

In the
Supreme Court of Ohio

GENEVA AREA RECREATIONAL, EDUCATIONAL, AND ATHLETIC TRUST,	:	
	:	Case No. 2014-1778
Appellant,	:	
	:	Appeal from Ohio Board of Tax Appeals
v.	:	
	:	BTA Case No. 2012-A-841
	:	
JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO,	:	
	:	
Appellee.	:	

APPELLEE TAX COMMISSIONER'S MERIT BRIEF

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INTRODUCTION

The appellant Geneva Area Recreational, Educational, and Athletic Trust (hereinafter “GaREAT”) seeks charitable real property tax exemption for a state-of-the-art sports complex and vacant land. But due to the exclusive use of the property for fee-for-service transactions at market rates, rather than without regard for ability to pay, GaREAT cannot satisfy its burden to show entitlement to charitable exemption. On this basis, the Commissioner and BTA denied exemption under two charitable exemption statutes, namely R.C. 5709.12 and R.C. 5709.121.

The subject realty is situated in Ashtabula County, Ohio and includes 45 acres holding a multi-facility sports complex as well as 118 acres of vacant land. GaREAT uses the sports complex to provide facility rentals, athletic camps and leagues, gym memberships, championship venues, and food and drink, among other things. GaREAT also uses the subject realty to train elite prep student-athletes through a boarding program, but the athletes live and attend school *off-premises* at nearby Andrews Osborne Academy in Willoughby, Ohio.

The BTA’s factual findings regarding the sports complex and vacant land, which are supported in the record, compel the inescapable conclusion that the property is *not* used exclusively for charitable purposes. The BTA found that the goods and services provided on the property lack an essential element of “charity” under Ohio law; namely, provision to the general public without regard for ability to pay. *Planned Parenthood v. Tax Commissioner*, 5 Ohio St.2d 117, 120 (1966) (defining “charity”). As the BTA found, “[t]hough appellant argues that many uses are provided for a reduced fee, it presented no concrete evidence of such.” *Geneva Area Recreational, Educational, and Athletic Trust v. Testa*, BTA Case No. 2012-A-841 (Sep. 16, 2014), unreported, at 4 (hereinafter “*BTA Decision and Order*”). The BTA additionally found, in no uncertain terms, that “appellant’s witness testified that it had no formal policy for providing services without regard to the ability to pay.” *Id.* The BTA further dismissed GaREAT’s alleged

charity policy as “unreliable hearsay.” *Id.*; Ex. F, Supp. 672. Thus, charitable exemption is defeated because there is no showing that goods or services are provided “to persons who are unable to afford them.” *Bethesda Healthcare, Inc. v. Wilkins*, 101 Ohio St.3d 420 (2004).

The BTA further found that “the majority of uses of [GaREAT’s] facilities are pursuant to quid pro quo transactions,” *i.e.* fee-for-service transactions. *BTA Decision and Order*, at 4. That is, GaREAT provides goods or services in exchange for money at market based rates. Since GaREAT uses its facilities for fee-for-service transactions at market rates, another element of “charity” under *Planned Parenthood* is absent, *i.e.* charitable intent to provide goods or services to the general public “without hope or expectation of profit.”

Such “quid pro quo” transactions principally benefit the private parties to the transaction rather than the general public or a subclass of the general public with a particularized need. As the BTA explained, any benefit to the community from such transactions is merely “tangential” to GaREAT’s non-charitable activities and transactions. *Id.* The absence of charitable intent is therefore a second independent basis for finding that the subject realty is not used exclusively for “charitable” purposes under R.C. 5709.12 and R.C. 5709.121. *See e.g. Olmsted Falls Bd. of Ed. v. Tracy*, 77 Ohio St.3d, 393, 397 (1997) (social club using property for member activities financed with membership dues did not qualify for charitable exemption).

GaREAT’s claim to exemption under R.C. 5709.121 also faces other insurmountable obstacles to exemption. R.C. 5709.121 requires that exempt property belong to a charitable institution. But GaREAT, which uses the property under a 99-year lease, does not qualify as a charitable institution because its core activities are the non-charitable activities conducted on the subject realty. And, as the BTA held, exemption is defeated under R.C. 5709.121 because the fee owner, Roni Lee, LLC, is a for-profit entity that is not a charitable institution.

