

IN THE SUPREME COURT OF OHIO

AKRON GENERAL MEDICAL CENTER, )  
 )  
 Appellant, ) CASE NO. 2014-0876  
 )  
 vs. )  
 ) On Direct Appeal from the Ohio Board of  
 JOSEPH W. TESTA, ) Tax Appeals, BTA Case No. 2012-426  
 TAX COMMISSIONER OF OHIO, and )  
 STOW-MUNROE FALLS CITY SCHOOLS )  
 BOARD OF EDUCATION, )  
 )  
 Appellees. )

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REPLY BRIEF OF APPELLANT  
 AKRON GENERAL MEDICAL CENTER

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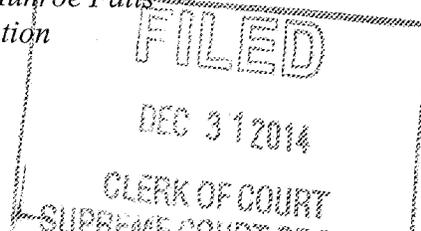
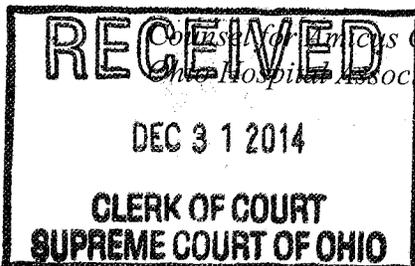
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## INTRODUCTION

The Briefs filed by the Tax Commissioner (“TC”) and the Stow City School District (“Stow”) do not dispute that the Board of Tax Appeals (“BTA”) failed to discuss or apply the three-part test set forth in R.C. 5709.121(A)(2) for determining whether property belonging to a charitable institution is exempt from taxation under Ohio law. Moreover, they do not dispute that AGMC is a “charitable institution” that owns the Health and Wellness Center (“HWC”), and that AGMC presented evidence of the “charitable use” of the property by providing an annual count of the thousands of patients who have used LifeStyles for rehabilitation and physical therapy purposes. (TC Br. 6, 19). Under the plain language of R.C. 5709.121(A)(2), therefore, the Court should conclude that AGMC is legally entitled to a charitable tax exemption because the undisputed evidence in the record demonstrates that LifeStyles is being used “in furtherance of” or, at a minimum, “incidental to” AGMC’s charitable purposes. (See AGMC’s Merit Brief, Proposition of Law No. 1, pp. 17-33).

Indeed, in their Briefs, Appellees do not dispute that the use of a medically-supervised fitness center for rehabilitation and physical therapy purposes may constitute the charitable use of property under Ohio law. (TC Br. 6); (Stow Br. 16). In *Bethesda Healthcare*, in fact, the Tax Commissioner *granted* a tax exemption for the portions of the Pavilion fitness center that were leased to two charitable hospitals for rehabilitation and physical therapy purposes. See *Bethesda Healthcare, Inc. v. Wilkins*, 101 Ohio St.3d 420, 2004-Ohio-1749, 806 N.E.2d 142, ¶¶ 5-6. In order to justify the Board’s Decision, therefore, the Tax Commissioner is literally forced to argue that the “amount” of patient use is allegedly “*de minimus*,” and to distort the statutory language in order to convince this Court to impose certain “quality” and “quantity” standards that are not found in the statute itself. (TC Br. 6, 9, 29-31).

As discussed more fully below, however, the Court should reject the Tax Commissioner's interpretation of R.C. 5709.121(A)(2) because it conflicts with the plain language of the statute and Supreme Court precedent. The language – “in furtherance of” or “incidental to” – has a common, ordinary meaning that should be applied as written. Indeed, as this Court held in *Cincinnati Community Kolliel v. Testa*, 135 Ohio St.3d 219, 2013-Ohio-396, 985 N.E.2d 1236, there is no requirement in the statute for a charitable or educational institution to establish that the property is used “primarily” for charitable or educational purposes. *Id.* at ¶ 26. Moreover, there is no requirement in R.C. 5709.121(A)(2) for a charitable institution to demonstrate that it provides a particular amount of unreimbursed services on the property. *Community Health Professionals v. Levin*, 113 Ohio St.3d 432, 2007-Ohio-2336, 866 N.E.2d 478, ¶ 22. Rather, the plain language of the statute merely requires that the property be used “in furtherance of” or “incidental to” its charitable purposes and not “with a view to profit.” Accordingly, the Court should apply the plain language of the statute as written and refrain from imposing any new requirements that are not found in the statute itself.

In their Briefs, Appellees also do not dispute Appellant's Second Proposition of Law that an institution need not show a particular percentage of unreimbursed services in order to qualify for a tax exemption under R.C. 5709.12(B) or R.C. 5709.121(A)(2). (TC Br. 17, 20-21, fn. 7); (Stow Br. 6-7). Yet, notwithstanding this concession, the Tax Commissioner essentially doubles down on the BTA's legal error by arguing over and over again that the Court should deny a tax exemption based upon the “amount” or “quantity” of free or donated services. (TC Br. 1-3, 5-6, 9, 16-19, 29-30, 32-34). This argument, however, ignores the plain language of the statute and Supreme Court precedent. (*See* AGMC Br. 33-36). Accordingly, for this additional reason, the Court should reject Appellees' arguments and reverse the BTA's Decision as a matter of law.

