tax exemption statutes, namely R.C. 5709.12 and R.C. 5709.121. In fact, Innkeeper agrees that activities are deemed charitable under R.C. 5709.121 “if they accord with the standard of charity that [this Court] developed when determining the charitable use of the property directly under R.C. 5709.12(B).” *Dialysis Clinic, Inc. v. Levin*, 127 Ohio St.3d 215, 2010-Ohio-5071, ¶ 27; Innkeeper Brief, at 17-18.

Here, Innkeeper is not entitled to exemption because the activities on the property are not “charitable” under Ohio law. Exemption must be denied because the private residential use of the property by the Hartensteins and the guests whom they personally invite to their country home does *not* constitute “charitable” activity. Charitable exemption must be denied in the absence of “charity.”

A. Over a century of controlling Ohio Supreme Court precedent uniformly holds that distinctly residential property does not qualify for charitable exemption.

Innkeeper’s property is used in a distinctly residential manner that this Court has *never* held charitable in and of itself. The case law is legion. *E.g.*, *Philada Home Fund v. Bd. of Tax Appeals*, 5 Ohio St.2d 135, 139 (1966); *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); *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); *Gerke v. Purcell*, 25 Ohio St. 229 (1874); *Watterson v. Halliday*, 77 Ohio St. 150 (1907).

And for good reason -- *private* residential use of a permanent residence does not provide a *public* benefit that could justify the loss of tax revenue. *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.”). Daily living activities occurring in the home, such as eating, sleeping, leisure activities, and attending to personal hygiene, provide *private* benefits to individuals rather than *public* benefits. *First Baptist Church of Milford* at ¶ 21.

To argue for charitable exemption of a personal residence, Innkeeper mistakenly relies almost exclusively upon a case that did not even decide exemption, namely *Cincinnati Community Kolloel v. Testa*, 135 Ohio St.3d 219, 2013-Ohio-396. There, this Court addressed whether apartment buildings housing Jewish scholars and their families were used exclusively for the Cincinnati Community Kolloel’s charitable educational purposes pursuant to R.C. 5709.121.² Rather than find exemption, this Court held that the BTA misapplied the legal standard to the facts of the case and remanded for the BTA to apply the correct standard. Upon remand, the BTA issued a three-paragraph decision and order granting exemption, but with little explanation and without citing any evidence. *Cincinnati Community Kolloel v. Testa*, BTA Case Nos. 2008-A-1367, 2008-A-1968, 2008-A-1369 (Jan. 15, 2014), unreported, Appx. 1.

² This Court previously held that the landowner in *Cincinnati Community Kolloel v. Testa* was a “charitable institution” under R.C. 5709.121 due to charitable educational activities that occurred at locations other than the apartment buildings at issue in that case. *Cincinnati Community Kolloel v. Levin*, 113 Ohio St.3d 138, 2007-Ohio-1249.

Despite Innkeeper's heavy reliance on *Kollel* as "seminal case authority," the holding of *Kollel* is actually very limited. Innkeeper Brief, at 24. In *Kollel*, the Court did not find any property exempt, let alone residential property. Certainly the *Kollel* case does not authorize charitable exemption in the absence of "charitable" activity. *Kollel* surely does not apply different definitions of "charity" to R.C. 5709.12 and R.C. 5709.121. Nor does the case actually establish a standard for the "exclusive" charitable use required for exempt property under R.C. 5709.121(A)(2).

Innkeeper places great significance on the *Kollel* Court's statement that "no requirement exists in R.C. 5709.121 that a resident be present 'around the clock' to carry out the institutions' purposes[.]" Innkeeper Brief, at 12-13. But the Commissioner does not rely on any "around the clock" rule in this case since charitable activity is completely absent from the premises in the first place. The Commissioner's initial brief mentioned the "on-call" cases only to explain that there may be extraordinary circumstances, inapplicable to this case, where residential property is exempt.

Under this Court's uniform case law, charitable exemption for property "used exclusively for charitable purposes" under R.C. 5709.12 and R.C. 5709.121 has always required the presence of "charitable" activity in all decisions whether issued before or after the *Kollel* decision.