GaREAT has failed to show that Roni Lee LLC did not effectively retain ownership and control over the subject realty, despite the 99-year lease, because the lease may be controlled on both sides by the same people who control GaREAT, namely Ron and Tracy Clutter. The Clutters are the only members of Roni Lee and Mr. Clutter controls GaREAT as President (officer), director, and founder. S.T. 254 (Roni Lee LLC members); Appellee Ex. 16, at Interrogatory 11 (GaREAT listing GaREAT officers and directors), Supp. 626; S.T. 18 (initial GaREAT directors), Supp. 238. GaREAT has not satisfied its burden to show precautions in internal decision-making to prevent self-dealing and/or private inurement of revenues to individuals. Absent such precautions, the lease could be rewritten at any time to remove GaREAT's purported property rights. Roni Lee's for-profit and non-charitable institution status therefore defeats exemption.

Against this background, and as more fully explained below, this Court should affirm the BTA decision and order below as reasonable and lawful. R.C. 5717.04 (reasonable and lawful standard); *Satullo v. Wilkins*, 111 Ohio St.3d 399, 2006-Ohio-5856, ¶¶ 14-16.

STATEMENT OF THE CASE AND FACTS

A. Statement of Relevant Facts

GaREAT, also known as "SPIRE," is a nonprofit corporation located in Geneva, Ohio. S.T. 1; S.T. 10-19, Supp. 221, 230-239.¹ Organized in 2008, GaREAT has a purpose "to create an elite athletic training facility to train professional and Olympic caliber athletes." *BTA Decision and Order*, at 4. To do so, GaREAT coordinates athletic training with an *off-premises* boarding school for elite prep athletes. S.T. 59-60, Supp. 279-280; Hr. Tr. 19, Supp. 19. In

¹ For purposes of this brief, the statutory transcript of evidence that the Commissioner certified to the Board of Tax Appeals pursuant to R.C. 5717.02 will be referenced as "S.T. ___." Citations to the hearing transcript from the evidentiary hearing before the BTA will be referenced as "Hr. Tr. ___." The appendix to this brief will be referenced as "Appx. ___" and the supplement to the record will be referenced as "Supp. ___."

addition, GaREAT organizes athletic clubs, leagues, tournaments, and championship events. Athletic activities are held on the subject realty at a complex consisting of more than 750,000 square feet. The complex includes a football stadium, an indoor track and field complex, a field and courts building, and an aquatic center. S.T. 73; S.T. 59; S.T. 1-8, Supp. 293, 279, 221.

1. *The record strongly supports the BTA's express finding that GaREAT has not provided any "concrete evidence" that it uses the subject realty to provide goods or services for a reduced fee. BTA Decision and Order, at 4. GaREAT actually uses the subject realty to generate millions of dollars in revenue through fee-for-service transactions at market rates.*

GaREAT does not actually use its property to provide goods or services on a charitable basis. The BTA so found despite GaREAT's claim to provide services based upon ability to pay. GaREAT brief, at 17-18. That is, the BTA found that "[GaREAT] presented no concrete evidence of [providing services based upon ability to pay], *i.e.*, a listing of users of the facility corresponding to the fee paid and the fee normally charged." *BTA Decision and Order*, at 4;

The recreational activities on the subject property arise from *private fee-for-service transactions* based upon market rates. *Id.* at 4. These "quid pro quo transactions" are not charitable because they principally benefit the contracting parties, *i.e.* GaREAT and the consumer, rather than the general public. *See, e.g., Olmsted Falls Bd. of Ed. v. Tracy*, 77 Ohio St.3d, 393, 397 (1997) (fraternal club using property for member activities financed with membership dues paid not charitable); see discussion of non-charitable private quid pro quo transactions in Proposition of Law No. II, *infra* 23-26. For example, gym memberships, facility rentals, athletic clubs, leagues, and tournaments, are all made available to paying customers at market rates – not on a sliding fee scale based upon financial need. Hr. Tr. 82, Supp. 82. These activities are further discussed with the facility descriptions below.