## ARGUMENT

### **I. THE COURT SHOULD REJECT APPELLEES' INTERPRETATION OF OHIO REVISED CODE 5709.121(A)(2).**

With respect to Appellant's First Proposition of Law, the Tax Commissioner's Brief does not dispute that R.C. 5709.121(A)(2) sets forth a three-part test for determining whether property belonging to a charitable institution shall be considered as used exclusively for charitable purposes. (TC Br. 9). Moreover, Appellees do not dispute that the BTA did not discuss or apply the elements of this three-part test, even though they concede that AGMC is a "charitable institution" that owns the entire HWC. (TC Br. 29); (Stow Br. 3). Given the BTA's admitted failure to apply the three-part test in R.C. 5709.121(A)(2), therefore, Appellees spend most of their Merit Briefs coming up with their own reasons for why AGMC did not satisfy the "in furtherance of" and "without a view to profit" elements of the applicable three-part test. (TC Br. 22-38); (Stow Br. 13-18). In so doing, however, they wrongfully ignore or minimize the legal importance of the undisputed evidence of patient use and wrongfully impose additional requirements that are not found in the statute itself.

#### **A. Appellees Wrongfully Ignore and/or Minimize The Undisputed Evidence In The Record That AGMC Makes The LifeStyles Space Available To Thousands Of Patients For Rehabilitation And Physical Therapy Purposes Without Regard To The Ability To Pay.**

As previously discussed in Appellant's Brief, the evidence in the record is undisputed that AGMC makes the LifeStyles space available for use by thousands of patients for rehabilitation and physical therapy purposes without regard to the ability to pay. (Tr. 88-89, 105, 113-121, 124-137, 139-141, 158-160, 216-217, Ex. 22) (Supp. 34, 38, 40-47, 52, 66, 197). In his Merit Brief, the Tax Commissioner concedes that AGMC presented some evidence of "charitable use" by providing "an annual count of the number of rehabilitation and physical therapy patients who used the Fitness Center." (TC Br. 6, 19). Notwithstanding this concession,

however, the Tax Commissioner wrongfully seeks to minimize the legal importance of this undisputed evidence by arguing that AGMC failed to show “how, how often or what part” of the LifeStyles space is used by patients. (TC Br. 2, 6, and 19).

This is not true. At the BTA Hearing, AGMC presented undisputed evidence to show that patients regularly use the *entire* LifeStyles space for rehabilitation and physical purposes on a *daily* basis. (Tr. 122-125, 217-218) (Supp. 043, 66-67). As Doug Ribley testified, the *entire floor area* of LifeStyles, along with the gymnasium and pools, are all “shared environments” that are regularly used by *both* members and patients *at the same time*. (Tr. 122-125, 217-218) (Supp. 43, 66-67). “Operationally,” Ribley explained, “it’s a blended environment, . . . any of the clinical areas . . . have complete access at all times.” (Tr. 125-126) (Supp. 43-44). For this reason, therefore, AGMC does not allocate the LifeStyles space between the percentage of patient use vs. member use because, as Mr. Ribley explained, the LifeStyles space cannot be functionally or operationally divided between the space used by patients and the space used by members. (Tr. 122-126) (Supp. 43-44). All of the patients who come to the HWC have “complete access at all times” to the *entire* LifeStyles area. (Tr. 126) (Supp. 44). Similarly, both patients *and members* have immediate access to the other healthcare services provided by the HWC, including a 24-hour emergency room, radiology, physical therapy, cardiac and pulmonary testing, orthopedics, sports medicine, and a wide variety of primary and specialty physicians in the adjacent medical office building. (Tr. 126-127, 155-156, 207) (Supp. 44, 51, 64). Accordingly, the undisputed evidence shows that the LifeStyles space is “clinically integrated” with AGMC’s other health care operations and is regularly used by patients “in furtherance of” or, at a minimum, “incidental to” AGMC’s charitable purposes. (*See* AGMC Merit Brief, pp. 9-11, 21-26).

In his Brief, the Tax Commissioner argues that the “primary beneficiaries” of the LifeStyles space are the dues-paying members, not the patients. (TC Br. 15). Once again, this argument ignores the applicable legal standard. As this Court held, “there is no primary-use or principal-use test set forth in R.C. 5709.121.” *Cincinnati Community Kollel*, 135 Ohio St.3d 219, 2013-Ohio-396, 985 N.E.2d 1236, at ¶ 26. Indeed, contrary to Appellees’ suggestions, the Court’s holding in *Kollel* is based upon the *plain language* of R.C. 5709.121(A)(2), and therefore is not limited only to “educational” institutions, as the Stow Brief argues. *Id.* at ¶ 26. Moreover, it is consistent with other judicial precedent on this issue. *See Galvin v. Masonic Toledo Trust*, 34 Ohio St.2d 157, 159-160, 296 N.E.2d 542 (1973); *Round Lake Christian Assembly, Inc. v. Comm’r of Tax Equalization*, 4 Ohio App.3d 189, 193-195, 447 N.E.2d 132 (5th Dist. 1982). Accordingly, the Court should reject Appellees’ arguments and conclude that AGMC was not required to show that LifeStyles is used “primarily” by patients under R.C. 5709.121(A)(2).

