

In the
Supreme Court of Ohio

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| AKRON GENERAL MEDICAL CENTER | : | |
| | : | |
| Appellant, | : | Case No. 2014-0876 |
| | : | |
| v. | : | |
| | : | On Appeal from the |
| JOSEPH W. TESTA, | : | Ohio Board of Tax Appeals |
| TAX COMMISSIONER OF OHIO, et al. | : | |
| | : | BTA Case No. 2012-426 |
| Appellees. | : | |

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TABLE OF CONTENTS

| | | |
|------|---|----|
| I. | Introduction..... | 1 |
| II. | Background | |
| | A. The Akron General Medical Center Facilities | 3 |
| | 1. The Akron General Medical Center and the Health & Wellness Center | 3 |
| | 2. The Fitness Center is an award-winning, state-of-the-art, membership based exercise and fitness club owned and operated by the AGMC, with limited use by non-members | 4 |
| | B. The Procedural Posture | 6 |
| III. | Proposition of Law: | |
| | A state-of-the-art, full-service fitness center that charges membership fees for the use of its facility, restricts community access, and offers negligible charity is not used exclusively for, or “in furtherance of or incidental to,” a charitable purpose and is not entitled to exemption. | 7 |
| | A. The Standard of Review..... | 7 |
| | 1. Tax exemption statutes are strictly construed against the party claiming exemption and the property owner bears the burden to show entitlement to exemption..... | 7 |
| | 2. The BTA’s decision is to be affirmed when that decision is reasonable and lawful and based on reliable and probative evidence..... | 8 |
| | B. AGMC’s use of the Fitness Center is a non-charitable use of property | 8 |
| | 1. The meaning of “used exclusively for charitable purposes” | 8 |
| | 2. The Bethesda Healthcare decision is controlling precedent | 10 |
| | a. The Fitness Center is a state-of-the-art, award winning, members-only fitness club that has positioned itself as a competitor in the fitness center market..... | 12 |
| | b. The Fitness Center limits and restricts its use by the general public | 15 |
| | c. The Fitness Center provides negligible charity care..... | 16 |

| | | |
|------|--|----|
| d. | Same facts, same legal analysis, same result | 20 |
| 3. | Even pursuant to an explicit statutory analysis, the Fitness Center is not a charitable use of property | 22 |
| a. | The Fitness Center operates “with a view to profit” | 23 |
| i. | The Fitness Center operates as a quid quo pro transaction, evidencing commercial activity and use as a fraternal or social organization..... | 23 |
| ii. | The Fitness Center’s reinvestment of proceeds does not demonstrate a charitable use of property..... | 27 |
| b. | AGMC is a charitable hospital. AGMC’s use of property as the Fitness Center is a kind of use that is inconsistent with AGMC’s charitable purpose and is a use that is charitable only to a <i>de minimus</i> degree..... | 29 |
| i. | AGMC miscomprehends the meaning of the terms “furtherance” and “incidental”..... | 29 |
| ii. | AGMC cannot meet the qualitative and quantitative standards required for exemption | 31 |
| iii. | AGMC’s proposed interpretation of R.C. 5709.121 is contrary to Ohio’s law of charitable use and renders R.C. 5709.12 meaningless. | 34 |
| c. | AGMC’s ownership of the Fitness Center coincides with its use of the Fitness Center..... | 39 |
| IV. | Conclusion | 41 |

TABLE OF AUTHORITIES

| | Page(s) |
|--|----------------|
| Cases | |
| <i>A. Schulman, Inc. v. Levin</i> , 116 Ohio St.3d 105, 2007-Ohio-5585..... | 8 |
| <i>Am. Commt. Of Rabbinical College of Telshe, Inc. v. Bd of Tax Appeals</i> , 156 Ohio St. 376 (1951)..... | 23 |
| <i>American Jersey Cattle Club v. Glander</i> , 152 Ohio St. 506 (1950)..... | 28 |
| <i>Anderson/Maltbie Partnership v. Levin</i> , 127 Ohio St.3d 178, 2010-Ohio-4904..... | <i>passim</i> |
| <i>Beckwith & Associates, Inc. v. Kosydar</i> , 49 Ohio St.2d 277 (1977)..... | 38 |
| <i>Benjamin Rose Institute v. Myers</i> , 92 Ohio St. 252 (1915)..... | 23 |
| <i>Bethesda Healthcare, Inc. v. Wilkins</i> , 101 Ohio St.3d 420, 2004-Ohio-1749..... | <i>passim</i> |
| <i>Church of God in N. Ohio, Inc. v. Levin</i> , 124 Ohio St.3d 36, 2009-Ohio-5939..... | 17, 21, 32, 37 |
| <i>Cincinnati College v. State</i> , 19 Ohio 110 (1850)..... | 7, 35 |
| <i>Cincinnati Community Kollel v. Testa</i> , 135 Ohio St.3d 219, 2013-Ohio-396..... | 21, 29, 31 |
| <i>D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health</i> , 96 Ohio St.3d 250, 2002-Ohio-4172..... | 38 |
| <i>Dialysis Clinic, Inc. v. Levin</i> , 127 Ohio St.3d 215, 2010-Ohio-5071..... | <i>passim</i> |
| <i>First Baptist Church of Milford v. Wilkins</i> , 110 Ohio St.3d 496, 2006-Ohio-4966..... | <i>passim</i> |
| <i>Highland Park Owners, Inc. v. Tracy</i> , 71 Ohio St.3d 405 (1994)..... | 8 |

| | |
|---|---------------|
| <i>Hosp. Service Assn. of Toledo v. Evatt</i> , 144 Ohio St. 179 (1944)..... | 8 |
| <i>Hubbard Press v. Tracy</i> , 67 Ohio St.3d 564 (1993)..... | 28, 29 |
| <i>Lutheran Book Shop v. Bowers</i> , 164 Ohio St. 359 (1955)..... | 25, 28 |
| <i>The Medina Chapter of the Izaak Walton League of America, Inc. v. Limbach</i> (March 30, 1990), BTA Case No., 87-H-1126, 1990 WL 208285 | 27 |
| <i>Northeast Ohio Psych. Inst. v. Levin</i> , 121 Ohio St.3d 292, 2009-Ohio-583..... | 28 |
| <i>Ohio Masonic Home v. Bd. of Tax Appeals</i> , 52 Ohio St.2d 127 (1977)..... | 25, 28 |
| <i>Olmsted Falls Bd. of Edn. v. Tracy</i> , 77 Ohio St.3d 393 (1997)..... | 2, 25, 26, 27 |
| <i>Planned Parenthood Assn. v. Commissioner</i> , 5 Ohio St.2d 117 (1996)..... | 10, 27 |
| <i>Rickenbacker Port Authority v. Limbach</i> , 64 Ohio St.3d 628 (1992)..... | 37 |
| <i>Rural Health Collaborative of Southern Ohio, Inc. v. Testa</i> , S.Ct. Case No. 2014-0963..... | 22 |
| <i>Seven Hills Schools v. Kinney</i> , 28 Ohio St.3d 186 (1986)..... | 2, 7, 24, 28 |
| <i>Socialer Turnverein v. Bd. of Tax Appeals</i> , 139 Ohio St. 622 (1942)..... | 26 |
| <i>Toledo Business & Professional Women’s Retirement Living, Inc. v. Bd. of Tax Appeals</i> , 27 Ohio St.2d 255 (1971)..... | 37 |
| <i>True Christianity Evangelism v. Zaino</i> , 91 Ohio St.3d 117 (2001)..... | 9, 23 |
| <i>Van Dyne Crotty Co. v. Limbach</i> , 53 Ohio St.3d 3 (1990)..... | 38 |
| <i>Welfare Fedn. of Cleveland v. Glander</i> , 146 Ohio St. 146 (1945)..... | 7 |

| | |
|---|-------|
| <i>White Cross Hosp. Assn. v. Bd. of Tax Appeals</i> , 38 Ohio St.2d 199 (1974)..... | 7, 10 |
|---|-------|

Statutes

| | |
|--|---------------|
| I.R.C. 501(c)(3)..... | 20, 38 |
| Am.Sub.H.B. No. 817, 133 Ohio Laws, Pt. III, 2646..... | 39 |
| R.C. 1.47 | 37, 38 |
| R.C. 5709.01 | 7, 35 |
| R.C. 5709.12 | <i>passim</i> |
| R.C. 5709.121 | <i>passim</i> |
| R.C. 5715.271 | 8 |
| R.C. 5717.04 | 8 |
| R.C. 5907.12 | 22 |

I. Introduction

Appellant, Akron General Medical Center (AGMC), is not entitled to charitable real property tax exemption for property that is used by AGMC as LifeStyles, the award-winning, state-of-the-art, members-only fitness center, and the related services of KidStyles, babysitting, and the Sports Performance Center (collectively, the Fitness Center). AGMC's use of the property as a Fitness Center is not a charitable use of property.

AGMC filed a real property tax exemption claim for the 2008 tax year, as owner of the property located in Stow, Ohio. AGMC sought charitable exemption pursuant to R.C. 5709.12 and R.C. 5709.121 for property that it uses as a Health and Wellness Center ("HWC"). Statutory Transcript (ST) at 1, 2. Appellee, Joseph W. Testa, Tax Commissioner of Ohio (Tax Commissioner), split listed the portions of the HWC which AGMC uses charitably. ST at 2. In doing so, the Tax Commissioner declined to exempt the portion of the HWC that is used by AGMC as the Fitness Center. ST at 2.

The Board of Tax Appeals (BTA) properly affirmed the Tax Commissioner's determination, recognizing that the circumstances presented in this case were indistinguishable from the circumstances presented in this Court's controlling precedent, *Bethesda Healthcare, Inc. v. Wilkins*, 101 Ohio St.3d 420, 2004-Ohio-1749. The relevant facts are materially the same, the applicable legal standards are the same, and the result is the same: there is no charitable use of property and exemption pursuant to R.C. 5709.12 or R.C. 5709.121 is properly denied.