Where, as here, property is used in a distinctly residential manner for private living, charitable activity is lacking and exemption must be denied. There is no dispute that Innkeeper's property is used as the Hartensteins' primary residence. Innkeeper Brief, at 10. Likewise, there is no dispute that the property is *not* open to the public. As Robert Hartenstein testified, only *Christian believers of Jan Hartensteins' personal choosing* may stay there. Hr. Tr. 15-16, Supp. 7. Innkeeper has not asserted that those staying on the property lack the financial means to

provide for themselves. Thus, charitable activity is absent from Innkeeper's distinctly residential property and charitable exemption must be denied.

B. Innkeeper's claim to provide "charity" to those with a *particularized need without regard to ability to pay* is unavailing absent a showing as to the frequency and duration of guests' stay and a showing that guests have a particularized need for goods or services that they cannot independently accommodate.

To create an exemption out of whole cloth, Innkeeper and the Board rely on a nebulous, unsupported concept of "Sabbath Rest" that the Hartensteins allegedly provided to their invited guests. Based upon unsupported representations by Innkeeper, the BTA defined "Sabbath rest in the context of Christian life" as "a time of personal worship, prayer, meditation, reflection, as well as the reading and studying of the Bible." *Innkeeper Ministries v. Testa*, BTA Case No. 2010-2803 (Feb. 28, 2014), unreported, at 3 (hereinafter "*BTA Decision and Order*"). In addition, Innkeeper's merit brief before this Court suggests, without directly stating, that "Sabbath rest" includes the provision to the Hartensteins' invited guests of: (i) Biblical and literary resources; (ii) "lodging, meals, cleaning, and laundry related physical plan amenities"; and (iii) "human resources, counseling, companionship, emotional and spiritual discipleship and support." Innkeeper Brief, at 1.

What Innkeeper and the BTA really mean by "Sabbath rest," however, is ordinary residential living. Each of the activities that the BTA and Innkeeper described as "Sabbath rest" are performed in *millions of homes* across Ohio every day. These activities include personal worship, prayer, meditation, reflection, reading and studying the Bible, eating, sleeping, cleaning, and doing laundry—all activities an individual or family may conduct in their private home on a daily basis. As noted, such distinctly residential use is not charitable under this Court's uniform body of controlling precedent prior and subsequent to *Planned Parenthood*.

In *Planned Parenthood*, this Court set forth the definition of “charity,” following a uniform line of its previous decisions denying exemption for realty used for private, residential purposes, as follows:

[C]harity 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.

5 Ohio St.2d 117, 120 (1966) (emphasis added).

Under *Planned Parenthood*, “charity” requires a legally cognizable benefit to “mankind in general,” or, to a sub-class of those of the general public with a particularized need and *without regard to ability to pay*. Innkeeper admits that it does not provide a benefit to the public generally, *i.e.* “mankind in general.” Innkeeper Brief, at 15-16. Innkeeper further admits that no one on the property has a particularized need for shelter. Innkeeper Brief, at 16.

Nonetheless, after having made these admissions, Innkeeper then incongruously maintains that it provides “charity” to “those in need of advancement and the benefit in particular.” Innkeeper Brief, at 2, 3, 13-14. According to Innkeeper and the BTA, Innkeeper uses the property exclusively for charitable purposes because it allegedly provides “Sabbath rest” to “fulltime Christian workers and pastors.” *BTA Decision and Order*, at 3; Innkeeper Brief, at 1-4, 19. In other words, Innkeeper asserts that it provides charity to “fulltime Christian workers and pastors” with a particularized need for “Sabbath rest.”

Through the lens of *Planned Parenthood*, Innkeeper does not engage in charitable activity because the “Sabbath rest” allegedly provided to its guests is not “charitable.” Innkeeper does *not* provide a benefit to those with a “particularized need” without regard for ability to pay.