In his Brief, the Tax Commissioner also argues that AGMC “does not include rehabilitation and physical therapy patients within the scope of its charitable policy.” (TC Br. 32). Once again, however, there is no evidence in the record to support this allegation. As AGMC’s Vice-President for Finance and Accounting explained at the BTA Hearing, AGMC’s charitable policies (Ex. 6-12) have been adopted in order to ensure that *all* persons in need are able to obtain “quality, medically necessary health care services without regard to the ability to pay.” (Tr. 42-44, Supp. 23). These charitable care policies apply to *all* of AGMC’s health care facilities (Tr. 43-44, Supp. 23), and thus are fully applicable to *all* of AGMC’s patients who use LifeStyles for rehabilitation and physical therapy purposes. (Tr. 105, Supp. 38) (explaining that AGMC’s charitable policies apply to any patients who use LifeStyles for rehabilitation, cardiac rehabilitation, and physical therapy purposes); (Tr. 139-140, Supp. 47) (explaining that any

person can become a patient of AGMC without regard to the ability to pay). Thus, as the Tax Commissioner conceded below, it is undisputed AGMC's charitable care policies apply to all patients who use "the LifeStyles facility for rehabilitation, cardiac rehabilitation, or physical therapy." (Tax Commissioner's Post-Hearing Brief, pg. 7, fn. 4) (citing Tr. 105).

In this regard, it appears that the Tax Commissioner may be confusing the difference between AGMC's charitable policies for patients (Ex. 6-12) with the *membership* policy that was marked as Exhibit 21. Exhibits 6-12 are charitable policies that apply to all of AGMC's patients and facilities, including LifeStyles. (Tr. 43-44, 105, Supp. 23, 38). Exhibit 21, in contrast, is merely an *additional* membership policy that relates only to the donation of free memberships. (Tr. 141-140, Supp. 47). The number of donated *memberships*, however, is not the sole evidence of the charitable use of the property. Rather, in this case, AGMC has relied primarily upon the evidence that it regularly makes the LifeStyles space available to AGMC's patients (or any other person who has a medical need to use the LifeStyles space) without regard to the ability to pay. (Tr. 105, 139-141, 216-217, Supp. 38, 47, 66). Even if there was *no* free memberships, therefore, the property still would be exempt because the undisputed evidence demonstrates that it is being used "in furtherance of or incidental to" AGMC's charitable purposes. (*Id.*)

**B. Appellees Wrongfully Ignore The Primary Legal Distinction Between This Case And The *Bethesda Healthcare* Case.**

In light of the undisputed evidence in the record that the entire LifeStyles facility is regularly used by patients for rehabilitation and physical therapy purposes without regard to the ability to pay, it is clear that the BTA erred as a matter of law by summarily denying a tax exemption based upon the *Bethesda Healthcare* decision. In *Bethesda Healthcare*, in fact, the Tax Commissioner *granted* a charitable tax exemption for the 24,720 sq. footage of the Pavilion fitness center that was leased to two charitable hospitals for patient use. *Id.*, 101 Ohio St.3d 420,

2004-Ohio-1749, 806 N.E.2d 142, at ¶¶ 5-6. Accordingly, because the portions of the Pavilion that were being leased to the two charitable hospitals for patient use *had already been granted* a tax exemption, the legal issue before the Supreme Court was different – it was limited only to reviewing whether the BTA erred by denying an exemption for the *remaining* space in the Pavilion that “was being used as a private health facility for the *exclusive* use of paying members.” *Id.* at ¶ 8 (emphasis added).

In their Briefs, Appellees completely ignore this significant distinction between the two cases. Rather, they blindly argue that *Bethesda Healthcare* is somehow controlling because LifeStyles is allegedly a “members only” fitness center used “exclusively” by dues-paying members. This argument, however, ignores the undisputed evidence that AGMC makes the entire LifeStyles facility available for use by patients without regard to the ability to pay. Unlike *Bethesda Healthcare*, therefore, the evidence does not show that LifeStyles is “being used as a private health facility for the *exclusive* use of paying members and that such use bore *no* functional relationship to *any* charitable purpose of its owner.” *Id.* at ¶ 8 (emphasis added). Accordingly, the Court should conclude that the BTA erred by relying solely upon *Bethesda Healthcare* to deny AGMC’s application.

**C. Appellees Misconstrue The “In Furtherance Of Or Incidental To” Standard.**

Given the undisputed evidence in the record that Lifestyles is used “in furtherance of” or “incidental to” AGMC’s charitable purposes, the Tax Commissioner also seeks to convince this Court to affirm the BTA’s Decision by requesting that the Court should impose new “quality” and “quantity” standards that are not found in the statute itself. (TC Br. 29-30). This argument, however, violates the “duty to apply a statute as written and not to read words into a statute that the legislature did not place there.” *State v. Gwen*, 134 Ohio St.3d 284, 2012-Ohio-5046, 982

N.E.2d 626, ¶ 39. Accordingly, the Court should reject the Tax Commissioner's arguments because they are not supported by the plain language of the statute itself.