Just as in *Bethesda Healthcare, Inc.*, the evidence shows that the Fitness Center is a private, high-end health club facility that is operated for the exclusive use of its membership, with limited and restricted use by the general community. There is a dearth of evidence of charity provided in the form of free or reduced cost memberships to the Fitness Center. And

although some rehabilitation and physical therapy patients of AGMC may trickle through the Fitness Center, AGMC presented no evidence to demonstrate *how* or *how often* those patients used *which parts* of the Fitness Center. Instead, the evidence shows that few of these patients are provided any charitable reduced or free memberships to the Fitness Center. Thus, just as in *Bethesda Healthcare, Inc.*, the totality of the circumstances indicates that “the small number of members able to use the Fitness Center without payment of membership dues does not indicate a charitable use[.]” *Id.* at ¶ 39.

With this appeal, AGMC seeks to avoid the clear application of *Bethesda Healthcare, Inc.* as precedent. But AGMC operates the Fitness Center as a commercial venture, similar to the manner in which fraternal or social clubs are operated. The premise is simple: to use the Fitness Center, one must obtain a membership. This amounts to a quid pro quo use of property and solely for the benefit of paying members. *See, e.g., Olmsted Falls Bd. of Edn. v. Tracy*, 77 Ohio St.3d 393 (1997); *Seven Hills Schools v. Kinney*, 28 Ohio St.3d 186 (1986). Similarly, AGMC may not vicariously attribute the charitable activities of the HWC itself, on the basis that it reinvests proceeds generated from the operation of the Fitness Center to support the charitable operations of the HWC. *Seven Hills School* at 187-188. The profit-generating use of the Fitness Center is not a charitable use of property entitled to exemption pursuant to R.C. 5709.12 or R.C. 5709.121.

The main argument advanced by AGMC is that it is entitled to exemption pursuant to R.C. 5709.121 because its use of the Fitness Center property is “in furtherance of or incidental to” AGMC’s charitable purpose. In this regard, AGMC states that any amount of its charitable use other than “primary,” as required by R.C. 5709.12, is enough for exemption. This Court has held that the relevant inquiry is whether, under a “totality of the circumstances,” the use

advocated as exempt is “sufficient” to indicate a charitable use of the property. *Dialysis Clinic, Inc. v. Levin*, 127 Ohio St.3d 215, 2010-Ohio-5071, ¶ 22, 40, 46; *Bethesda Healthcare Inc.*, 101 Ohio St.3d 420, 2004-Ohio-1749, at ¶ 39. And AGMC cannot meet this standard with respect to the Fitness Center.

This Court has long held that statutes granting tax exemptions are to be strictly construed against the granting of the exemption as they are in derogation of equal rights. *Anderson/Maltbie Partnership v. Levin*, 127 Ohio St.3d 178, 2010-Ohio-4904, ¶ 16. AGMC is asking this Court to disregard this long-established principle of strict construction and apply a new, relaxed standard that has never before been applied in charitable exemption cases. AGMC’s argument is wrong. The evidence demonstrates that AGMC’s use of the property as a Fitness Center fails to meet the statutory requirements for exemption. Thus, if the Court grants an exemption to AGMC for the Fitness Center, the non-exempt taxpayers will bear a disproportionate property tax burden.

For these reasons, this Court should affirm the Tax Commissioner’s and the BTA’s denial of the exemption requested by AGMC for its Fitness Center. The operation of a members-only Fitness Center is not a charitable use of property.

II. Background

A. The Akron General Medical Center Facilities.

1. The Akron General Medical Center and the Health & Wellness Center.

AGMC filed an Application for Real Property Tax Exemption and Remission (“Application”) in 2008.¹ ST at 19. AGMC requested charitable real property exemption from

¹ Subsequent to the submission of the Application, in 2009 AGMC constructed the 40,000 square foot Medical Office Building (MOB) near the HWC. HT at 61, Supp. at 27. The space in the MOB is either leased to physicians and physicians groups not employed by AGMC, occupied by AGMC, or vacant. HT at 69-81, 108-110, Supp. at 29-32, 39-40. The exempt status of the MOB is not at issue in this appeal. BTA Decision at 3, Supp. at 3; Appellant’s Merit Brief at 7.

2005 to the present, pursuant to R.C. 5709.12 and 5709.121, for property and a building called the Health & Wellness Center (the HWC). ST at 19, 20. AGMC sought to exempt 94.78% of the HWC and all the land on which the building sits.

AGMC identified its assorted uses of the property. The HWC facility contains various units, including the emergency and diagnostics departments, a laboratory, physical therapy department, administrative offices, building services, conference room, and common areas and corridor spaces.² ST at 29-32; HT at 100, Supp. at 37. AGMC also identified its Fitness Center as a part of its use of the HWC. ST at 29-32.

2. The Fitness Center is an award-winning, state-of-the-art, membership based exercise and fitness club owned and operated by the AGMC, with limited use by non-members.

The Fitness Center is made up of the LifeStyles exercise and fitness facility, and the related services of KidStyles, a babysitting area and a sports performance center. *Id.* The fitness club industry has recognized the Fitness center as a premier fitness and gym club by awarding it the best hospital-owned center for numerous years. ST at 10, 88, 100. The Fitness Center offers the broadest array of cutting-edge fitness equipment options, including the Cybex Trazer and pneu-max high-speed treadmills and vibration plates, a rock-climbing wall, and over 200 pieces of cardiovascular and weightlifting equipment. Tax Commissioner's Post-Hearing Brief to the BTA at 4; ST at 7, 8, 78-100. The Fitness Center has unparalleled experiences through fitness programming, offering over 60 fitness classes. HT at 177, Supp. at 56. These experiences are led by certified staff professionals, personal trainers, and fitness coaches for its adult and youth

² AGMC also stated in its Application that one of its uses of the property included a spa, a private business called Mario's Spa. ST at 30. AGMC did not request exemption for the use of that space, and the Commissioner did not grant exemption for that use. ST at 2, 30. Since the filing of the Application, Mario's Spa vacated that space and it is now used by AGMC. HT at 68, 102, Supp. at 29, 38.

members. ST at 6, 7, 8, 12, 78-100. The Fitness Center facilities are also available for rent for birthday parties and other events, including weddings. HT at 104, Supp. at 38; Hearing Exhibit C, Supp. at 217; Hearing Exhibit D, Supp. at 218.

The Fitness Center is a membership-based fitness club. The Fitness Center presently has 3714 members and limits its overall membership. Hearing Exhibit 22, Supp. at 196; ST at 32. Upon joining, members sign a contract to the facility in which they agree to pay the initiation, or one-time enrollment, fee and the monthly membership fees. HT at 153-155, 195, Supp. at 50, 51, 61; Hearing Exhibit A, Supp. at 213. Guests are limited to provide an ideal environment for members. HT at 181, Supp. at 57.

The Fitness Center also provides limited charity. Before 2012, the Fitness Center did not have a charity care policy. HT at 140, 141, Supp. at 47. At that time, charity care was provided only informally. *Id.* Once the policy was adopted, the criteria for qualification were stringent: only six no-cost memberships would be provided upon a demonstration of a medical *and* financial need. Hearing Exhibit 21, Supp. at 196. But even after the adoption of that policy, the amount of charity care declined even further. Hearing Exhibit 22, Supp. at 197. Nor is the Fitness Center's charity care policy advertised on the membership contract, so prospective members do not even know to ask if there is a charity policy that may apply. HT at 172, Supp. at 55; Hearing Exhibit A, Supp. at 213. Instead, that determination is left to the discretion of the Fitness Center staff. HT at 172, Supp. at 55. AGMC has several charity care policies of its own, but these do not apply to the Fitness Center. HT at 92, Supp. at 35.

The Fitness Center does offer some discounts to the initiation fee, but the largest discounts – 50% off – are offered to Fitness Center employees and corporate members. HT at 195, 196, Supp. at 61; Hearing Exhibit B, Supp. at 215. There are never any partial

memberships provided for charity or other discounts in the monthly membership fees. *Id.*, HT at 168, Supp. at 54.

AGMC has attempted to demonstrate some charitable use of the Fitness Center. HT at 88, 145-147, Supp. at 34, 48, 49; Hearing Exhibit 22, Supp. at 197. But in this regard, AGMC has not demonstrated *who* used *which parts* of the facility, for *what purpose*, in *what manner*, or for *how long*. AGMC has not demonstrated that its charitable use is anything more than *de minimus*, and this is not enough to meet the standard for charitable exemption.

B. The Procedural Posture

The Tax Commissioner determined that the Fitness Center portion of the HWC property was not entitled to exemption but the Tax Commissioner granted exemption to the remainder of the HWC. ST at 2, 3. In reaching this determination, the Tax Commissioner agreed with the recommendation by the Summit County Fiscal Office that the 55% of the HWC that comprised the Fitness Center should be taxable, and the remaining 44.38% of the HWC should be exempt. The Stow-Munroe Falls City School Board supported the recommendation by the Summit County Fiscal Office.

From that final determination, AGMC appealed to the Board of Tax Appeals (BTA). Notice of Appeal (BTA). The BTA upheld the Tax Commissioner's denial of exemption for the Fitness Center. BTA Decision at 5. AGMC now seeks review of the BTA decision by this Court. Notice of Appeal (Ohio Supreme Court).

III. Proposition of Law:

A state-of-the-art, full-service fitness center that charges membership fees for the use of its facility, restricts community access, and offers negligible charity is not used exclusively for, or “in furtherance of or incidental to,” a charitable purpose and is not entitled to exemption.

A. The Standard of Review

- 1. Tax exemption statutes are strictly construed against the party claiming exemption and the property owner bears the burden to show entitlement to exemption.**

The well-established rule in Ohio is that all property is taxable. R.C. 5709.01. Tax exemptions are the exception to this rule and are a matter of legislative grace. *Bethesda Healthcare, Inc. v. Wilkins*, 101 Ohio St.3d 420, 2004-Ohio-1749, ¶ 20; *Seven Hills Schools v. Kinney*, 28 Ohio St.3d 186 (1986). Accordingly, tax exemption statutes are strictly construed because they “are in derogation of equal rights.” *Cincinnati College v. State*, 19 Ohio 110, 115 (1850). See also *Anderson/Maltbie Partnership v. Levin*, 127 Ohio St.3d 178, 2010-Ohio-4904, ¶ 16; *First Baptist Church of Milford v. Wilkins*, 110 Ohio St.3d 496, 2006-Ohio-4966, ¶ 10; *Welfare Fedn. of Cleveland v. Glander*, 146 Ohio St. 146, 177 (1945). This is because when an exemption is granted, the tax burden falls more heavily on other properties that remain taxable. *Bethesda Healthcare, Inc.* at ¶ 19. “The rationale for granting a tax exemption is that there is a present benefit to the general public from the operation of the charitable institution sufficient to justify the loss of tax revenue.” *Id.*; *White Cross Hosp. Assn. v. Bd. of Tax Appeals*, 38 Ohio St.2d 199, 201 (1974).