Olmsted Falls Bd. of Educ. v. Tracy, 77 Ohio St.3d 393, 397 (1997); *Socialer Turnverein v. Bd. of Tax Appeals*, 139 Ohio St. 622 (1942). In *Olmsted Falls*, this Court explained that a private members-only fraternal organization was not a charitable institution because it “does not advance or benefit mankind in general or those in need of advancement or benefit in particular; it benefits its members.” 77 Ohio St.3d at 397.

Like the fraternal organization in *Olmsted Falls*, Innkeeper is not a charitable institution and does not engage in charitable activity because it does not provide anything to the general public or indiscriminately to those who need it. Innkeeper benefits only those Christian leaders whom Jan Hartenstein subjectively selects as deserving. As Robert Hartenstein testified before the BTA, his wife Jan verbally “screens” Christian leaders to determine whether she subjectively “perceive[s] some type of need.” Hr. Tr. 15-16, Supp. 5; S.T. 29, 35, Supp. 73, 79 (excerpt from Innkeeper website).³ There are no objective criteria. Jan Hartenstein’s undocumented, oral, and wholly subjective “screening process” that discriminates against non-Christians hardly ensures that her guests have a particularized need that they cannot independently accommodate.

In fact, the record developed before the BTA does not *actually* reflect the number of guests who visited the property, how frequently they visited, when, or for how long they stayed. S.T. 73-74, Supp. 117-18 (application for exemption referring to “wounded and weary pastoral couples”). Innkeeper presented no testimony before the BTA in this regard. There are passing references to the number of guests visiting Innkeeper in material submitted to the Commissioner,

³ 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. ___.”

but even those figures refer to years prior to the 2008 through 2010 years at issue here. S.T. 7, 13, 60, Supp. 51, 58, 104.

In addition, Innkeeper has failed to assert that anyone on the property lacks the financial means to “supply that need from other sources.” Under *Planned Parenthood*, providing a benefit to those with a particularized need constitutes charity only if it is provided without regard for the recipient’s ability to pay for the item, *i.e.* “without the ability to supply that need from other sources.” *Bethesda Healthcare, Inc. v. Wilkins*, 101 Ohio St.3d 420, 2004-Ohio-1749, ¶ 39 (“Whether an institution renders sufficient services to persons who are unable to afford them to be considered as making charitable use of property must be determined on the totality of the circumstances”) (underlining added); *Dialysis Clinic, Inc. v. Levin*, 127 Ohio St.3d 215, 2010-Ohio-5071, ¶ 32.

But here, Innkeeper has made no effort to assert, let alone provide, probative evidence showing that, from a financial standpoint, any of the guests invited to the property actually *need* Innkeeper to provide “Sabbath rest,” however defined. In the absence of establishing that the recipients of alleged aid lack the financial means to independently obtain any benefits themselves, Innkeeper has failed to establish that it provides “charitable” goods or services.

To the extent that Innkeeper argues entitlement to exemption due to counseling services provided on the property, that assertion is unsupported by the record as well. 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 Innkeeper turns entirely upon the subjective judgment of Jan Hartenstein.

In fact, the evidentiary record affirmatively 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. However, it remains 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 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. The alleged counseling on the property amounts to little more than personal, perhaps spiritual, conversations between the Hartensteins and their alleged guests, just like countless thousands of Ohio residents engage in every day with their friends and family.

Thus, Innkeeper has not shown that it provides a benefit to the general public or to those with a particularized need without regard for ability to pay. Charitable activity on the property is simply lacking and exemption must be denied.

C. Innkeeper has not satisfied its burden to show *clear* entitlement to charitable exemption and its claim to use the property exclusively for charitable purposes is unsupported by the evidentiary record.

In the absence of charitable activity on the property, Innkeeper turned to legal maneuvering to justify exemption. Relying heavily on the BTA’s decision and order, Innkeeper argues that the burden of proof has somehow “shifted” to the Commissioner and that the BTA’s findings below support its claim to exemption. In this way Innkeeper thereby attempts to excuse itself from having to have demonstrated any actual charitable use of the property. Unfortunately for Innkeeper, it has not satisfied its burden to show clear entitlement to exemption and its claim to use the property exclusively for charitable purposes is unsupported by the evidentiary record.