Here, the statutory terms – “in furtherance of” and “incidental to” – are terms of common usage that should be given their plain and ordinary meaning. As this Court has held, “[u]nless expressly defined, the words and phrases contained in Ohio's statutes are to be given their plain, ordinary meaning and are to be construed ‘according to rules of grammar and common usage.’” *Smith v. Landfair*, 135 Ohio St.3d 89, 2012-Ohio-5692, 984 N.E.2d 1016, ¶ 18 (citations omitted). Indeed, where, as here, “the General Assembly has plainly and unambiguously conveyed its legislative intent, there is nothing for the court to interpret or construe, and therefore, the court applies the law as written.” *In re I.A.*, 140 Ohio St.3d 203, 2014-Ohio-3155, 16 N.E.3d 653, ¶ 12. Thus, because the statute is not ambiguous, this Court must apply the statute as written and “may not resort to rules of statutory interpretation.” *Ohio Neighborhood Finance, Inc. v. Scott*, 139 Ohio St.3d 536, 2014-Ohio-2440, 13 N.E.3d 1115, ¶ 34.

Here, the terms, “in furtherance of” and “incidental to” are words of common usage that have an ordinary and plain meaning. According to Merriam-Webster's Online Dictionary, “furtherance” means “the act of helping something to become more successful or advanced,” <http://merriam-webster.com/dictionary/furtherance>, and “incidental” means “happening as a minor part or result of something else,” <http://merriam-webster.com/dictionary/incidental>. In other words, the “in furtherance of” language merely means that the use of the property must “help” to further or advance AGMC's charitable purposes, and the “incidental” language recognizes that the use may be only a “minor part” of the institution's charitable purposes. *See Smith*, at ¶ 18 (recognizing that Ohio courts often look to “common dictionary definitions” in defining the meaning of statutory terms).

In this regard, the Tax Commissioner is wrong in suggesting that AGMC is advancing “new, relaxed legal standards” or a “novel” interpretation of the statute. (TC Br. 3, 35). Rather, AGMC is merely requesting that the Court apply the plain language of the statute *as written*, and **not** to impose any new requirements that are not in the statute itself. Indeed, as explained in Appellant’s Merit Brief, AGMC’s interpretation of R.C. 5709.121(A)(2) is consistent with existing Supreme Court precedent, which has long recognized that real property belonging to a charitable institution is exempt under R.C. 5709.121(A)(2) as long as there is a “functional relationship” (even if only “incidental”) between the use of the property and the charitable purpose of the institution. (See AGMC’s Merit Brief, pp. 21-23). Thus, as this Court held in *Community Health Professionals*, the second-part of R.C. 5709.121(A)(2) can be satisfied as long as the use of the property is not “functionally removed” from the owner’s charitable purposes. *Id.*, 113 Ohio St.3d 432, 2007-Ohio-2336, 866 N.E.2d 478, at ¶ 21; *see also Bethesda Healthcare*, 101 Ohio St.3d 420, 2004-Ohio-1749, 806 N.E.2d 142, at ¶ 8 (affirming the BTA’s finding that the “use bore no functional relationship to any charitable purpose of its owner”).

In his Brief, the Tax Commissioner argues that the Court should construe the “in furtherance of” language in R.C. 5709.121(A)(2) as requiring that the use be “reasonably certain to advance” the owner’s charitable purposes. (TC Br. 30). There is no language in the statute, however, that imposes a “reasonably certain” standard. Similarly, the Court should reject the Tax Commissioner’s argument that the “incidental to” language means that the use must be “causally linked by necessity” to the owner’s charitable purpose. (*Id.*); (*see also* Stow Br. 16) (arguing that the use must be “necessary” to carrying out the owner’s charitable purposes). Once again, this “necessity” argument violates “the duty to apply a statute as written and not to read words into a statute that the legislature did not place there.” *Gwen*, 134 Ohio St.3d 284, 2012-

Ohio-5046, 982 N.E.2d 626, at ¶ 39. There is nothing in the statute that provides that the use must be “causally linked by necessity” to the owner’s charitable purposes. Rather, the statute recognizes that the use may be only “incidental to” the owner’s charitable purposes.

In his Brief, the Tax Commissioner also requests that the Court impose certain “quantity” standards under R.C. 5709.121(A)(2). (TC Br. 9, 30-33). The Tax Commissioner’s proposed “quantity” standards, however, are not based upon the statutory language and are contrary to Supreme Court precedent. As this Court has held, the question of “[w]hether an institution renders sufficient services to persons who are unable to afford them” is a question that relates to whether an institution is a “charitable institution,” not whether it “use[s] the property in furtherance of or incidentally to its charitable purposes.” *Community Health Professionals*, at ¶ 22. Thus, in *Cincinnati Community Kollel*, this Court held that the BTA erred as a matter of law by imposing a “principal-use” or “primary-use” test that was not found in the statutory language. *Id.*, 135 Ohio St.3d 219, 2013-Ohio-396, 985 N.E.2d 1236, at ¶ 26. Accordingly, the Court also should reject the Tax Commissioner’s proposed “quality” and “quantity” standards because they are not supported by the plain language of the statute itself. *Id.*