The principle of strict construction means that the statute’s language is construed against the exemption and that the property owner must show that the language of the statute “clearly express[es] the exemption” in relation to the facts of the claim. *Anderson/Maltbie Partnership*, at ¶ 16, quoting *Ares, Inc. v. Limbach*, 51 Ohio St.3d 102, 104 (1990); *Hosp. Service Assn. of*

Toledo v. Evatt, 144 Ohio St. 179, 182 (1944). Thus, the property owner bears the burden to show that it meets the statutory requirements for the tax exemption. 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. “In all doubtful cases,” the claim must be resolved against the asserted statutory tax exemption. *Anderson/Maltbie Partnership* at ¶ 16; *A. Schulman, Inc. v. Levin*, 116 Ohio St.3d 105, 2007-Ohio-5585, ¶ 7.

2. The BTA’s decision is to be affirmed when that decision is reasonable and lawful and based on reliable and probative evidence.

In addition to the strict construction standard, when a BTA decision is appealed, this Court is confined to its statutory duties, as set forth in R.C. 5717.04, to determine whether the BTA’s decision was “reasonable and lawful.” *Dialysis Clinic, Inc. v. Levin*, 127 Ohio St.3d 215, 2010-Ohio-5071, ¶ 18; *Bethesda Healthcare, Inc.* ¶ 18. Thus, it is not the function of this Court to substitute its judgment for that of the BTA on factual issues. *Bethesda Healthcare, Inc.* at ¶ 18. If the BTA decision contains reliable and probative evidence for its determinations, this court will affirm. *Id.* See also *Dialysis Clinic, Inc.* at ¶ 18.

B. AGMC’s use of the Fitness Center is a non-charitable use of property.

1. The meaning of “used exclusively for charitable purposes.”

AGMC’s use of the HWC property as the Fitness Center is a non-charitable use of property and does not meet requirements for charitable exemption. R.C. 5709.12(B) provides, “Real * * * property belonging to institutions that is *used exclusively for charitable purposes* shall be exempt from taxation[.]” (Emphasis added.) Thus, to be exempt from taxation pursuant to R.C. 5709.12(B), real property must: (1) belong to an institution and (2) be used for charitable purposes. *Highland Park Owners, Inc. v. Tracy*, 71 Ohio St.3d 405, 406 (1994). The Supreme Court of Ohio has construed the “used exclusively for charitable purposes” language of R.C.

5709.12 to require that the property must be used primarily for charitable purposes to qualify for exempt use. *True Christianity Evangelism v. Zaino*, 91 Ohio St.3d 117, 120-121 (2001).

Related to the foregoing is R.C. 5709.121(A)(2). This provision provides, “Real property * * * belonging to a charitable * * * institution * * * shall be considered as *used exclusively for charitable * * * purposes* by such institution * * * if it meets one of the following requirements:

“ * * *

“(2) It is made available under the direction or control of such institution * * * for *use* in furtherance of or incidental to its charitable * * * purposes and not with the view to profit.”

R.C. 5709.121(A)(2) (emphasis added).

In other words, for R.C. 5709.121(A)(2) exemption determinations, the property use must meet certain standards for quality and quantity: (1) the type of use the property is given must advance, or be causally necessary to, the owner’s purpose and (2) the amount of charitable use occurring on the property must be in excess of a “*de minimus*” use. *Bethesda Healthcare, Inc.*, 101 Ohio St.3d 420, 2004-Ohio-1749, at ¶ 37-39.

R.C. 5709.121 is not an independent charitable use exemption. Instead, this provision provides a definition of “used exclusively for charitable purposes” for exemption under R.C. 5709.12 and links certain property uses to the exclusive-charitable-use exemption of R.C. 5709.12(B). *Dialysis Clinic, Inc.*, 127 Ohio St.3d 215, 2010-Ohio-5071, at ¶ 22. Thus, the requirement that property sought to be exempted pursuant to R.C. 5709.12 must have a charitable use also applies to exemption requests pursuant to R.C. 5709.121. *Id.* at ¶ 22-24. *See, also, Bethesda Healthcare, Inc.; True Christianity Evangelism*, 91 Ohio St.3d at 120-121.

There is no definition of “charitable use,” but “charity” is defined as follows:

In the absence of a legislative definition, ‘charity,’ in the legal sense, 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.

Planned Parenthood Assn. v. Commissioner, 5 Ohio St.2d 117 (1996), paragraph one of the syllabus. According to this definition, “charity” reflects the principle that tax exemption is appropriate only where there is a general public benefit, or a benefit to those with a particularized need, to justify the loss of tax revenue. *First Baptist Church of Milford*, 110 Ohio St.3d 496, 2006-Ohio-4966, at ¶ 10; *The White Cross Hosp. Assn.*, 38 Ohio St.2d at 201.

In any event, no single test determines whether an institution is conducted in an exclusively charitable manner and no minimum threshold of “charity” is required to demonstrate charitable use of a property. *Dialysis Clinic, Inc.*, 127 Ohio St.3d 215, 2010-Ohio-5071, at ¶ 40; *Bethesda Healthcare, Inc.*, 101 Ohio St.3d 420, 2004-Ohio-1749, at ¶ 37. In this regard, the totality of the facts and circumstances must be considered, and the substance of the operations examined, to determine whether an institution is entitled to exemption. *Bethesda Healthcare, Inc.* at ¶ 37.

2. The *Bethesda Healthcare* decision is controlling precedent.

When the BTA affirmed the Tax Commissioner’s final determination, it relied on this Court’s decision in *Bethesda Healthcare, Inc.* The BTA was correct to rely on this precedent because the circumstances and applicable legal standards presented in that case are materially the same to the circumstances presented by AGMC with respect to its use of the Fitness Center. Appellant’s Merit Brief at 28, 33.

In the *Bethesda Healthcare* decision, this Court examined whether the payment for services received negated the charitable nature of an institution’s activities. The Court began its

discussion with the statement that the operation of a fitness center did not define whether property is being used in a charitable manner:

[T]he mere fact that a charge is made for use of the Fitness Center does not in and of itself negate consideration of the use being a charitable use. However, when charges are made for the services being offered, we must consider the overall operation being conducted to determine whether the property is being used exclusively for charitable purposes.

Bethesda Healthcare Inc. at ¶ 35, 36. The Court ultimately concluded that based on the totality of the circumstances, the “small number of members able to use the Fitness Center without payment of membership dues does not indicate a charitable use under the facts of this case.” *Id.* at ¶ 39. As a consequence, a charitable exemption pursuant to R.C. 5709.12 or R.C. 5709.121 was denied to Bethesda Healthcare. *Id.*

AGMC goes to great lengths in its Merit Brief to distinguish *Bethesda Healthcare, Inc.* In this regard, it points out that it is a not-for-profit hospital, with seven off-site locations called community health centers. ST at 114, 135; HT at 33, Supp. at 20. One such community health center is the HWC. HT at 33-34, Supp. at 20-21. AGMC’s mission is to “improve the health and lives of the people in the communities we serve.” HT at 136, Supp. at 46. AGMC further characterizes the Fitness Center as a medically-based facility, noting that it operates as a department of AGMC itself. See, e.g., HT at 114; Supp. at 41. In further support, AGMC points to its highly trained staff at the Fitness Center: a “blend of professionals; degreed exercise physiologists, physical therapists, sports performance trainers, athletic trainers, [and] cardiopulmonary rehab nurses,” who possess proper specializations and certifications and work under the supervision of a medical director. ST at 12; HT at 120, 129; Supp. at 42, 44.

But any factual distinction that may be present between the two cases is not relevant to the determinative criterion presented in this case: whether AGMC uses the Fitness Center

property charitably. It is in this way that this case is just like *Bethesda Healthcare*: the property used as the Fitness Center is “being used as a private health facility for the exclusive use of paying members,” with little access granted to the general public and little charity provided to those who are financially unable to pay. *See Bethesda Healthcare*, 101 Ohio St.3d 420, 2004-Ohio-1749, at ¶ 8.

a. The Fitness Center is a state-of-the-art, award winning, members-only fitness club that has positioned itself as a competitor in the fitness center market.

Since its opening, AGMC has been awarded the “#1 Hospital Owned Center in the Nation,” by Club Industry Magazine for its operation of the Fitness Center, as well as other awards. ST at 10, 88, 100.

The Fitness Center has the types of amenities found in private, high-end, fitness clubs. The Fitness Center offers its members access to more than 200 pieces of cardiovascular and weight equipment, three swimming pools (an indoor lap, recreational, and warm-water), a steam room, a sauna, a whirlpool, indoor and outdoor walking tracks, a youth fitness area, an indoor rock wall and a gymnasium. See Tax Commissioner’s Post-Hearing Brief to the BTA at 4; ST 7, 8, 12, 78-100. The Fitness Center also provides a Cybex Trazer, a device that “launches you into an interactive virtual world where your reaction time, acceleration, speed, power, and balance drive on-screen activities.” ST at 94. More than 70 land and water aerobics classes and many fitness and wellness programs, described as including “everything you can imagine,” for all ages and abilities are offered at the Fitness Center. *Id.*, HT at 177, Supp. at 56. For the ease of detailing all of the Fitness Center activity options, the Fitness Center publishes a full-scale program schedule. ST at 89-100. The Fitness Center is also specially designed, containing

specialized equipment, such as expensive, specifically-installed, shock-absorbing features in the floors and special surfaces on the walking track. HT at 178, 203, Supp. at 57, 63.

The Fitness Center staff includes athletic trainers, personal trainers, and exercise physiologists, nutritionists, and wellness experts, but there is no requirement that a member must see any of these staff prior to using the facility. ST at 12; HT at 120, 129, 175, 176; Supp. at 42, 44, 56. The Fitness Center also provides personal trainers to the members who choose that service. ST at 83. Or a member could sign-up for multiple sessions in the Sports Performance Center. Here, athletes of all levels can receive personalized coaching from “degreed and certified staff” that “will help you take it to the next level- helping you ignite, excel and achieve.” ST at 6. See also HT at 144, Supp. at 48. The Sports Performance Center has expert equipment such as the pneu-max high speed treadmill and the pneu-max vibration plate. ST at 6, 7; HT at 144, Supp. at 48. The Sports Performance Center offers a monthly program or a 12-session package, for between 60 to 90 minutes a session, at custom pricing of \$17 to \$32 an hour. ST at 7, 9.