In making its express finding that GaREAT produced “no concrete evidence” of providing goods or services for a reduced fee, the BTA rejected the testimony of GaREAT’s sole witness, GaREAT Chief Operating Officer Jeffrey Orloff. Mr. Orloff claimed that GaREAT has an unwritten policy to provide goods and services based upon the customer’s ability to pay. Hr. Tr. 95, Supp. 95. Mr. Orloff further claimed that GaREAT provides athletic leagues, clubs, facility rentals, *even banquet hall rentals for weddings*, all based upon ability to pay. Hr. Tr. 112-115 (leagues and rentals); Hr. Tr. 136 (weddings). But, the BTA weighed the evidence and found that GaREAT does not actually provide these services on a reduced fee basis.

Since its beginnings in 2008, GaREAT has generated millions of dollars in revenue from, among other things, fees for participating in athletic activities, fees for facility rentals, and revenue from food and drink sales. See GaREAT’s Profit & Loss Statements, Appellee’s BTA Ex. 6, Ex. 7, Ex. 8 and Ex. 9, Supp. 577-608.² The following table shows GaREAT’s annual revenues, excluding contributions, for 2009, 2010, and 2011:

Year	2009	2010	2011
Revenue (excluding contributions)	\$410,473	\$1,016,800	\$1,524,963

Note: As reported on GaREAT’s Profit & Loss Statements, these revenue figures are calculated as “Total Income” less “Individual, Bus Contributions” and less “Corporate Contributions”³

The record thus firmly supports the BTA’s finding that GaREAT provided no “concrete evidence” to show reduced fee transactions. Instead, the record reflects that the property is used for fee-for-service transactions at market rates that are quintessentially non-charitable.

² GaREAT stipulated to the authenticity and the accuracy of the figures in Appellee’s Ex. 5-10, Supp. 574-612, which consist of Profit & Loss Statements and Balance Sheets for GaREAT for 2009, 2010 and 2011.

³ For 2009: (\$3,668,114)-(\$3,257,641) = \$410,473. For 2010: (\$20,059,468)-(\$19,042,667) = \$1,016,800. For 2011: (\$7,527,135)-(\$6,002,172) = \$1,524,963. See, Appellee’s Ex. 6, Ex. 7, Ex. 8, and Ex. 9, Supp. 577-608.

2. *The BTA found that GaREAT has “no formal policy for providing goods or services without regard to the ability to pay.” GaREAT presented an alleged charity policy at hearing, but the BTA rejected the alleged policy as “unreliable hearsay.” BTA Decision and Order, at 4.*

Consistent with GaREAT’s failure to actually provide goods or services without regard for ability to pay, the BTA expressly rejected GaREAT’s contention that it maintains a *policy* to provide goods or services without regard for ability to pay. As the BTA found, “appellant’s witness [Mr. Orloff] testified that it had no formal policy for providing services without regard for ability to pay.” *BTA Decision and Order*, at 4. And, as already discussed, the BTA likewise rejected GaREAT’s contention that it has an *unwritten* charity policy through its finding that GaREAT provided no concrete evidence that it provides goods or services for a reduced fee.

Even more telling, the BTA expressly rejected an *unsigned and undated* document that GaREAT presented as its alleged charity policy because it is “unreliable hearsay.” *Id.* at 4. GaREAT never explained where the alleged policy came from or how and when it was created. Rather than lay a foundation and authenticate the alleged policy, GaREAT’s sole witness, Mr. Orloff, gave sworn testimony that he did not know when the document was created or when he had first seen it. Hr. Tr. 94, 97, Supp. 94, 97. Further, Mr. Orloff admitted that GaREAT does not advertise the alleged written policy, such that even if it existed, potential consumers would not know about it or benefit from it. Hr. Tr. 82-84, Supp. 82-84. For these reasons, and those that follow in Proposition of Law No. II, the record strongly supports the BTA’s express finding that GaREAT does not have a written or oral charity policy.