Finally, the Court should reject Stow’s argument that the relevant inquiry should focus on whether the charitable use of the property is “too remote” or too “indirect” to the owner’s charitable purposes. (Stow Br. 14-17). This Court has never adopted a “direct” or “indirect” standard, which, if adopted, would conflict with the plain language of the statute, which recognizes that the use may be only “incidental” to the owner’s charitable purposes. Moreover, contrary to Stow’s suggestion, this Court did not adopt a “too remote” standard in *White Cross Hosp. Assn. v. Bd. of Tax Appeals*, 38 Ohio St.2d 199, 311 N.E.2d 862 (1974). Rather, in *White Cross Hosp. Assn.*, it was the BTA, which held that the use of the property was “too remote to

bring that use within the purview of R.C. 5709.121.” *Id.* at 201. Upon review, therefore, this Court did not adopt the “too remote” standard, but affirmed the BTA’s decision only because it was “clear” that “the board considered the pertinent language in that statute.” *Id.*

*White Cross Hosp. Assn.*, therefore, actually support’s AGMC’s position. Unlike *White Cross Hosp. Assn.*, it is far from “clear” in this case that the Board properly considered and applied “the pertinent language” in R.C. 5709.121(A)(2). If it had properly considered and applied the “in furtherance of” and “incidental to” language, in fact, it would have granted AGMC’s application because the undisputed evidence in the record establishes that the entire LifeStyles space is being used to provide rehabilitation and physical therapy services in furtherance of AGMC’s charitable purposes. Accordingly, the Court should reverse the BTA’s Decision because it did not apply the correct legal standard in deciding the merits of AGMC’s application under R.C. 5709.121(A)(2). (*See* AGMC’s Merit Brief, pp. 17-33).

**D. Appellees Misconstrue The “Not With A View To Profit” Standard.**

Appellees’ Briefs also misconstrue the “not with a view to profit” standard in R.C. 5709.121(A)(2). In his Brief, the Tax Commissioner argues that AGMC operates LifeStyles “with a view to profit” because it allegedly generates “surplus revenues” from the facility. (TC Br. 27-28). This argument, however, ignores the applicable case law, which has repeatedly held that a charitable institution, such as AGMC, does not operate “with a view to profit” merely because it generates revenues that exceed expenses as long as any “surplus” is not used or diverted for any purposes that are *ultra vires* to the institution. *See Community Health Professionals*, 113 Ohio St.3d 432, 2007-Ohio-2336, 866 N.E.2d 478, at ¶¶ 6, 23-24 (property not used “with a view to profit” because “no individuals made a profit as a result of the business activities of the three corporations,” even though “some financial surplus exists”); *see also Bowers v. Akron City Hosp.*, 16 Ohio St.2d 94, 96, 243 N.E.2d 95 (1968) (surplus revenues from

hospital parking lot did not defeat tax exemption because “fees are not diverted to purposes *ultra vires* to the institution”); *Vick v. Cleveland Mem. Med. Found.*, 2 Ohio St.2d 30, 33, 206 N.E.2d 2 (1965) (“a surplus [that] has been created in the hospital fund (no part of which has been diverted to a private profit)” did not defeat hospital’s tax exemption).<sup>1</sup>

In his Brief, the Tax Commissioner argues that LifeStyles is a “commercial venture” because the membership dues and other rental charges constitute “*quid pro quo*” transactions involving the exchange of goods or services “for receiving something in return.” (TC Br. 23-25). The cases cited by the Tax Commissioner in support of this argument, however, are readily distinguishable because they involve the commercial sale of goods (school uniforms, farm crops, and books) that were “functionally removed” from the owner’s charitable purposes. See *Seven Hills Schools v. Kinney*, 28 Ohio St.3d 186, 187, 503 N.E.2d 163 (1986) (property used by schools to sell school uniforms); *Ohio Masonic Home v. Bd. of Tax Appeals*, 52 Ohio St.2d 127, 130, 370 N.E.2d 465 (1977) (property used for commercial farming and sale of crops was not exempt because it was “functionally removed” from the owner’s charitable purposes); *Lutheran Book Shop v. Bowers*, 164 Ohio St. 359, 361-62, 131 N.E.2d 219 (1955) (use of property for Christian book store was not exempt). Indeed, contrary to the Tax Commissioner’s suggestions, the charitable use of the property is not “vicarious.” Rather, LifeStyles space itself is being used

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<sup>1</sup> In this regard, the Tax Commissioner misconstrues the evidence relating to the revenues and expenses associated with the operation, maintenance, and occupancy of the LifeStyles space. (TC Br. 27). At the Hearing, AGMC’s Vice-President for Accounting and Finance testified that membership dues are not charged to “generate a profit or to generate income, it’s really to help offset the expenses of that facility.” (Tr. 88-89, Supp. 34). Indeed, the evidence demonstrates that the revenues from LifeStyles are *less* than the total expenses, which includes the proportionate share of the utilities, housekeeping, security, and other occupancy costs. (Tr. 85-87, Supp. 33-34). While the Tax Commissioner argues that these “indirect” expenses should not have been included in the total amount of expenses, this argument ignores the fact that such occupancy costs clearly would have been included if LifeStyles were a separate entity that maintained separate financial statements or leased space from AGMC. (Tr. 86-88, Supp. 34).

for charitable purposes in a manner that is *clinically integrated* with the other health care services provided at the HWC. (AGMC’s Brief, pp. 9-11). Thus, there is no evidence in the record to establish that AGMC uses LifeStyles *merely* to raise funds “to support other charitable activities,” as the Tax Commissioner suggests. (TC Br. 28).<sup>2</sup>