The Fitness Center also offers its members on-site babysitting and KidStyles, a supervised play area for children aged 5-12 years old. ST at 93. In this space, the children can climb on the indoor rock-climbing wall, circuit train, and participate in gym activities, group games, jump roping, parachute games and free play. *Id.* Holiday and summer day camp programs are offered, in addition to special programs, such as parents’ night out parties, preschool activity sessions, and themed holiday parties. ST at 93, 94; HT at 103, 150, Supp. at 38, 50; Hearing Exhibit E, Supp. at 220.

The Fitness Center hosts birthday parties for its members. HT at 151, Supp. at 50. This programming has 1½-hour packages to 3½-hour packages, and depending on the option chosen

can include a cake and supplies, an activity, and time in an inflatable “jump house” for up to 20 people. Hearing Exhibit C, Supp. at 217. The cost for this service is between \$175 to \$425 and upgrades are available for additional food items, such as pizza and soda drinks, and additional guests over the 20 person limit. *Id.* Other parts of the Fitness Center are also available for rent, such as the gyms, pools, and the rock climbing wall, for late- and over-night events. Hearing Exhibit D, Supp. at 218; HT at 151, Supp. at 50. The Fitness Center has also hosted weddings. HT at 104, Supp. at 38.

The summer camp opportunities are available for children ages 3-14, and programming options include a day camp, a basketball camp, a water safety camp, and a summer swim camp. Hearing Exhibit E, Supp. at 220. Pre- and post-camp care is also offered. *Id.*

The Fitness Center is a membership-based facility. In 2009, the Fitness Center had 1889 membership units, which made up 3519 individual members.³ Hearing Exhibit 22, Supp. at 197. In 2013, the Fitness Center had 1940 membership units, comprising 3714 members. *Id.* See also HT at 168, Supp. at 54.

When members join the Fitness Center, they sign a contract and agree to pay the initiation fee, or a one-time enrollment fee, and monthly membership charges that range between \$55 and \$111/month, depending on the type of membership purchased (i.e., single person, couple, whole family, or corporate). HT at 153-155, 195, Supp. at 50, 51, 61; Hearing Exhibit A, Supp. at 213. A family membership is \$111/month, or \$1332 a year. HT at 153-155, 195, Supp. at 50, 51, 61. The Fitness Center is coy with its rates, too. The rates are not listed online for a potential member’s general review and consideration. Instead, the potential member must

³ A membership unit refers to the type of membership purchased: a family, couple, or individual. HT at 196-197, Supp. at 61. Thus, a family membership unit could be comprised of three individuals, or six, depending on the number of persons in the family.

submit an inquiry and personal information. See Tax Commissioner's Post-Hearing Brief to the BTA at 18.

AGMC limits the number of Fitness Center members to allow for comfortable member access without overcrowding. ST at 32; HT at 181, 185, 198, Supp. at 57, 58, 62. Members are permitted to bring escorted guests, but only on one of the eight designated "Guest Days," which are typically around the holidays. ST at 80, 92. Guest passes are \$10.75 for adults and \$5.75 for children. *Id.* In general, AGMC limits the guests within the Fitness Center because the focus is on creating an optimal environment for its members. HT at 181, Supp. at 57.

The fitness center in *Bethesda Healthcare, Inc.* also advertised itself as a "premiere fitness center" and contained a "multitude of state-of-the-art exercise facilities." *Id.* at ¶ 9. That fitness center had three pools, a sports arena, two exercise studios, conference rooms, a nursery, a children's activity area, a children's gym, outdoor sand volleyball courts, and an outdoor basketball court. *Id.* at ¶ 10, 11. Members who joined the fitness center in *Bethesda Healthcare Inc.* paid an initiation fee and a monthly membership fee, and completed a health profile prior to using the fitness center. *Id.* at ¶ 12, 13.

In other words, just as in *Bethesda Healthcare, Inc.*, the primary beneficiaries of AGMC's "#1 Hospital Owned Center in the Nation," are those persons who choose to pay the membership fee to, and who become members of, the Fitness Center.

b. The Fitness Center limits and restricts its use by the general public.

Another consideration in the *Bethesda Healthcare, Inc.* decision was whether charitable benefits were extended to the general public. *Id.* at ¶ 38. In this case, the Fitness Center's focus of providing a quality experience to its members is apparent upon the documented lack of access the general public has to the facility.

The evidence presented at the BTA hearing demonstrated that a Fitness Center swimming pool was made available to local emergency squads for aquatic training and to the local high school swim team for practice and swim meets. ST at 85; HT at 125, 145-146, Supp. at 43, 48, 49. AGMC even placed an annual dollar value on those services. HT at 145-146, Supp. at 48, 49. But that dollar value did not indicate how much actual time the Fitness Center is actually dedicated to use by these members of the general public. Instead, the record shows that the Fitness Center hosted two swim meets in 2008 and only one in 2009. ST at 85, 97.

In a similar vein, AGMC provided a value for what it considers to be other “donated services” to the community. HT at 147, Supp. at 49. Again, that dollar value did not indicate how much actual time the Fitness Center was actually dedicated to community use. Nor did AGMC provide concrete examples of the manner or amount of use, and the portions of the Fitness Center that were made available for use by non-members. But the conference rooms are always available for rent. Hearing Exhibit D, Supp. at 218.

The fitness center in *Bethesda Healthcare, Inc.* also made some of its facilities available to the public, such as access to the warm-water-therapy pool for arthritis patients and free cholesterol screenings. *Id.* at ¶ 16. Some community programs occurred in the facilities. *Id.* Non-members would pay a participation in basketball and volleyball leagues. *Id.* But this degree of community availability was insufficient to meet the standard for charitable exemption. *Id.* at ¶ 38, 39. Similarly, AGMC has not demonstrated that enough use of the Fitness Center is made available to the general public so that the charitable use requirement is met.

c. The Fitness Center provides negligible charity.

In its consideration of this matter, the BTA recognized that the degree of charity use provided by AGMC to those who wish to use the Fitness Center, but are financially unable to

afford membership, is directly relevant to the question of exemption. BTA Decision at 4, Supp. at 4. In the healthcare context, entitlement to the charitable use exemption requires a demonstration that services are provided on a “nonprofit basis to those in need, without regard to race, creed, or ability to pay.” *Dialysis Clinic, Inc.*, 127 Ohio St.3d 215, 2010-Ohio-5071, at ¶ 26; *Church of God in N. Ohio, Inc. v. Levin*, 124 Ohio St.3d 36, 2009-Ohio-5939, ¶ 19.

The official Fitness Center charity care policy adopted in 2012, five years after the Fitness Center opened. Hearing Exhibit 21, Supp. at 196. According to this policy, only 12 six-month, no-cost memberships are available at any given time, and these brief no-cost memberships are available only if an individual meets a demonstrated financial *and* medical need. Hearing Exhibit 21; Supp. at 196; HT at 139, 170, Supp. at 47, 55. AGMC has several charity care programs that apply to its patients, such as the Hospital Care Assurance Program, the Discount Program for the Uninsured, called CARE, the Traditional Charity Care Program, and the Self-Pay Qualified Adjustment (for uninsured hospital patients. HT at 45, 47, 53, Supp. at 23, 24, 25; Hearing Exhibits 9, 11, 21, Supp. at 125, 167, 196. But none of these programs apply to Fitness Centers members, who must qualify under the Fitness Center’s more stringent and limited financial *and* medical need policy. HT at 92, Supp. at 35.

Prior to 2012, the Fitness Center did not even have a charity policy. HT at 140, 141, Supp. at 47. During this time, charity memberships were granted informally and only a small percentage of the Fitness Center’s membership unit base received a waiver of the monthly membership fee, ranging from 1.8% in 2008 to the maximum of 3% in 2010.⁴ Hearing Exhibit

⁴ The term “membership unit” refers to the type of Fitness Center membership purchased and not the total individual number of Fitness Center members. See footnote 3.

22, Supp. at 197.⁵ But since the adoption of the official policy, the percentage of charity memberships has declined even further. In 2012, under the terms of the policy, 1.7% of the Fitness Center’s membership units received a charity membership and through August of 2013, only 5 of the charity memberships had been offered, amounting to .2% of the membership units. Hearing Exhibit 22, Supp. at 197. Even if all 12 no-cost memberships had been offered, only .6% of the membership units would have been charitable.

Moreover, the “charity” is only a discount of the enrollment fee, and payment of the full monthly membership fee is required of the recipients. HT 195, 196, Supp. at 61; Hearing Exhibit B, Supp. at 215 (discounts pertain to the enrollment fee). As a practical matter, under the stringent qualification regime of the “official policy” – which requires a medical *and* financial need, in contrast to the standard set forth in *Dialysis Clinic, Inc.*, 127 Ohio St.3d 215, 2010-Ohio-5071, at ¶ 26 – only short-term, nominal charity memberships are provided to those who need assistance.

The Fitness Center does not provide partial memberships and to the extent fee reductions are provided, they are only one-time *discounts* on the initiation, or enrollment, fee. HT 195, 196, Supp. at 61; Hearing Exhibit B, Supp. at 215. In this regard, the enrollment fee reduction is simply akin to a coupon and the member remains on the hook for the on-going, full monthly membership fee. HT 195, 196, Supp. at 61. And even then, to the extent that AGMC provides discounts to its enrollment fee, the largest reduction – 50% off the enrollment fee – is granted to AGMC employees and employees of companies that pay a supplemental fee, the annual

⁵ AGMC’s Hearing Exhibit 22 indicated the following:

| | <u>2008</u> | <u>2009</u> | <u>2010</u> | <u>2011</u> | <u>2012</u> | <u>2013</u> |
|---------------------------------|-------------|-------------|-------------|-------------|-------------|----------------|
| Number of Membership Units for: | 1429 | 1889 | 1916 | 1965 | 1992 | 1940 (Jan-Aug) |
| Number of Donated Memberships: | 26 | 48 | 58 | 39 | 35 | 5 (Jan-Aug) |
| Percent of Donated Memberships: | 1.8% | 2.5% | 3% | 1.9% | 1.7% | .2% (Jan-Aug) |

corporate fee that entitles the company to a “menu of wellness & business related services.” Hearing Exhibit B, Supp. at 215. *There is never any discount in the monthly membership fees.* HT at 168, Supp. at 54. This is hardly the quality or quantity of charity envisioned within the standards for charitable use.