1. Innkeeper carries the affirmative evidentiary burden to show clear entitlement to exemption.

The standard of review before this Court is well-established. “In reviewing a decision of the BTA, this Court considers whether the decision was “reasonable and lawful.” *A. Schulman, Inc. v. Levin*, 116 Ohio St.3d 105, 2007-Ohio-5585, ¶ 6 (internal citation omitted). This Court “will not hesitate to reverse a BTA decision that is based on an incorrect legal conclusion.” *Id.*, quoting *Gahanna-Jefferson Local Sch. Dist. Bd. of Ed. v. Zaino*, 93 Ohio St.3d 231, 232 (2001).

In considering Innkeeper’s claim to exemption, the BTA was required to follow the standard of review that this Court has set forth. Specifically, the Commissioner’s findings are “are presumptively valid, absent a demonstration that those findings are clearly unreasonable or unlawful.” *Id.*, quoting *Nusseibeh v. Zaino*, 98 Ohio St.3d 292, 2003-Ohio-855, ¶ 10. “Furthermore, it is error for the BTA to reverse the Commissioner’s determination when no competent and probative evidence is presented to show that the Commissioner’s determination is factually incorrect.” *Alcan Aluminum Corp. v. Limbach*, 42 Ohio St.3d 121, 123 (1989); *Hatchadorian v. Lindley*, 21 Ohio St.3d 66 (1986).

Under this standard, Innkeeper unquestionably carries the burden to “show that the language of the statute ‘clearly express[es] the exemption’ in relation to the facts of the claim.” *Anderson/Maltbie Partnership v. Levin*, 127 Ohio St.3d 178, 2010-Ohio-4904, ¶ 16; R.C. 5715.271 (“the burden of proof shall be placed on the property owner to show that the property is entitled to exemption”). The taxpayer claiming exemption must establish a right to exemption by “clear and convincing proof.” *Youngstown Metro. Hous. Auth. v. Evatt*, 143 Ohio St. 268, 273 (1944). “[I]n all doubtful cases exemption is denied.” *Anderson/Maltbie* at ¶ 16, quoting with approval *Youngstown Metro. Hous. Auth.* at 273.

This Court articulated the rationale for this “clear and convincing proof” requirement as following from the principle that “all property shall bear its proportionate share of the cost and expense of government.” *Youngstown Metro. Hous. Auth.* at 273. Indeed, as this Court has emphasized, “exemption is in derogation of the rights of all other taxpayers and necessarily shifts a higher burden upon the non-exempt.” *Parma Hts. v. Wilkins*, 105 Ohio St.3d 463, 2005-Ohio-2818, ¶ 10, quoting with approval *Joint Hospital Services, Inc. v. Lindley*, 52 Ohio St.2d 153, 155 (1977). Thus, exemption must be “strictly construed” against the claim of exemption. *Id.*, quoting *Bethesda Healthcare, Inc. v. Wilkins*, 101 Ohio St.3d 420, 2004-Ohio-1749, ¶ 19.

2. Innkeeper has not satisfied its affirmative evidentiary burden to show clear entitlement to exemption. The record developed before the BTA demonstrates that the BTA’s decision and order must be reversed as unreasonable and unlawful.

Rather than develop a record to show clear entitlement to exemption, Innkeeper relies heavily upon erroneous legal conclusions in the BTA’s decision and order to support its claim. To be sure, “‘the BTA is responsible for determining factual issues and, if the record contains reliable and probative support for these BTA determinations,’ this Court will affirm them.” *Satullo v. Wilkins*, 111 Ohio St.3d 399, 2006-Ohio-5856, ¶ 14 (internal citation omitted).

But the statements in the BTA’s decision and order that Innkeeper relies upon are bare *legal conclusions* unsupported by the factual record. Innkeeper claims that the findings are factual, but in reality they are not. For instance, at page 18 of its merit brief, Innkeeper wrongly claims that the BTA’s erroneous *legal conclusion* as to the charitable activity on the property is actually a *factual finding*. Specifically, Innkeeper relies upon the following statement in the BTA’s decision and order that constitutes an unsupported legal conclusion:

Based upon the foregoing, this Board finds 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, supra*.