3. *The subject property consists exclusively of sports facilities and vacant undeveloped land.*

The subject realty contains the following five major areas: (1) the field and courts building; (2) the indoor track and field building; (3) the outdoor football stadium; (4) the aquatic

center; and (5) undeveloped property. In explaining the use of each area, this section demonstrates that each area is used for non-charitable fee-for-service transactions.

i. The Field and Courts Building

The field and courts building is a 215,000 square foot facility with two major areas for athletic activities. Hr. Tr. 24, Supp. 24. One area is covered with synthetic turf and used for soccer, lacrosse, football, baseball, softball, field hockey, and rugby. Hr. Tr. 24, Supp. 24; S.T. 73, Supp. 293. The other area has a multi-purpose court surface that may be used for volleyball, basketball, tennis, or gymnastics. Hr. Tr. 24, Supp. 24. This area may be set up as twelve volleyball courts, six NBA-sized basketball courts, or nine tennis courts. S.T. 73, Supp. 293.

The field and courts building is available for the public to rent for a fee. Hr. Tr. 120-121, Supp. 120-121. Moreover, the facility is rented to other organizations at market-based rates for major sporting events such as the Mid-American Conference Women's Volleyball Championships. Hr. Tr. 196, 48 Supp. 196, 48. Mr. Orloff testified that GaREAT's facilities are arguably nicer than college or university owned facilities. Hr. Tr. 196, Supp. 196. During events at the field and courts building, food and drink are sold at the facility, and patrons may not bring in their own food and drink. Hr. Tr. 121-122, Supp. 121-122.

GaREAT also hosts athletic leagues and camps for participants of all ages at the field and courts building. S.T. 168-183, Supp. 388-403. Camps for basketball, volleyball, and soccer are held at the field and courts building. Hr. Tr. 115, Supp. 115. Adult leagues for basketball and soccer, among other leagues, are also available at the field and courts building. Hr. Tr. 113, Supp. 113; S.T. 168, 180, Supp. 388, 400. These camps and leagues charge a fee for participation, which usually runs into the hundreds of dollars. S.T. 168, 170, 172, 174, 176 and

179, Supp. 388, 390, 392, 394, 397 (website descriptions); Appellee's Ex. 6, 7, and 9, Supp. 577-608 (GaREAT profit and loss statements).

In addition, there are luxury suites that overlook the outdoor football stadium, which are sometimes rented out for a fee. Hr. Tr. 138-139, Supp. 138-139. Dr. Seed's Orthopedic, also known as All Star Physical Therapy and Wellness, operates out of the field and courts building as well. All Star Physical Therapy and Wellness is a *for profit* entity that is open to the public and pays \$4,473 per month in rent to use the property. Hr. Tr. 169, Supp. 169; Appellee's Ex. 20, Supp. 639-649.

ii. The Indoor Track & Field Building

The indoor track and field building is a 240,000 square foot building with a state-of-the-art 300 meter indoor track, two high jump pits, two long jump pits, two pole vault pits, portable cages for discus and shot put competition, and a full football field that may also be used for baseball, softball, soccer, and lacrosse. S.T. 73, Supp. 293; Hr. Tr. 27, Supp. 27. The facility also has full locker room facilities and seating for up to 5,000 people. Appellant's Ex. E. at 4, Supp. 668. Additional features include a state-of-the-art sound system, lighting, and temperature control. Appellant's Ex. E. at 4, Supp. 668.

The indoor track and field building is available on a fee-for-rental basis to the public and for hosting events in the same market-based manner as the field and courts building. Hr. Tr. 132, Supp. 132. The Big Ten recently hosted the 2013 Big Ten Indoor Track and Field Championships at the facility, for example. Hr. Tr. 140, Supp. 140.

In addition to recreational areas, the indoor track and field building contains a 25,000 square foot glass-encased banquet and meeting hall that is available to rent for a fee. S.T. 102, Supp. 322; Hr. Tr. 132, Supp. 132; S.T. 113-121, Supp. 113-121 (photos). The banquet hall may

be rented for such events as parties, weddings, corporate events and outings, business meetings, and large conferences. Hr. Tr. 133, Supp. 133. GaREAT has a liquor permit such that it may accommodate events at the banquet and meeting hall where alcohol is served. Hr. Tr. 132, Supp. 132. On one occasion a wine tasting was held at the facility. Hr. Tr. 133-135, Supp. 133-135.