Here, the membership dues are no different than any other charges that a charitable institution may collect for services rendered on behalf of a person who has the ability to pay. As this Court has long held, the fact that “one or more persons receiving the benefits of a charitable institution have the means, in whole or in part, to purchase those benefits in the market place or that some consideration is exacted from them on receipt of the benefits does not detract from the charitable character of the institution.” *Planned Parenthood Ass’n v. Tax Comm’r*, 5 Ohio St.2d 117, 214 N.E.2d 222, syllabus ¶ 3 (1966). Thus, in *Bethesda Healthcare*, this Court held that “the 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.” *Id.*, 101 Ohio St.3d 420, 2004-Ohio-1749, at ¶ 35. Rather, “it is the use of the property rather than the fact that revenues are collected and received from the property which is controlling.” *Community Health Professionals*, at ¶ 23.

Similarly, the Court should reject the argument that LifeStyles is similar to a “social or fraternal organization.” (TC Br. 25). This argument is misleading because it is based entirely upon the flawed premise that LifeStyles is a “members-only organization” that allegedly operates on an “invitation-only basis.” (*Id.*) The undisputed evidence in the record establishes, however, that AGMC makes LifeStyles available to thousands of patients without regard to the ability to

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<sup>2</sup> Both Appellees also rely heavily upon *Northeast Ohio Psych. Inst. v. Levin*, 121 Ohio St.3d 292, 2009-Ohio-583, 903 N.E.2d 1188, but this case is not applicable. (Stow Br. 17-18); (TC Br. 28). In that case, the issue was whether Northeast Ohio Psychiatric Institute was a “charitable institution,” not whether it used the property “in furtherance of” its charitable purposes or operated “with a view to profit” under R.C. 5709.121(A)(2). *Id.* at ¶¶ 16-20.

pay, and has never turned away any person in need based upon the ability to pay. Indeed, the Tax Commissioner ultimately concedes that AGMC is entitled to a tax exemption under R.C. 5709.121(A)(2) to the extent that it “uses the HWC ‘in furtherance of or incidental to’” its charitable purposes. (TC Br. 31). This tax exempt status is not negated merely because AGMC charges for the use of LifeStyles by persons who have the ability to pay. Accordingly, the Court should conclude that AGMC is entitled to the same tax exemption that was granted to all of the other portions of the HWC that are being used “in furtherance of” AGMC’s charitable purposes.<sup>3</sup>

**E. The Court Should Reject The Argument That R.C. 5709.121(A)(2) Does Not Apply If The “Use And Ownership” Of The Property “Coincide.”**

Finally, the Court should reject Appellees’ argument that R.C. 5709.121(A)(2) does not apply in this case because the “use and ownership” of the property allegedly “coincide.” (Stow Br. 4-5) (TC Br. 39-40). This is a meritless argument for several reasons. First, it is meritless because the BTA expressly held that R.C. 5709.121(A)(2) is *applicable* to AGMC’s application, and neither the Stow City School District nor the Tax Commissioner appealed that determination to this Court. (BTA Decision, pp. 3-4) (Supp. 3-4). Indeed, in this case, it is simply wrong for the Tax Commissioner to suggest that LifeStyles is *not* being used by “someone other than the property owner,” given the undisputed evidence that LifeStyles is being used by thousands of

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<sup>3</sup> In their Briefs, Appellees also argue that the Court should affirm the BTA’s Decision because there is an insufficient “public benefit” from granting a tax exemption in this case. (TC Br. 7); (Stow Br. 11-13). This argument is misleading because it ignores the undisputed fact that AGMC is a “charitable institution,” as defined by Ohio law. Indeed, in adopting R.C. 5709.121 and providing a charitable institution with an alternative means for obtaining a tax exemption, the General Assembly *already has determined* that there is a “public benefit” in granting an exemption for property belonging to a charitable institution if the three elements of the statutory test are met. The legal question presented, therefore, is not whether there is a “public benefit” to the proposed tax exemption. Rather, this Court’s role is limited only to determining whether the elements of statute have been satisfied. If so, then no further inquiry is required.

patients and members on a regular basis. Accordingly, the Court need not decide this legal issue because the undisputed evidence shows that AGMC in fact makes the property available for use by “others” in furtherance of its charitable purposes.

In any event, even if this argument were applicable to this case, it still should be rejected as a matter of law because it once again seeks to impose an additional requirement that is not set forth in the statute itself. As this Court has repeatedly held, R.C. 5709.121 provides an alternative method for a “charitable institution” to satisfy the “exclusive use” standard” in R.C. 5709.12(B). *Community Health Professionals*, 113 Ohio St.3d 432, 2007-Ohio-2336, 866 N.E.2d 478, at ¶ 18 (“If the institution is charitable, its property may be exempt if it uses the property exclusively for charitable purposes or it uses the property under the terms set forth in R.C. 5709.121”) (emphasis added). As in *Community Health Professionals*, therefore, this alternative method is available to any property “belonging to” a charitable institution, even if the institution both owns and “uses the property under the terms set forth in R.C. 5709.121.” *Id.* Accordingly, the Court should reject this argument as a matter of law because the statute does not, on its face, impose any requirement that ownership and use “must not coincide.”