BTA Decision and Order, at 4.

Albeit erroneously, the BTA here made the legal determination that the property is used in a “sufficiently charitable” manner to qualify for exemption. To the extent there are factual findings in this statement, the BTA is merely finding that the property is used year round and that more than one Christian leader has visited the property without charge.

These findings and the evidentiary record developed before the BTA *cut against* exemption, not in favor of it. That is, the BTA made few factual findings and none that are inconsistent with the non-exempt residential use of the property by the Hartensteins and their personally invited guests. In fact, the BTA expressly found that the Hartensteins reside on the property and fund Innkeeper through family donations. *BTA Decision and Order*, at 2. Other than a few isolated gifts, there is no evidence in the record that anyone other than the Hartenstein family business, Hartco, and the Hartenstein family itself provides Innkeeper with funding.

Moreover, as noted, the record developed before the BTA does not *actually* reflect the number of guests who visited the property, how frequently they visited, when, or for how long they stayed. In addition, Innkeeper has not shown that visitors to the property have some special need and lack the financial means to independently address that need. Tellingly, Innkeeper even admits that the Hartensteins’ “counseling abilities and credentials” are unsupported in the record. *Innkeeper Brief*, at 16. Innkeeper further concedes that it did not present evidence before the BTA to explain the nature, frequency, and duration of “spiritual conversations” it claims constitute charitable activity. *Innkeeper Brief*, at 16. Because Innkeeper failed to satisfy its evidentiary burden with respect to these matters, key factual findings that would be necessary to find property exempt are conspicuously absent from the BTA’s decision and order.

Certainly the BTA's finding that the subject property is "71.066 acres comprised of vacant land, two houses and various other amenities" cuts against exemption. Dozens of acres of vacant and unused land is hardly "used exclusively for charitable purposes." Innkeeper has not even attempted to satisfy its affirmative burden to show that the property is not held for sale, which is a vital element of its claim to exemption under R.C. 5709.121. Instead, Innkeeper cites *American Chemical Society v. Kinney* as authority that vacant land is exempt. 69 Ohio St.2d 167 (1982). But *American Chemical Society* is inapposite because there, unlike here, the owner institution had a charitable purpose. Further, the taxpayer in *American Chemical Society* satisfied its evidentiary burden, among other ways, through a study that concluded that the vacant property materially advanced that purpose. *Id.* at 171.

Lacking evidence in the record to support its claim, Innkeeper attempts to "shift" the burden of proof to the Commissioner. Specifically, Innkeeper argues that the BTA's decision and order "shifts the evidentiary burden from Appellee to Appellant thereby rendering Appellant's oft mentioned strict construction argument inapplicable." Innkeeper Brief, at 8. Against the longstanding and uniform body of case law discussed above, this "burden shifting" argument must be swiftly dismissed. There can be no question that Innkeeper carries the affirmative evidentiary burden to show clear entitlement to exemption. Since Innkeeper has not satisfied that burden and the evidentiary record shows that the residential property is used in a non-exempt manner, the BTA's decision below must be reversed as unreasonable and unlawful.

II. The "exclusive" charitable use required to qualify for charitable exemption under R.C. 5709.12 and R.C. 5709.121 requires exempt property to satisfy a strict standard for "exclusive" charitable use of the property and certainly does not authorize exemption for any *de minimus* use of the property for charitable purposes.

Assuming *arguendo* that some charitable use of the property were to have occurred on the premises of the realty at issue, Innkeeper's claim to exemption nonetheless would fail

because the BTA did not apply a “strict construction” standard for the statutorily required “exclusive” charitable use. R.C. 5709.121 is a definitional section that defines the phrase “used exclusively for charitable purposes” as that phrase describes exempt property under R.C. 5709.12(B). *Bethesda Healthcare, Inc. v. Wilkins*, 101 Ohio St.3d 420, 2004-Ohio-1749, ¶ 27.