Also located at the indoor track and field facility is a fitness center called Spire Fit that is open to the public for a fee. The fee schedule does not provide reduced rates based upon a consumer's ability to pay. Hr. Tr. 164, Supp. 164; S.T. 35-36, Supp. 255-256 (Spire Fit fee schedule). Spire Fit has equipment for member use typical of a fitness center, including bikes, treadmills and weights. Hr. Tr. 164, Supp. 164.

iii. The Outdoor Football and Track and Field Stadium

The outdoor stadium contains a full size football field with an outdoor track surrounding, suitable for football, soccer, and track and field events. Hr. Tr. 145-146, Supp. 145-146; S.T. 73, Supp. 293. Spectator amenities include seating for 6,000, ten loges, and a large press box. S.T. 73, Supp. 293. There is also a nearby stadium for track and field throwing events such as javelin and discus. Hr. Tr. 145, Supp. 145. The outdoor stadium is available on a fee-for-rental basis to the public and for hosting events in the same market-based manner as the other major facilities on the property. Hr. Tr. 148, Supp. 148.

In addition, GaREAT has a special arrangement with the Geneva Area City Schools to use the outdoor stadium. Appellee's Ex. 13, Supp. 618; Hr. Tr. 147, Supp. 147. Under a special revenue sharing agreement with the Geneva schools, the Geneva schools receive gate receipts for Geneva High School football games held at the facility up to the historical average at their old stadium that this stadium replaced. Gate receipts over and above that amount are split 75% for GaREAT and 25% for the Geneva schools. Appellee's Ex. 13, at 6, Supp. 618.

iv. The Aquatic Center

The Aquatic Center is a 293,000 square foot facility with an Olympic-grade 50 meter pool, a diving area, therapeutic pools, locker room facilities and seating for approximately 2,000 people. Appellant's Ex. E, at 5, Supp. 668-669. Like the other major facilities, the aquatic center is available on a fee-for-rental basis to the public and for hosting events in a market-based manner. Hr. Tr. 156, Supp. 156. For example, the NCAA has hosted the NCAA Division II Swimming and Diving Championships at the facility. Hr. Tr. 46, Supp. 46.

Also located at the aquatic center is a for-profit company called Michael Johnson Performance, Inc. Hr. Tr. 148-149, Supp.; Appellee's Ex. 21, Supp. 650-660. There, athletes train for a variety of sports using, among other methods, weight training and sprint training on a 60 yard track. Hr. Tr. 42, Supp. 42. GaREAT annually pays Michael Johnson Performance \$150,000 to provide these services. Appellee's Ex. 21, Supp. 650-660; Hr. Tr. 152, Supp.152.

Separately, a restaurant and food service called "Spire Fuel" operates out of the aquatic center. Hr. Tr. 172-174, Supp. 172-174. Spire Fuel is a cafeteria style restaurant that provides healthy food. Hr. Tr. 127, Supp. 127. Like other restaurants, GaREAT charges fees for the food sold at Spire Fuel and the prices are predominately based upon cost. Hr. Tr. 127, Supp. 127.

v. The Undeveloped Property

Roughly 118 acres of the 163 acre property at issue in this case is undeveloped land that is not currently being used for any purpose. Hr. Tr. 158, Supp. 158. As GaREAT stated on its application for exemption, and as Mr. Orloff confirmed, the undeveloped land "may be sold to businesses for commercial development." S.T. 325, Supp. 545; *see also*, S.T. 73, 103, 248, Supp. 293, 323, 468 (other references to commercial development at GaREAT). In fact, Mr. Orloff testified that roughly 20% of this property is currently held for future sale. Hr. Tr. 200,

Supp. 200. Future commercial development may include a hotel, restaurant and office space. S.T. 236, Supp. 546.