The Fitness Center’s membership application form is another indicator of the Fitness Center’s lack of interest to provide charity use of its facilities. The membership application does not mention that charity in the form of a no-cost membership may be available if the proper qualifications are met. Hearing Exhibit A, Supp. at 213; HT at 172, Supp. at 55. To the contrary, the Fitness Center staff assesses a potential member’s need for charity. HT at 172, Supp. at 55. Simply stated, the Fitness Center does not promote the fact that any charity policy exists and it relies on the highly subjective and discretionary perceptions of its staff to identify charity candidates. Prospective members *do not even know to ask* if there is a charity policy that may be applicable to them.

There was some testimony at the BTA hearing that the Fitness Center accommodates a number of rehabilitation and physical therapy patients. HT at 88, Supp. at 34. To this end, AGMC provided an annual count of the number of rehabilitation and physical therapy patients who used the Fitness Center. Hearing Exhibit 22, Supp. at 197. But AGMC did not indicate *how, how often, or what part* of the facilities these patients used. Similarly, AGMC did not indicate how many of these patients actually became Fitness Center members at the end of their treatment. HT at 173, Supp. at 55. Anyway, to the extent that any of these patients would need charity care, AGMC provides that care through the Hospital Care Assurance Program, the Discount Program for the Uninsured, the Traditional Charity Care Program, or the Self-Pay

Qualified Adjustment and not the Fitness Center charity care policy. Appellant's Merit Brief at 24; HT at 105, Supp. at 38.

In *Bethesda Healthcare, Inc.*, eight scholarships were available on a no-cost basis. *Id.* at ¶ 15. Some partial scholarships were provided, but Bethesda Healthcare did not demonstrate how many. *Id.* Employees of the fitness center operator, and corporate members, received the largest reduction in membership fees.⁶ *Id.* at ¶ 12. Persons who completed physical, occupational, or cardiac rehabilitation could obtain a three-month membership to the fitness center, but at the end of the three months, the person had to convert to a regular membership. *Id.* Only about 50 persons participated in this option. *Id.*

The similarities between *Bethesda Healthcare, Inc.* and AGMC's Fitness Center with respect to access to charity are extensive. And in the same way that this Court denied charitable exemption in *Bethesda Healthcare, Inc.* because of "the small numbers of members able to use the Fitness Center without payment of membership dues," AGMC's request for charitable exemption for its use of the Fitness Center should also be denied. *Id.* at 39.

d. Same facts, same legal analysis, same result.

This Court has stated that "no absolute percentage" determines "whether an institution renders sufficient services to persons who are unable to afford them." *Bethesda Healthcare, Inc.*, 101 Ohio St.3d 420, 2004-Ohio-1749, at ¶ 39. *See also Dialysis Clinic, Inc.*, 127 Ohio St.3d 215, 2010-Ohio-5071, at ¶ 40, 46. But based upon the three considerations above, AGMC's use of the Fitness Center is indistinguishable from *Bethesda Healthcare, Inc.* The facts and circumstances are materially the same and, accordingly, the same legal analysis – whether

⁶ Bethesda Healthcare, Inc., an I.R.C. 501(c)(3) organization established to carry out the purposes of Bethesda Hospital, leased the fitness center property to TriHealth, as the operator of the fitness center. TriHealth was also a 501(c)(3) organization formed by Bethesda Hospital and Good Samaritan Hospital. *Bethesda Healthcare, Inc.* at ¶ 2, 12.

AGMC “renders sufficient services to persons who are unable to afford” a membership to the Fitness Center – applies. *Bethesda Healthcare Inc.* at ¶ 39; *See also Dialysis Clinic, Inc.*, 127 Ohio St.3d 215, 2010-Ohio-5071, at ¶ 26; *Church of God in N. Ohio, Inc.*, 124 Ohio St.3d 36, 2009-Ohio-5939, at ¶ 19. Accordingly, the BTA’s decision to apply the same legal analysis as in *Bethesda Healthcare, Inc.*, and to reach the same legal conclusion as in *Bethesda Healthcare, Inc.*, – that the charitable exemption requirements were not met – was correct. To the extent AGMC argues otherwise, it is wrong.

Moreover, the recent decision of *Cincinnati Community Kollel v. Testa*, 135 Ohio St.3d 219, 2013-Ohio-396, did not change the proper legal standard required for charitable exemption. Instead, *Kollel* only held that the BTA misapplied the legal standard to the facts of that case and remanded the case to the BTA to apply the correct standard. *Id.* at ¶ 33. In other words, the legal standard for charitable exemption after the *Kollel* decision is the same as it was before the *Kollel* decision.

Thus, just as in *Bethesda Healthcare, Inc.*, upon consideration of the totality of the circumstances presented in this matter, “the small number of members able to use the Fitness Center without payment of membership dues does not indicate a charitable use under the facts of this case.” 101 Ohio St.3d 420, 2004-Ohio-1749, at ¶ 39. AGMC’s Fitness Center is not a charitable use of property and AGMC’s use of the Fitness Center is not entitled to charitable exemption.⁷

⁷ The Ohio Hospital Association has filed an amicus brief asserting that the BTA erred because it held that some amount of unreimbursed care, or charity, is necessary for charitable exemption. Amicus Brief at 3. In many respects, the Tax Commissioner does not dispute the legal standards set forth by amicus, such as that in the healthcare context, the entitlement to the charitable use exemption requires a demonstration that services are provided on a “nonprofit basis to those in need, without regard to race, creed, or ability to pay.” *Dialysis Clinic, Inc.*, 127 Ohio St.3d 215, 2010-Ohio-5071, at ¶ 26. But such consideration also “must be determined on

3. Even pursuant to an explicit statutory analysis, the Fitness Center is not a charitable use of property.

In an apparent recognition of the applicability of the *Bethesda Healthcare, Inc.* decision, AGMC attempts to distance itself from this precedent. Accordingly, AGMC contends that the *only* proper consideration of its claim for exemption requires an *explicit* recitation and rote analysis of each element of the exemption statute, and that the BTA erred because it did not provide such an analysis. Appellant’s Merit Brief at 19.

Again, AGMC is wrong. *First*, in *Bethesda Healthcare, Inc.*, this Court engaged in an analysis that detailed the “used for charitable purposes” elements of R.C. 5907.12 and R.C. 5709.121 and applied those elements to the facts of that case. *Bethesda Healthcare, Inc.*, at ¶ 21-29; 33-39. And in this regard, this Court concluded that the operation of a fitness center was not a charitable use and exemption was properly denied pursuant to R.C. 5709.12 and R.C. 5709.121. *Id.* at ¶ 21, 39. The BTA applied the very same legal analysis used in *Bethesda Healthcare, Inc.* to the indistinguishable circumstances presented by AGMC in connection with its use of the Fitness Center, and reached the same legal conclusion. BTA Decision at 4-5, Supp. at 4-5. The BTA’s analysis of this matter was correct and consistent with this Court’s precedent.

Second, even if an explicit and rote statutory analysis were applied to AGMC’s claim for exemption, the conclusion is the same: AGMC’s use of the Fitness Center is not a charitable use

the totality of the circumstances; there is no absolute percentage.” *Bethesda Healthcare, Inc.*, 101 Ohio St.3d 420, 2004-Ohio-1749, ¶ 39; *Dialysis Clinic, Inc.*, at ¶ 40, 46.

In this case, the totality of the circumstances include not only AGMC’s lack of charity access to the Fitness Center, but the exclusive and members-only operation and nature of the Fitness Center facility itself, and the general lack of community access. Under the facts of this case, a non-charitable use is demonstrated beyond just the nominal amount of charity provided.

Because this case is factually and legally consistent with *Bethesda Healthcare, Inc.*, and the principles from *Bethesda Healthcare, Inc.* directly apply and are outcome determinative, perhaps the more appropriate case for amicus to raise its proposition of law is the pending case of *Rural Health Collaborative of Southern Ohio, Inc. v. Testa*, S.Ct. Case No. 2014-0963, in which the question raised by the amicus’ proposition of law is directly addressed.

of property pursuant to the statutes. In this regard, AGMC's use of the Fitness Center: (1) is to operate it as a commercial venture, similar to a fraternal or social club, inconsistent with the "not with the view to profit" standard, (2) does not comport with the "in furtherance of or incidental to" standard, and (3) is not "under the direction or control" as that term is set forth in the statute. R.C. 5709.12; R.C. 5709.121(A)(2).

a. The Fitness Center operates "with a view to profit."

A central element for considering exemption is that the property must be used without any view to profit by the institution. R.C. 5709.121(A)(2). *See also True Christianity Evangelism*, 91 Ohio St.3d at 120-121; *Am. Comm. Of Rabbinical College of Telshe, Inc. v. Bd of Tax Appeals*, 156 Ohio St. 376 (1951), paragraph one of the syllabus (interpreting former G.C. 5353, recodified as R.C. 5709.12); *Benjamin Rose Institute v. Myers*, 92 Ohio St. 252 (1915) (all for the principle that R.C. 5709.12 inherently includes the limitation that the property must be used without any view to profit). As detailed next, the Fitness Center fails to meet this standard in two ways.

i. The Fitness Center operates as a quid quo pro transaction, evidencing commercial activity and use as a fraternal or social organization.

Access to the Fitness Center is provided in the form of a quid pro quo, or a commercial, transaction solely for the benefit of the paying members. All the benefits of the Fitness Center are provided only upon the payment of the monthly membership fee. In this way, the Fitness Center is used primarily to benefit only the Fitness Center members, and not the general public or any special class of persons, as required by the definition of "charity." The commercial characterization of the Fitness Center use is demonstrated in three ways.