In their Briefs, both Appellees cite to this Court’s opinion in *Dialysis Clinic, Inc. v. Levin*, 127 Ohio St.3d 215, 2010-Ohio-5071, 938 N.E.2d 329, ¶ 22-24, as allegedly supporting their position. This is not true. Although the Court noted in *Dialysis Clinic* that ownership and use “need not coincide” in order for property belonging to a charitable institution to be tax exempt under R.C. 5709.121, the acknowledgment that ownership and use “need not coincide” is not the same as holding that ownership and use “must not” or “shall not” coincide, as Appellees argue. This argument in fact conflicts with the plain language of the statute and Supreme Court precedent. In *Community Health Professionals*, for example, the property at issue was owned by

Community Health Professionals (“CHP”), and *used by* CHP and two affiliated entities for administrative offices. *Id.* at ¶¶ 2-4. In affirming the BTA’s grant of a tax exemption under R.C. 5709.121(A)(2), this Court held that the key question is whether “*a charitable institution uses its property* in furtherance of its charitable purposes,” and thus affirmed the decision because “the evidence before the BTA supports its conclusion that CHP *used its* property in furtherance of its charitable purpose and without a view to profit.” *Id.* at ¶¶ 21, 24 (emphasis added).

In his Brief, the Tax Commissioner argues that AGMC’s interpretation would render R.C. 5709.12(B) “meaningless” because it would allow a charitable institution to “mix & match” the two statutes in order to “avoid” the “exclusive use” requirements of R.C. 5709.12(B). (TC Br. 35-36). This argument, however, once again ignores Supreme Court precedent. This Court has repeatedly held that R.C. 5709.121(A)(2) provides an alternative method for satisfying the exclusive use standard set forth in R.C. 5709.12(B). *Community Health Professionals*, at ¶ 18. The availability of this alternative method does not mean that R.C. 5709.12(B) has been rendered “meaningless.” Rather, as this Court has acknowledged, the General Assembly simply has provided a “charitable or educational institution” with “[s]pecial treatment” that is not otherwise available to other institutions under R.C. 5709.12(B). *Dialysis Clinic*, at ¶ 22. Accordingly, given that there is no language in the statute that expressly bars a charitable institution from applying, in the alternative, for a tax exemption under both R.C. 5709.12(B) and R.C. 5709.121(A), the Court should reject the Tax Commissioner’s argument as a matter of law.

## **II. THE COURT SHOULD REJECT APPELLEES’ INTERPRETATION OF OHIO REVISED CODE 5709.12(B).**

### **A. Appellees Wrongfully Argue That AGMC’s Tax Exemption Should Be Determined Based Upon The Percentage Of Free Memberships.**

In their Briefs, Appellees do not dispute the Second Proposition of Law set forth in Appellant’s Brief (and in the Brief of Amicus Ohio Hospital Association) that a charitable

healthcare institution need not show a particular percentage of unreimbursed services in order to qualify for a tax exemption under R.C. 5709.12(B) or R.C. 5709.121(A)(2). (TC Br. 17, 20-21, fn. 7); (Stow Br. 6-7). Yet, notwithstanding this concession, the Tax Commissioner repeatedly argues that the Court should deny AGMC's exemption based upon the "degree" or "amount" or "quantity" of free or donated services. (TC Br. 1-3, 5-6, 9, 16-19, 29-30, 32-34). This argument, however, was previously rejected by this Court in both the *Dialysis Clinic* and *Community Health Professionals* cases. (See AGMC's Merit Brief, pp. 33-36). Accordingly, the Court should once again reject the Tax Commissioner's arguments as a matter of law.

In its Brief, Stow also argues that LifeStyles is not exempt because it allegedly does not permit free access to any person who "come[s] off the street" and wants to use the fitness center for any reason. (Stow Br. 9). This argument misconstrues the evidence in the record. Although Douglas Ribley testified, upon cross-examination, that AGMC "wouldn't just let someone come off the street and walk into the center" without a proper medical screening, he explained that AGMC regularly grants "complimentary access" to LifeStyles subject only to the condition that "they fill out health information and meet with an exercise physiologist" in order to make sure that "it's medically safe for them to come into the environment." (Tr. 180-181, Supp. 57). In so doing, Mr. Ribley made clear that AGMC has never turned away any person who has a medical need to use the facility. (Tr. 140-141, 216-217, Supp. 47, 66). Indeed, there is no evidence in the record to establish that AGMC has ever turned away any person "in need" based upon the ability to pay. (*Id.*) Accordingly, in light of AGMC's commitment to make LifeStyles available to all persons in need without regard to the ability to pay, the Court should conclude, in the alternative, that AGMC also can satisfy the "exclusive use" standard set forth in R.C. 5709.12(B). (See AGMC Br. pp. 35-36).

In his Brief, the Tax Commissioner also argues that AGMC did not show “enough” donations of the LifeStyles space for use by community organizations and other members of the “general public.” (TC Br. 16). Once again, this argument ignores the applicable legal standard. AGMC was not required to provide free access to any community organization or school who wants to use the facility. While AGMC presented evidence of community donations in order to further show how AGMC does not operate LifeStyles “with a view to profit,” this evidence was not outcome determinative. To the contrary, Ohio law is clear that a charitable institution does not lose its tax exempt status merely because it collects revenues from persons who have the ability to pay, or fails to donate a sufficient amount of unreimbursed services to the general public. *See Community Health Professionals*, 113 Ohio St.3d 432, 2007-Ohio-2336, 866 N.E.2d 478, at ¶ 18 at ¶¶ 22-23. The Tax Commissioner’s Brief, however, wrongfully ignores this legal standard and does not cite or discuss the *Community Health Professionals* opinion at all. (*See* TC’s Merit Brief, Table of Authorities, pg. v).