GaREAT also claims that it may develop dormitories on the undeveloped property in the future. Hr. Tr. 200, Supp. 200. However, Mr. Orloff testified that GaREAT has no funds in place to build such dormitories or other new facilities. Hr. Tr. 163, Supp. 163. Mr. Orloff further explained that plans to develop other facilities are highly speculative. Hr. Tr. 163, 200, Supp. 163, 200.

4. The off-premises boarding school where student athletes receive schooling, room, board, and transportation services from Andrews Osborne Academy rather than GaREAT.

GaREAT also bases its claim to exemption upon an off-premises boarding school for elite prep athletes. GaREAT brief, at 7, 18. GaREAT fails to mention in its brief, however, that all student-athletes in its boarding program live, sleep, and learn off-premises from the subject realty. Hr. Tr. 89, Supp. 89. In fact, the student-athletes that GaREAT is referring to attend school at nearby Andrews Osborne Academy in Willoughby, not at GaREAT's facilities in Geneva. The subject realty is not used as a school and no formal education occurs there.

Andrews Osborne provides room, board, schooling, and transportation to and from GaREAT for the student-athletes in GaREAT's boarding program. The student-athletes attending Andrews Osborne all live off-premises from GaREAT. Significantly, GaREAT has no control over admissions to Andrews Osborne, nor the fees charged for tuition, room, board, and transportation services provided to student-athletes in GaREAT's boarding program. Hr. Tr. 89, 108, Supp. 89, 108. Nearly half of the price of the boarding school program is for the off-premises educational component at Andrews Osborne. Hr. Tr. 91-93, Supp. 91-93.

GaREAT provided a document purporting to show that fees for the boarding program are provided on a discounted basis, but the document does not show whether or to what extent fees for GaREAT's coaching services are reduced. Appellant's Ex. H, Supp. 673-674; Hr. Tr. 105-106, Supp. 105-106. Based upon this document, the BTA found that there was "some indication" that 30 student-athletes received some *de minimus* amount of reduced coaching fees, but such evidence is not "concrete evidence." *BTA Decision and Order*, at 4. Assuming *arguendo* that some students actually receive a discount, GaREAT has failed to show that the "full price" is not artificially high to attract student-athletes. A discount from a rate that no one pays is hardly a discount – a commercial enterprise might do the same as a marketing strategy. And, the services provided to the 30 student-athletes on the premises cannot justify exemption in any event because they are *de minimus* and ancillary to the non-charitable activities there.

Mr. Orloff also testified that GaREAT has no admission policy for its boarding program. GaREAT does not ask athletes to provide *any* documentation showing financial condition. As Mr. Orloff stated, "we just trust folks" and "we just believe them and -- usually you can tell." Hr. Tr. 157, 178. But without financial documentation, GaREAT cannot reliably know whether or to what extent it provided goods or services based upon a student-athlete's ability to pay.

B. Procedural Posture

On May 20, 2010, GaREAT filed an application with the Commissioner seeking charitable exemption under R.C. 5709.12 and R.C. 5709.121 for its state-of-the art sports complex and vacant land for tax year 2010. S.T. 312-313, Supp. 532-533. GaREAT noted the property is used to provide services on a fee-for-service basis, but claimed that such fees are "at a level within the financial reach of residents of Ashtabula County, Ohio." S.T. 325, Supp. 545. GaREAT provided no documentary evidence with its application to support this claim.

Through his final determination dated January 23, 2012, the Commissioner denied GaREAT's claim for charitable exemption under both R.C. 5709.12 or R.C. 5709.121. S.T. 1-8, Supp. 221-228. Based upon the evidence, the Commissioner rejected GaREAT's claim to provide services with the financial reach of patrons. The Commissioner expressly found that GaREAT "acknowledged that there is no fee waiver policy or plan to provide goods or services on a sliding scale based upon a consumer's financial need. The online membership price chart has no provision for discounts for local residents or based on need." S.T. 3, Supp. 223.