R.C. 5709.121(A) 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:
* * *

(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).

R.C. 5709.121 thus requires exempt property to be used “exclusively” for charitable purposes under a strict construction standard. *Bethesda Healthcare* at ¶ 19. Nonetheless, in an attempt to excuse its failure to have adduced any probative and reliable evidence contained in the record, and to support its reliance upon the BTA’s erroneous legal conclusions, Innkeeper implicitly calls for this Court to ignore the “exclusive” charitable use necessary to qualify for exemption. Innkeeper Brief, at 18-19, citing the *BTA Decision and Order*.

That is, to avoid the General Assembly’s “exclusive” charitable use directive, Innkeeper singularly relies upon what it self-describes as this Court’s “seminal” decision in *Cincinnati Community Kolllel v. Testa*, 135 Ohio St.3d 219, 2013-Ohio-396. But the *Kollel* decision does not support Innkeeper in this respect because the Court did not provide the legal standard to be applied. Instead, the *Kollel* Court reaffirmed the strict construction principle and remanded the case to the BTA to apply the correct legal standard. *Kollel* at ¶ 17.

As set forth in the Commissioner's initial brief, the "exclusive" charitable use required to qualify for tax exemption is not just "any" *de minimus* use "in furtherance or incidental to" Innkeeper's allegedly charitable purposes. R.C. 5709.121 affirmatively employs the word "exclusive" to explain the charitable use of the property necessary to qualify for exemption. If words are to be given meaning, as they must, the word "exclusive" in R.C. 5709.121 cannot be read to mean "any." This Court must determine exemption based upon the "totality of the circumstances," whether charitable use of property rises to the level of "exclusive" charitable use. *Bethesda Healthcare, Inc. v. Wilkins*, 101 Ohio St.3d 420, 2004-Ohio-1749, ¶ 39. With adherence to the strict construction principle, a substantial "charitable" use is required to qualify as "exclusive charitable use."

The statutory language that Innkeeper has focused on, *i.e.*, the phrase "in furtherance or incidental to" in R.C. 5709.121(A)(2), does not somehow obviate the requirement of exclusive charitable use. Instead, it describes the *nature or quality* of an exempt use necessary to qualify for exemption. This language in R.C. 5709.121(A)(2) requires the use of the property to be consistent with an owner institution's purpose in order to qualify for exemption. While explaining the *nature or quality* of exempt use, the phrase "in furtherance or incidental to" does not address the *frequency or duration* of such use necessary to show entitlement to exemption. The frequency or duration of exempt charitable use on a given parcel of realty is "exclusive" use.

Nevertheless, by relying entirely upon the BTA's legal conclusions unsupported by the record, Innkeeper implicitly contravenes the strict construction principle to argue for the "any" use standard of "exclusive" use. Innkeeper Brief, at 18-19. Yet, to broadly construe R.C. 5709.121 as Innkeeper suggests threatens to impermissibly swallow up another tax exemption statute, namely R.C. 5709.12(B). R.C. 1.47(B); *Church of God in N. Ohio, Inc.*, 124

Ohio St.3d 36, 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, statutory language would effectively be rendered meaningless. 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.

Innkeeper’s unconvincing response to these absurd consequences of reading “exclusive” to mean “any” reveals that its position is wholly untenable. Innkeeper first dismisses out of hand the statutory language rendered meaningless under its position while claiming that the “the *Kollel* decision” held property exempt. Innkeeper Brief, at 21. This statement is, at best, highly misleading and, at worst, plainly false.

Again, this Court’s decision in *Kollel* did not find any property exempt. Instead, the *Kollel* Court held that the BTA misapplied the legal standard to the facts of the case and remanded for the BTA to apply the correct standard. Upon remand, the BTA issued a three-paragraph decision and order granting exemption, but with little explanation and without citing any evidence. *Cincinnati Community Kollel v. Testa*, BTA Case Nos. 2008-A-1367, 2008-A-1968, 2008-A-1369 (Jan. 15, 2014), unreported, Appx. 1.