First, the Fitness Center membership agreement contract is a commercially binding agreement. Upon signing the membership agreement contract, the member assents to monthly

charges on a credit card or electronic fund transfers from a checking account. Hearing Exhibit A, Supp. at 213. This contract reflects the commercial nature of the transaction: the consumer/new member has the right to cancel within three business days of the joining date and consumer/new member “agrees to pay collection costs incurred by the Center in collecting any past due amounts, including court costs and reasonable attorneys fees.” Id. p 2, Supp. at 214. The membership agreement contract is intended to provide a sustained income stream to the Fitness Center, with financial consequences to the member upon default.

Second, beyond the payment of the monthly membership fee, the Fitness Center charges additional amounts for a number of the services it provides. Personal trainers for individualized fitness attention are available for \$45/session. ST at 95. Sports Performance Center coaching is available between \$17 and \$32/hour, depending on the program used. ST at 7. Special summer and day camps are available to the children of members at a rate of \$35 to \$150 each week. Hearing Exhibit D, Supp. at 218; HT at 150, Supp. at 50. The Fitness Center advertises that it will host birthday parties for the children of members, at a cost between \$175 to \$425 depending on the amenities chosen and number of guests. Hearing Exhibit C, Supp. at 217. And specific portions of the Fitness Center can also be rented, such as the rock climbing wall for \$175/hour, the pool for \$200/hour (with a two hour minimum), and the gym for \$100/hour. Hearing Exhibit D, Supp. at 218.

The bottom line is: to use the Fitness Center, one must pay the necessary fees, whether that is a membership fee or a special program fee. This is not a charitable use of the property. Rather, it is the quintessential example of a quid pro quo transaction; there is an exchange of goods or services in exchange for receiving something in return. *See, e.g., Seven Hills Schools*, 28 Ohio St.3d at 199 (non-profit educational institution that used property to operate a “clothing

exchange” where donated used school uniforms were sold in exchange for money did not qualify for charitable exemption); *Ohio Masonic Home v. Bd. of Tax Appeals*, 52 Ohio St.2d 127, 130 (1977) (property used for commercial farming and the sale of crops in exchange for money did not qualify for exemption); *Lutheran Book Shop v. Bowers*, 164 Ohio St. 359 (1955) (non-profit corporation that used property as a Christian literature store and operated on a nonprofit basis did not qualify for charitable personal property exemption).

There may be some use of the Fitness Center by the general public, but it is on an invitation-only basis. Nor has AGMC has indicated how, or how often, the rehabilitation and physical therapy patients used which parts of the Fitness Center, how many patients ultimately became Fitness Center members, or that the Fitness Center’s specific charity care policy even applied to these patients. Thus, as a general principle, the use of the Fitness Center is conditioned on being a member of the Fitness Center.

Third, AGMC operates the Fitness Center as a members-only organization, akin to a social or fraternal organization. And when an organization closes its property to the public and declines to provide a benefit to the public-at-large, the property is not used exclusively for charitable purposes. *Olmsted Falls Bd. of Edn.*, 77 Ohio St.3d at 397. The Fitness Center is this type of organization.

In *Olmsted Falls*, this Court denied exemption for property held by a group that operated the Donauschwaben German American Cultural Center. 77 Ohio St.3d at 398. The property included a cultural center, which contained an assembly room with a stage, meeting rooms, a dance floor, a kitchen, offices, a bowling alley and an indoor soccer field with locker rooms, and outdoor recreation areas, such as soccer fields, tennis courts, a picnic area, a lake and a playground. *Id.* at 393. The group hosted events such as dinners, dances, fish fries, carnivals,

Octoberfests, and balls and occasionally invited the general public to some these events. *Id.* at 394, 397. Membership in the Donauschwaben was limited and membership fees were required. *Id.* at 393, 394.

On these facts, the Court held that Donauschwaben did not benefit the general public interest or those in particular need, because it only benefited its paying members. *Id.* at 397. The Court made a particular mention of the fact that isolated cases existed where non-members participated in the group's activities, but that these instances were rare because "[p]articipation in Donauschwaben's activities requires one to be a dues-paying member." *Id.* See also *Socialer Turnverein v. Bd. of Tax Appeals*, 139 Ohio St. 622 (1942) (property use akin to a private health club which occasionally allowed financially needy children to participate in gym classes did not constitute a use to advance or benefit the public in general, but was a use primarily to benefit the membership).

In this case, as in *Olmsted Falls*, some of the activities and programs which the Fitness Center offers may be commendable. But the fact remains that the Fitness Center is a high-end fitness center operated for the benefit of those who pay to be members. ST at 10, 88, 100. Hearing Exhibit A, Supp. at 213. The Fitness Center provides its members access to highly-trained staff and specialized fitness equipment, charges its members for use of certain portions of the property, rents its facilities, and excludes from the Fitness Center non-members and others who do not pay the membership fee. ST at 6, 7, 12, 83, 94, 95, 100; HT at 104, 120, 129, 144, 150, 151, 178, 181, 203, Supp. at 38, 42, 44, 48, 50, 57, 63; Hearing Exhibit C, Supp. at 217; Hearing Exhibit D, Supp. at 218. Membership to the Fitness Center is limited to provide the best possible service to its members. ST at 32; HT at 181, 185, 198, Supp. at 57, 58, 62.

These are all indicia of a members-only organization, which is not a use of property within the meaning of charity. *Olmsted Falls* at 397; *Planned Parenthood Assn.*, 5 Ohio St.2d, at syllabus. See also *The Medina Chapter of the Izaak Walton League of America, Inc. v. Limbach* (March 30, 1990), BTA Case No., 87-H-1126, 1990 WL 208285. AGMC's use of property as the Fitness Center falls short of the standard required for charitable exemption.

ii. *The Fitness Center's reinvestment of proceeds does not demonstrate a charitable use of property.*

AGMC contends that it does not operate the Fitness Center with a profit motive. AGMC argues that the "surplus revenue" from the Fitness Center membership fees is used: (1) to improve AGMC's technology and facilities, (2) to offset AGMC's operating expenses, and (3) to provide access to patients regardless of their ability to pay. HT at 37, 58, 88, 215-216, 220; Supp. 21, 27, 34, 66, 67.

To support this foregoing argument, AGMC provided some financial information, in which AGMC purports that it operates the Fitness Center at a loss. Hearing Exhibit 25, Supp. at 201. But the Fitness Center does not operate at a loss. *First*, the financial content in AGMC's own Hearing Exhibit 25, which details the revenues and expenses for the Fitness Center from 2008-2012, shows a consistent net gain operation. *Id.* The budget for the Fitness Center anticipates \$1.8 million in revenues and \$1.4 in direct expenses. *Id.* The Fitness Center's costs are covered primarily by the membership fees, and to a lesser extent, the personal trainer charges and summer camp programs. HT at 103, Supp. at 38. Only when AGMC includes *indirect* expenses into its calculations, such as security, housekeeping, and administration, does the Fitness Center operate at a net loss. *Id.*

Second, the inclusion of the "indirect expenses" in the financial picture of the Fitness Center operation is sleight of hand. In the ordinary course of business, AGMC accounts for the

expenses that are attributed to the whole of the HWC property in its own department: Buildings Services and Administration. HT at 85-86, 101, Supp. at 33, 34, 37. AGMC does not ordinarily allocate the expenses attributed to the whole of the building to each department contained in the HWC (i.e., emergency, physical therapy, diagnostic, Fitness Center, etc. . . .). HT at 101, Supp. at 37. Simply stated, AGMC does not keep its financial records in the format presented in Hearing Exhibit 25 and these are not AGMC's actual financial statements. This document was created for purposes of this appeal and for whatever reason, AGMC declined to provide the more accurate financial information contained in its annual reports and audited financial statements. HT at 82, 83, 102, Supp. at 33, 34, 38. Thus, the assertion that AGMC operates the Fitness Center at a loss is at odds with its own records.

The other problem with AGMC's contention that its "surplus revenue" reinvestment is indicative of charitable use of the Fitness Center is that such a position is contrary to a long-recognized principle: property used to produce income for use in furtherance of charitable purposes is not an exempt use. *Northeast Ohio Psych. Inst. v. Levin*, 121 Ohio St.3d 292, 2009-Ohio-583, ¶ 16; *Hubbard Press v. Tracy*, 67 Ohio St.3d 564, 566 (1993). See also *Seven Hills School*, 28 Ohio St.3d at 187-188; *Ohio Masonic Home*, 52 Ohio St.2d at 130; *Lutheran Book Shop*, 164 Ohio St. at 361-62. In this regard, AGMC may not vicariously attribute the charitable activities of the HWC to itself, on the basis that it reinvests proceeds from the operation of the Fitness Center to support other charitable activities of the HWC. So, too, is AGMC's problematic statement that there is no distribution of any financial profit to any individual, because AGMC, *as an entity*, is not permitted to obtain a profit through its operation of the Fitness Center. *American Jersey Cattle Club v. Glander*, 152 Ohio St. 506, 510 (1950); HT at 37, Supp. at 21. See also ST 101 (Statement of Unrestricted Revenues and Expenses, 1/1/08-

11/30/08, submitted by AGMC with the Application, indicating that the HWC, as a whole, operates at a \$1.3 million surplus).

In other words, AGMC has lost sight of the overarching principle at issue in this matter: it is the use of the property that controls the charitable exemption analysis. *Hubbard Press*, 67 Ohio St.3d at 566. AGMC's operation of the Fitness Center as a commercial venture, similar to a fraternal or social club, is inconsistent with the "not with the view to profit" standard of R.C. 5709.12 and R.C. 5709.121 and the exemption was properly denied.

b. AGMC is a charitable hospital. AGMC's use of property as the Fitness Center is a kind of use that is inconsistent with AGMC's charitable purpose and is a use that is charitable only to a de minimus degree.

AGMC's primary claim in support of its rote recitation argument is it uses the Fitness Center "in furtherance of or incidental to" its charitable purposes. In this regard, AGMC contends that it qualifies for exemption pursuant to R.C. 5709.121(A)(2), and therefore, it is not required to show that it uses the Fitness Center in a "primarily" charitable manner, as in an R.C. 5709.12 exemption claim. Citing to *Cincinnati Community Kellel*, AGMC tactically argues that "any" use by a charitable institution meets the "in furtherance of or incidental to" use standard. AGMC is wrong.

i. AGMC misconprehends the meaning of the terms "furtherance" and "incidental."