Relying on *Bethesda Healthcare, Inc. v. Wilkins*, 101 Ohio St.3d 420 (2004) and *Planned Parenthood Ass'n v. Tax Commissioner*, 5 Ohio St.2d 117, syllabus, 120 (1966), the Commissioner further explained that GaREAT does not conduct charitable activities nor use the subject realty exclusively for charitable purposes, at S.T. 6, as follows:

[T]here is no evidence of charitable activity by [GaREAT]. Certainly, the applicant is doing things that benefit the surrounding community, but this benefit is basically the same as any other large business that might be developed in the community. The applicant's primary goal is to develop an elite sports training facility to develop Olympic and professional caliber athletes. The facilities primarily benefit elite athletes locally and from beyond the local region, and the facilities incidentally benefit the local community by generating business activity and by providing recreational activity that can be accessed for a fee. Further **the operation of the GaREAT complex, though by a non-profit entity, is based on a for-profit business model, not a charitable model. The programs and usages of the premises are based on significant user fees and charges that are, in turn, based on market rates. Further, the applicant acknowledges that it neither has, nor plans to have, any charitable reduced fees or an income-based sliding scale for the use of the facilities.**

The Commissioner also denied exemption for the undeveloped and vacant land on the property. S.T. 7, Supp. 227; Hr. Tr. 158, Supp. 158. As the Commissioner found, GaREAT did not satisfy its burden to provide "tangible evidence of efforts in preparation for an ultimate

exempt [use]” of the undeveloped land. Lastly, the Commissioner rejected GaREAT’s claim to exemption due to GaREAT’s 501(c)(3) status with the federal government. S.T. 7, Supp. 227.

GaREAT then appealed the Commissioner’s final determination to the BTA, arguing that the Commissioner’s erred in finding that the subject property is not used exclusively for charitable purposes under R.C. 5709.12 and R.C. 5709.121. The BTA affirmed the Commissioner’s denial of exemption as reasonable and lawful because the property is not used exclusively for charitable purposes. *BTA Decision and Order*, at 3-4, quoting *Growth Partnership for Ashtabula v. Levin*, BTA Case No. 2008-K-1030 (Dec. 7, 2010), unreported, affirmed by Eleventh District at 2012-Ohio-37, Appx. 8-9.

The BTA held that any benefits GaREAT provides to the community are “tangential to its primary purpose of establishing itself as an elite athletic training facility.” *BTA Decision and Order*, at 4. In this regard, the BTA made the following factual findings:

The majority of the uses of the facilities are pursuant to quid pro quo transactions. Though appellant argues that many uses are provided for a reduced fee, it presented **no concrete evidence** of such, *i.e.*, a listing of users of the facility corresponding to the fee paid and the fee normally charged. * * * Moreover, **appellant’s witness testified that it had no formal policy for providing services without regard to the ability to pay. Appellant did provide a copy of appellant’s charitable policy; however, the witness could not authenticate the document, and we find it to be unreliable hearsay.**

Id. at 4 (Emphasis added). In other words, GaREAT uses its facilities to for ordinary commercial transactions, does not have a charitable policy, and fails to actually provide goods or services without regard to ability to pay. These activities are not “charitable” and the BTA properly rejected exemption due to such use of the property. After rejecting exemption based upon current use, the BTA then rejected exemption based upon prospective use as well. *Id.* at 4.

The BTA further held that exemption is defeated under R.C. 5709.121 because the for-profit owner of the property, Roni Lee, LLC, is not a charitable institution. *Id.* at 3.

GaREAT then appealed the BTA's Decision and Order to this Court pursuant to R.C. 5717.04. In its notice of appeal, GaREAT maintained its position that the subject realty is used exclusively for charitable purposes pursuant to R.C. 5709.12 and R.C. 5709.121. GaREAT further challenges the BTA's express factual findings through the following "assignment of error": "SPIRE's witness could not authenticate SPIRE's written charitable policy and in finding it to be unreliable hearsay thus according it no evidentiary weight."

For the reasons that follow, and those already stated, this Court should reject GaREAT's assignments of error and affirm the BTA's decision and order below as reasonable and lawful.

ARGUMENT

Proposition of Law No. I:

This Court reviews BTA decisions affirming a final determination of the Tax Commissioner to determine whether the BTA reasonably and lawfully affirmed the Tax Commissioner's final determination as "not clearly unreasonable or unlawful." Further, tax exemption statutes are strictly construed against exemption and the claimant bears the burden to show clear entitlement to exemption.