If Innkeeper’s reference to the “*Kollel* decision” means the BTA’s *Kollel* decision on remand, its misleading reliance on a three-paragraph administrative decision before this Court is quite telling. The BTA’s three-paragraph decision on remand provided little explanation and

certainly has no weight to overturn over a century of *this Court's* uniform body of case law *sub silentio*. Innkeeper could not provide controlling case law precedent because this Court's cases have uniformly denied charitable exemption for purely residential property.

Next, Innkeeper ostensibly argues that the strict construction principle applies to some but not all tax exemption statutes. Innkeeper Brief, at 22. However, the strict construction principle has been the touchstone of all Ohio tax exemption statutes for well over a century.

As explained in the Commissioner's initial brief, the strict construction principle applies with equal force to all other property tax exemptions in Chapter 5709, including the "house-of-public-worship," the "public college," and the "public schoolhouse" exemptions. Commissioner's initial brief, at 27-33, citing *Case W. Res. Univ. v. Wilkins*, 105 Ohio St.3d 276, 2005-Ohio-1649 and *Faith Fellowship Ministries, Inc. v. Limbach*, 32 Ohio St.3d 432, 437-38 (1987); *Anderson/Maltbie Partnership v. Levin*, 127 Ohio St.3d 173, 2010-Ohio-4904, ¶ 16.

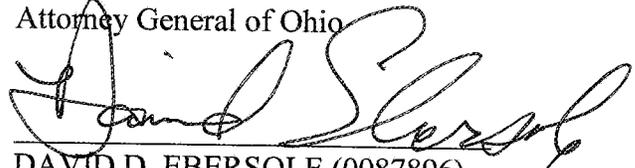
In summary, even if this Court were to determine that some charitable activity occurred at the Hartensteins' personal residence, the allegedly charitable use of the property does not conform to the strict construction standard for "exclusive" charitable use necessary to show entitlement to charitable exemption.

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 are 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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OHIO BOARD OF TAX APPEALS

Cincinnati Community Kolllel,)	
)	CASE NOS. 2008-A-1367,
Appellant,)	2008-A-1368, 2008-A-1369
)	
vs.)	(REAL PROPERTY TAX EXEMPTION)
)	
Richard A. Levin, Tax Commissioner)	DECISION AND ORDER
of Ohio,)	
)	
Appellee.)	

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Entered **JAN 15 2014**

Mr. Williamson, Mr. Johrendt, and Mr. Harbarger concur.

This matter is considered once again by the Board of Tax Appeals on remand from the Supreme Court following the court’s reversal of this board’s decision in *Cincinnati Community Kolllel v. Testa*, 135 Ohio St.3d 219, 2013-Ohio-396. Specifically, in our previous decision and order, we affirmed the final determination of the Tax Commissioner denying exemption, pursuant to the provisions of R.C. 5709.121(A)(2),¹ for three parcels owned by appellant on which are located three buildings used as residential apartments.

¹ The Kolllel seeks exemption pursuant to the provisions of R.C. 5709.121(A)(2), which provides in pertinent part that:

On appeal, the court concluded that we misconstrued the plain language of R.C. 5709.121(A)(2), the statute under which exemption was sought, by improperly imposing "a primary-use test to qualify the subject property for tax exemption." *Cincinnati* at ¶26. Instead, the court held that "the focus of the inquiry should be on the relationship between the actual use of the property and the purpose of the institution." *Cincinnati* at ¶28.

On remand, the court has directed this board "to review the evidence submitted *** and determine whether the subject property was used in furtherance of the kollel's educational purposes." *Cincinnati* at ¶33. Upon our review of the evidence presented, under the standards set out by the court, we find that the subject property was used in furtherance of the Kollel's educational purposes. As such, the final determinations of the Tax Commissioner are hereby reversed and the subject property shall be exempt from taxation for tax years 2004-2007.

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.



A.J. Groeber, Board Secretary

"(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:

"(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."

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Appellant Tax Commissioner's Reply Brief was served upon the following by U.S. regular mail on this 3rd day of November, 2014:

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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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