Simply stated, AGMC fundamentally misconprehends the terms "furtherance" and "incidental" and that these terms refer to the relationship between the two parties using the property sought to be exempted. Namely, these terms reference, *first*, the type or nature (i.e., the *quality*), of the property used by a party other than the property owner. As derived from the plain language of R.C. 5709.121(A)(2), another's use of the property is an exempt use only if

that use is of the same kind that the property owner would have given to the property to carry out its mission. Stated another way, the use given to the property must be reasonably certain to advance the owner's purposes ("in furtherance of") or be causally linked by necessity to the owner's purpose ("incidental to").

Second, these terms pertain to the amount of charitable use a property receives, meaning the frequency and duration of that use (i.e., the *quantity*). *Bethesda Healthcare, Inc.*, 101 Ohio St.3d 420, 2004-Ohio-1749, at ¶ 37. The relevant inquiry is whether, under a "totality of the circumstances," the use advocated as exempt is "sufficient." *Id.* at ¶ 39. *See also Dialysis Clinic*, 127 Ohio St.3d 215, 2010-Ohio-5071, at ¶ 40, 46. A qualifying use that has no relationship to the total operation on the property, or a *de minimus* use, will not be considered a basis for exemption. *Id.* at ¶ 37-39. Stated another way, a property owner that shows just *some*, or *any*, exempt use is not entitled to charitable exemption.

Third, that the qualitative and quantitative requirements are a part of the phrase "in furtherance of and incidental to" is inherent to the jurisprudence pertaining to charitable exemption of real property. Any other reading of this phrase is overly broad and expansive, and inconsistent with the principle that real property exemption statutes are strictly construed against exemption. *Anderson/Maltbie Partnership*, 127 Ohio St.3d 178, 2006-Ohio-4904, at ¶ 16.

In other words, AGMC's contention that any use other than "primarily" charitable, to the extent that *any* or *some* charitable use is permissible, is in error. Real property exemption statutes are strictly construed in favor of leaving property on the tax rolls, and for R.C. 5709.121(A)(2) purposes, require a demonstration that the property's charitable use: (1) is reasonably certain to advance, or is causally linked to, the owner's charitable purposes, and (2) is

more than just a *de minimus* use.⁸ *Id.*; *Dialysis Clinic*, at ¶ 40, 46; *Bethesda Healthcare, Inc.*, at ¶ 37, 39; R.C. 5709.121(A)(2).

ii. AGMC cannot meet the qualitative and quantitative standards required for exemption.

Additionally, AGMC is unable to demonstrate that its use of the Fitness Center satisfies the quality or quantity requirements of a use “in furtherance of or incidental to” AGMC’s charitable purpose of operating a hospital.

With respect to the qualitative requirement, AGMC seeks to exempt its HWC. As set forth in the Application, AGMC uses the HWC to house its free-standing emergency department, as well as diagnostic facilities, laboratories, a physical therapy center, and supporting administrative services. The HWC also houses the Fitness Center: an award-winning, state-of-the-art, members-only facility, that provides highly-trained staff and specialized services to that membership, with no demonstrative evidence of the types of services provided to rehabilitation and physical therapy patients, or notable use by the general public or provision of charity care.

Based on these variations in the use of the HWC, the Tax Commissioner split listed the property. ST at 2, 3. Thus, to the extent that AGMC uses the HWC “in furtherance of or incidental to,” or to carry out, its purpose of being a *hospital*, that portion of the property has already been exempted. And charitable exemption was properly denied to that portion of the HWC that AGMC uses in a commercial transaction to serve an exclusive membership clientele and to generate surplus revenue to support and offset other AGMC expenses and activities, i.e.,

⁸ Nor has this standard been modified by this Court recent decision of *Cincinnati Community Kolliel*, 135 Ohio St.3d 219, 2013-Ohio-396. *Kolliel* does not hold that merely “some” or “any” charitable use is enough to satisfy the “in furtherance or incidental to” standard, or even provide any legal standard to be applied in charitable exemption questions. Instead, *Kolliel* only: 1) reaffirmed the principle that exemption statutes are subject to strict construction, and 2) remanded the matter to the BTA to apply the correct standard in determining whether residential buildings for staff scholars were entitled to charitable exemption. *Id.* at ¶ 17, 33.

the Fitness Center. The Tax Commissioner and the BTA applied the strict construction requirement for charitable exemption, and properly concluded that the Fitness Center was not reasonably certain to advance, or causally linked by necessity to, AGMC's charitable purposes to qualify as an exempt use.

Similarly, AGMC cannot satisfy the quantitative requirement. In this regard, this Court has already spoken on this circumstance: a fitness center that: (1) has dedicated only *de minimus* time for open community use, (2) provides nominal charity, and (3) does not include rehabilitation and physical therapy patients within the scope its charity care policy or know how many patients ultimately become members of the facility, is not a charitable use of a facility to qualify for exemption. *Bethesda Healthcare*, 101 Ohio St.3d 420, 2004-Ohio-1749. And because the circumstances surrounding AGMC's use of the Fitness Center are the same as those presented in *Bethesda Healthcare, Inc.*, the same conclusion applies. There may not be a minimum percentage of charity necessary to demonstrate a charitable use of property, but certainly more than the sporadic, or *de minimus*, charitable use that AGMC has demonstrated it provides is necessary to show that the Fitness Center is entitled to exemption. *Dialysis Clinic, Inc.*, 127 Ohio St.3d 215, 2010-Ohio-5071, ¶ 26, 40, 46; *Church of God in N. Ohio, Inc.* 124 Ohio St.3d 36, 2009-Ohio-5939, ¶ 19; *Bethesda Healthcare, Inc.* at ¶ 39.

AGMC's response to this quantitative concern is to take umbrage with the BTA's review of the evidence: AGMC contends that the BTA improperly considered Hearing Exhibit 22. Appellant's Merit Brief at 36-38. Hearing Exhibit 22 was created by AGMC and details the membership distribution at the Fitness Center. The Exhibit sets forth the number of discounts granted to the enrollment fee, the number of donated memberships, the number of new members, the number of total members and membership units, and the number of rehabilitation and

physical therapy patients using the Fitness Center, from 2007 through August of 2013. Hearing Exhibit 22, Supp. at 197. The argument advanced by AGMC is that this Exhibit was not reliable or probative evidence for the BTA review and consider. AGMC's argument in this regard, however, should be disregarded.

First, AGMC's argument is simply disingenuous. Hearing Exhibit 22 is AGMC's own evidence. AGMC compiled the information, admitted it into evidence, and provided testimony on it. For AGMC to argue that this Exhibit is not reliable and probative, suggests that AGMC's conduct and arguments with respect to this matter are less than credible.

Second, in an attempt to recast the content of Hearing Exhibit 22, AGMC provides some calculations of its own. Despite the inclusion on the Exhibit of the partial years of 2007 and 2013, AGMC now ignores the number of charity care memberships for these two partial years. Appellant's Merit Brief at 37. Apparently AGMC considers the number of charity care memberships in these years to be unfavorable. But even if these numbers were doubled to hypothetically reflect a full year, the number of charity care memberships would still be less than those provided in any year between 2008 and 2012, which were ever only at its maximum 3% of the total Fitness Center membership units. Hearing Exhibit 22, Supp. at 197.

Third, in yet another attempt to recast the content of Hearing Exhibit 22, AGMC now provides its own percentage of Fitness Center charity care memberships, which of course, is higher than that percentage: (1) calculated by the Tax Commissioner, (2) cited to by the BTA, and (3) presented in the *Bethesda Healthcare* decision. Appellant's Merit Brief at 37. In this newly-presented modification of Hearing Exhibit 22, AGMC now calculates the number charity care Fitness Center memberships by using the *new, individual members* in any given year, as opposed to counting the *overall number of membership units*.

Again, AGMC misses the mark. The question of providing charity care is not how many *new* Fitness Center members received charity care in a given year. Rather, the question is how much charity care is given to the membership *overall*.⁹ AGMC's self-serving charity care calculations only artificially inflate the number of Fitness Center charity care memberships (because the number of new members is smaller than the overall total of the Fitness Center individual members or membership units). AGMC's calculations also inherently exclude the renewing membership units from the charity care calculation, and by omission, demonstrate that these members do not receive any charity.

In other words, this Court must reject AGMC's attempt to discredit and recast the content of its own Exhibit as insincere and an unnecessary disparagement of the BTA.

iii. AGMC's proposed interpretation of R.C. 5709.121 is contrary to Ohio's law of charitable use and renders R.C. 5709.12 meaningless.

With respect to the merits of AGMC's argument, AGMC contends that to qualify for charitable exemption under R.C. 5709.121(A)(2), the "in furtherance of or incidental to" language means *any* charitable use other than "primary," as is required for exclusion pursuant to R.C. 5709.12. There are two reasons why this Court must reject AGMC's interpretation.

First, AGMC's position with respect to the meaning of the "in furtherance of or incidental to" language is novel and upends Ohio's well-developed law of charitable use. The most foundational principle of Ohio's charitable use laws is that tax exemption statutes are strictly construed against exemption; such statutes "are in derogation of equal rights" and cause the tax

⁹ In fact, by calculating the number of charity care memberships on the number of Fitness Center membership units, as opposed to the overall number of Fitness Center members, AGMC received the benefit of the doubt with respect to the percentages of charity care given. If, instead, the total number of members had been used to calculate the percentage charity care, the percentage of charity care given would have been even lower.

burden to fall more heavily on other properties that remain taxable. R.C. 5709.01; *Anderson/Maltbie Partnership*, 127 Ohio St.3d 178, 2010-Ohio-4904, at ¶ 16; *Bethesda Healthcare, Inc.* at ¶ 19; *Cincinnati College*, 19 Ohio at 115.

Further, the legislative intent behind enacting R.C. 5709.121 was not to broaden the possible *uses* that would qualify for exemption. Rather, the intent was to broaden the class of *persons* who were eligible to affect those uses and to include within the scope of charitable uses the activities by someone other than the property owner. *Dialysis Clinic, Inc.*, 127 Ohio St.3d 215, 2010-Ohio-5071, ¶ 23, 24; *First Baptist Church of Milford, Inc.*, 110 Ohio St.3d 496, 2006-Ohio-4966, at ¶ 16. R.C. 5709.121 is not intended to alter the standard for charitable use required for exemption. *Dialysis Clinic, Inc.* at ¶ 19, 20, 22.