In this regard, the Stow Brief is also wrong in suggesting that the BTA made a factual finding that “Lifestyles was not open to the public at large,” and that AGMC “limits access only to members and guests.” (Stow Br. 2, 9-10). The BTA did not make either alleged finding. Rather, the BTA’s Decision merely found that “AGMC renders an insufficient amount of services to persons who are unable to afford them” based upon “the percentage of donated memberships” cited in the Tax Commissioner’s Brief. (BTA Decision, pg. 5). This is clear legal error because it not only violates the applicable legal standard, but ignores the undisputed evidence of patient use, which Appellees concede is a charitable use. (TC Br. 6); (Stow Br. 16). Accordingly, the Court should reverse the BTA’s Decision and conclude that AGMC is also entitled to a charitable tax exemption under the “exclusive use” standard in R.C. 5709.12(B).

**B. Appellees Misconstrue The Evidence Of Free Memberships In Exhibit 22.**

Although it is not outcome determinative of this appeal, we note that Appellees' Briefs misconstrue the evidence about the percentage of free memberships, as set forth in AGMC Ex. 22. The percentages in AGMC's Merit Brief were based upon an apple-to-apple comparison between the total number of new memberships per year and the number of new memberships donated each year. (AGMC Br. 36-37) (citing Ex. 22). In their Briefs, however, Appellees wrongfully compare the total number of existing memberships in each year with the number of new memberships that were donated each year. (TC Br. 33-34); (Stow Br. 10). This calculation only confirms the BTA's error. To the extent that a comparison of the number of paid versus free memberships is somehow relevant, such a comparison should be an apples to apples comparison between the number of existing paid memberships and the number of existing donated memberships, or alternatively, between the number of new paid memberships per year with the number of new donated memberships per year. Indeed, if the BTA had added up all of the free memberships that had been donated from 2008 to 2013, the percentage of free memberships would have significantly increased. (See AGMC Ex. 22, Supp. 197).<sup>4</sup>

In any event, the fact remains that the percentage of free vs. paid memberships ultimately does not matter because it is not controlling under either R.C. 5709.121(A)(2) or R.C. 5709.12(B). Under R.C. 5709.121(A)(2), AGMC, as a charitable institution, merely needs to

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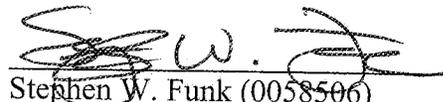
<sup>4</sup> In his Brief, the Tax Commissioner also argues that the number of "free" memberships in Exhibit 22 only represented the number of members who did not pay an "enrollment fee," not the number of members who did not pay any monthly dues. (TC Br. 18). This argument is not supported by any evidence in the record. Although Doug Ribley testified that "no discounts" were provided for membership dues, he *specifically explained* that the category of "donated or free memberships" were the "exception" to this rule. (Tr. 168, lines 6-23) (Supp. 54). Thus, the donated/free memberships in Exhibit 22 are members who did not pay both an enrollment fee and did not pay any monthly dues. (*Id.*)

demonstrate that the property is made available (1) “under its direction and control”; (2) for use “in furtherance of or incidental to” its charitable purposes; and (3) not “with a view to profit.” *Community Health Professionals*, 113 Ohio St.3d 432, 2007-Ohio-2336, 866 N.E.2d 478, at ¶ 19. AGMC therefore was *not* required to show a specific percentage of free memberships or to satisfy any other “quantity” requirements. *Id.* at ¶¶ 22-23. Similarly, as this Court has held, it “need not show a particular percentage” of free or unreimbursed services in order to qualify for a tax exemption under R.C. 5709.12(B). *Dialysis Clinic, Inc.*, 127 Ohio St.3d 215, 2010-Ohio-5071, 938 N.E.2d 329, at ¶¶ 38-46. Accordingly, the Court should conclude that the BTA erred as a matter of law by denying a tax exemption based only upon the percentage of free or donated memberships.

### CONCLUSION

For these reasons and the reasons set forth in Appellant’s Merit Brief, Appellant Akron General Medical Center respectfully requests that the Court reverse the BTA’s Decision under R.C. 5717.04 and remand with instructions to grant a tax exemption under R.C. 5709.12(B) and R.C. 5709.121(A)(2) for all of the non-leased portions of the AGMC Health & Wellness Center in Stow, Ohio.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that on this 3<sup>rd</sup> day of December, 2014, a true and correct copy of the foregoing *Reply Brief of Appellant Akron General Medical Center* was served via regular first-class mail, postage prepaid, under Civ. R. 5(B)(2)(c), upon the following counsel of record:

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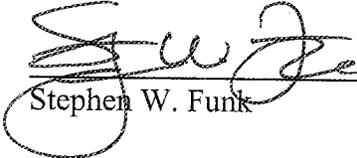
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