Yet in this appeal, AGMC requests to this Court to interpret the phrase “in furtherance of or incidental to” as any charitable use other than “primary.” In other words, AGMC seeks this Court’s sanction and blessing to apply a relaxed standard for exemption and to conclude that exemption pursuant to R.C. 5709.121(A)(2) includes the *de minimus* charitable use of its Fitness Center. Moreover, as discussed more fully below, AGMC’s request to include its use of the Fitness Center within the meaning of the phrase “direction and control” without the requisite non-coinciding ownership and use is an even more capacious request for an expansive interpretation of R.C. 5709.121(A)(2).¹⁰ *Id.*

AGMC’s novel interpretation of R.C. 5709.121(A)(2) is in contrast to Ohio’s law pertaining to charitable exemptions. As a consequence, AGMC’s proposed construction in favor of exemption is most certainly improper and inappropriate.

¹⁰ For the full discussion pertaining to the “direction and control” language of R.C. 5709.121(A)(2) and the necessity of non-coinciding ownership, see the next section, III.B.3.c.

Second, AGMC’s proposed interpretation of the definitional provision of R.C. 5709.121(A)(2) renders the actual exclusion provision, R.C. 5709.12, meaningless. In this regard, AGMC is attempting to avoid the requirement in R.C. 5709.12 that requires it to demonstrate how its use of the Fitness Center is “exclusively for charitable purposes.” Instead, AGMC advances that the appropriate standard the “in furtherance of incidental to” language of R.C. 5709.121(A)(2).

From all appearances, this reliance on R.C. 5709.121(A)(2) is an implied admission that AGMC’s use of the Fitness Center could not qualify for exemption under R.C. 5709.12, which is the provision that would ordinarily apply to an institution seeking a charitable use exemption of property it owns. Therefore, AGMC advances a substitute argument in an attempt to have its use that is “other than primarily,” or that is *de minimus*, to nevertheless qualify the Fitness Center for a charitable exemption.

AGMC’s inability to meet the R.C. 5709.12 charitable standard for the Fitness Center should not mean that it can play “mix and match” and alternately seek exemption under the “in furtherance of or incidental to” language of R.C. 5709.121(A)(2). Allowing such a maneuver permits AGMC to avoid: (1) the more stringent exemption requirements of R.C. 5709.12 in favor of AGMC’s claimed use “other than primarily” requirement contained in R.C. 5709.121(A)(2), and (2) the separation of use and ownership requirement as contemplated within R.C. 5709.121(A)(2).¹¹ In other words, AGMC disregards the specific criteria for exemption pursuant to R.C. 5709.12 that apply to its use of the Fitness Center and misappropriates the language of

¹¹ Again, the full discussion pertaining to the “direction and control” language of R.C. 5709.121(A)(2) and the necessity of non-coinciding ownership is in the following section, III.B.3.c.

R.C. 5709.121(A)(2) to claim that its use of the Fitness Center is tantamount to another organization's charitable use of property.

If AGMC's construction of R.C. 5709.121(A)(2) is correct, there would be no purpose for the General Assembly to have enacted the R.C. 5709.12 exemption. In fact, AGMC's expansive reading of R.C. 5709.121(A)(2) would "swallow up" and render the entire R.C. 5709.12 exemption meaningless. This result is in stark contrast to the harmonious-reading-of-statutes principle: a specific exemption statute must be read harmoniously with the whole of the statutory provisions for real property exemption and avoid absurd results. R.C. 1.47(B). *See also Church of God in N. Ohio, Inc.*, 124 Ohio St.3d 36, 2009-Ohio-5939, at ¶ 30 ("Taken together, these circumstances would amount to a violation of the precept that we should construe statutes to give effect to all the enacted language."). In this case, the absurd result is that a property owner who would not qualify for exemption because of the requirements and limitations imposed by a directly applicable and specific statutory provision, could nonetheless obtain a tax exemption under a broad reading of another, less applicable, provision. *Id.*

This Court has long rejected similar attempts to bypass the express requirements of a statutory exemption's delineation of a specific kind of exempt use or exempt property. *Rickenbacker Port Authority v. Limbach*, 64 Ohio St.3d 628, 630-31 (1992); *Toledo Business & Professional Women's Retirement Living, Inc. v. Bd. of Tax Appeals*, 27 Ohio St.2d 255 (1971), paragraph one of the syllabus (holding that "[a]fter the General Assembly has marked a specific use of property for exemption and has established the criteria therefor, the function of the judicial branch is limited to interpreting and applying those criteria"). Here, this established principle should have particular force, because, as noted above, under the arguments advanced by AGMC, the specific criteria enacted by the General Assembly in R.C. 5709.12 would not have any

significance either to AGMC in particular, or other institutions in general.

Such disregard of the General Assembly's enactments should be avoided. As this Court held in *D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, ¶ 26:

Statutory language ‘must be construed as a whole and given such interpretation as will give effect to every word and clause in it. *No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative.*’ (Quoting *State ex rel. Myers v. Spencer Twp. Rural School Dist. Bd. of Edn.*, 95 Ohio St. 367, 372-373 (1917) (Emphasis added.)

See also *Beckwith & Associates, Inc. v. Kosydar*, 49 Ohio St.2d 277, 278 (1977) (holding that “[i]n this state, it is presumed that, in enacting a law, the General Assembly intended for the statute to be effective in its entirety”) (citing R.C. 1.47(B)); *Van Dyne Crotty Co. v. Limbach*, 53 Ohio St.3d 3, 5-6 (1990) (same).

This Court has previously denied just such an attempt to undermine R.C. 5709.12. In *Dialysis Clinic*, this court rejected an interpretation of R.C. 5709.121 that would allow any entity with federal tax-exempt status pursuant to 501(c)(3) of the Internal Revenue Code to also qualify as a charitable or educational organization under R.C. 5709.121(A). 127 Ohio St.3d 215, 2010-Ohio-5071, at ¶ 26. This Court concluded that proposition was inconsistent with both the legislative purpose of R.C. 5709.121 and its interrelationship to R.C. 5709.12. *Id.* at ¶ 21-26. Continuing, this Court concluded that such a result would improperly “conflate Ohio’s property-tax exemption with standards under federal law for tax-exempt charities” and would disregard Ohio’s well-developed law of charitable use. *Id.*

In this case, even though AGMC’s argument focuses on a different portion of R.C. 5709.121(A), the result is exactly the same: if the phrase “in furtherance of or incidental to” is

read as AGMC suggests, then the “definitional provision” of “exclusive use” would encompass the very statute that it purports to define, causing R.C. 5709.121 to be inconsistent with the legislative purpose for its enactment and the provisions of R.C. 5709.12. Such a result allows AGMC to violate principles of statutory interpretation, perform an end-run around directly applicable and specific statutory provisions, and disrupts Ohio well-developed law of charitable use and alters the manner in which charitable exemption requests are construed.

AGMC’s interpretation of the phrase “in furtherance of or incidental to” as meaning *any*, or a *de minimus*, charitable use must be rejected.

c. AGMC’s ownership of the Fitness Center coincides with its use of the Fitness Center.

To qualify for exemption under R.C. 5709.121, a charitable institution must demonstrate that *another organization’s* use of the property is in a manner that advances the property owner’s own charitable purposes. See *Dialysis Clinic*, 127 Ohio St.3d 215, 2010-Ohio-5071, at ¶ 22, 24; *First Baptist Church of Milford*, 110 Ohio St.3d 496, 2006-Ohio-4966, at ¶ 13-15; *Bethesda Healthcare, Inc.*, 101 Ohio St.3d 420, 2004-Ohio-1749, ¶ 21. This is the requirement of non-coinciding ownership and use.

The requirement of non-coinciding ownership and use of property is grounded in the purpose behind the enactment of R.C. 5709.121. Historically, Ohio’s charitable exemption statute, R.C. 5709.12(B) (formerly G.C. 353), required that property ownership and use coincide to achieve tax exempt status. *Dialysis Clinic*, at ¶ 23; R.C. 5709.12(B). To address the circumstance where the ownership of the property and its use did not coincide, the General Assembly enacted R.C. 5709.121. Am.Sub.H.B. No. 817, 133 Ohio Laws, Pt. III, 2646; *Dialysis Clinic, Inc.* at ¶ 24, ft. 3. Pursuant to this definitional provision, R.C. 5709.121 is intended to

permit exemption of property based on a charitable use performed by someone other than the property owner. *Dialysis Clinic, Inc.* at ¶ 22-24.

Based on this underpinning of R.C. 5709.121, two important principles arise. *First*, exemption applications filed pursuant to R.C. 5709.121 inherently invoke the requirements of R.C. 5709.12 and relevant decisional law as precedent. *Second*, an exemption request pursuant to R.C. 5709.121 considers uses of property performed by third parties and not the uses of property by the property owner.

AGMC cannot meet the non-coinciding ownership and use requirement: AGMC's ownership of the Fitness Center coincides with AGMC's use of the Fitness Center. There is no dispute that AGMC owns and operates the Fitness Center. HT at 40, 57, 134-135, Supp. at 22, 26, 46. The Fitness Center is one of the several HWC departments and AGMC oversees all the Fitness Center's daily operations. ST at 29-32; HT 40, 65, 78, 135-136, Supp. at 22, 28, 32, 46. AGMC employs the Fitness Center staff and AGMC includes the Fitness Center revenue and expenses on its financial statements and income tax returns. ST at 101; HT 57, 65, 78, 82-83, 88-89, 135, 213, 218-221, 223-224, Supp. at 26, 28, 32, 33, 34, 46, 65, 67, 68.

Thus, because AGMC cannot demonstrate non-coinciding ownership and use, R.C. 5709.121 cannot apply to support AGMC's claim for exemption. *See Dialysis Clinic*, 127 Ohio St.3d 215, 2010-Ohio-5071, at ¶ 22-24; *First Baptist Church of Milford*, 110 Ohio St.3d 496, 2006-Ohio-4966, at ¶ 13-15; *Bethesda Healthcare, Inc.*, 101 Ohio St.3d 420, 2004-Ohio-1749, at ¶ 21.

IV. Conclusion

For the foregoing reasons, this court should affirm the Tax Commissioner's and the BTA's decisions that deny AGMC's request for exemption of the Fitness Center.

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