Satullo v. Wilkins, 111 Ohio St.3d 399, 2006-Ohio-5856, ¶¶ 14-15, followed.

A. This Court affirms the BTA when the BTA reasonably and lawfully affirms the Tax Commissioner's final determination as not "clearly reasonable and lawful."

"In reviewing a BTA decision, this court looks to see if that decision was "reasonable and lawful." R.C. 5717.04; *Satullo v. Wilkins*, 111 Ohio St.3d 399, 2006-Ohio-5856, ¶ 14 (internal citation omitted). Similarly, the standard for BTA review of the Commissioner's final determinations is that "[t]he Tax Commissioner's findings are presumptively valid, absent a

demonstration that those finding are clearly unreasonable or unlawful.” *Shiloh Auto. v. Levin*, 117 Ohio St.3d 4, 2008-Ohio-68, ¶ 16; *Hatchadorian v. Lindley*, 21 Ohio St.3d 66, 69 (1986).

The Commissioner’s legal and factual findings are subject to the “clearly unreasonable or unlawful” standard, among other reasons, because, as the State’s expert on Ohio tax matters and a public official, he is presumed to have acted in “good faith” and with “sound judgment.” *Wheeling Steel Corp. v. Evatt*, 143 Ohio St. 71, syllabus (1944). “[T]he tax commission has facilities which are not available to a judicial tribunal[.]” *Floyd v. Manufacturers’ Light & Heat Co.*, 111 Ohio St. 57, 65-66 (1924); *Wheeling Steel*, 143 Ohio St. at 83-84. Moreover, as the State’s expert, the Commissioner has the “highest level of discretion and official judgment.” *Ashland Cty. Bd. of Comm. v. Ohio Dept. of Taxation*, 63 Ohio St.3d 648, 656 (1992).

Recently, this Court held that the Commissioner is entitled to a presumption of regularity in “performing the function that the law calls upon him to perform.” *Toledo v. Levin*, 117 Ohio St.3d 373, 2008-Ohio-1119, ¶ 28, quoting *State ex rel. Shafer v. Ohio Turnpike Comm.* 159 Ohio St. 581, 590 (1953) (“in the absence of evidence to the contrary, public officers, administrative officers and public boards, within the limits of the jurisdiction conferred by law, will be presumed to have properly performed their duties and not to have acted illegally but regularly and in a lawful manner”); see also *State ex rel. Taft v. Campanella*, 50 Ohio St.2d 242, 246 (1977). The Commissioner’s experience, expertise, and integrity thus explain why his legal and factual findings are presumptively unless shown to be “clearly unreasonable or unlawful.”

Thus, the Court’s review of the BTA’s legal and factual findings in a decision affirming a final determination of the Tax Commissioner specifically addresses whether the BTA reasonably and lawfully determined that the Commissioner’s final determination was “not clearly unreasonable or unlawful.” R.C. 5717.04; *Satullo*; *Shiloh*. “The court ‘will not hesitate to

reverse a BTA decision that is based on an incorrect legal conclusion,” but GaREAT’s request for “de novo” review of legal conclusions runs contrary to R.C. 5717.04 and the controlling case law discussed above. *Satullo*, at ¶ 14; GaREAT brief, at 10. With respect to factual matters, “this court will affirm the BTA’s determinations of factual issues if the record contains reliable and probative evidence to support the BTA’s findings. *Satullo*, at ¶ 14 (internal citation omitted).

The BTA’s decision and order in this case should be affirmed as reasonable and lawful. Significantly the BTA made several factual findings in this case that are strongly supported by the evidentiary record. Most notably, the BTA found that GaREAT has “no formal policy for providing goods or services without regard to the ability to pay” and that the alleged charity policy that GaREAT did produce at hearing is “unreliable hearsay.” *BTA Decision and Order*, at 4. The BTA further found that GaREAT has not provided any “concrete evidence” that it uses the subject realty to provide goods or services for a reduced fee and without regard for ability to pay. As explained in the following Propositions of Law No. II and III, these findings and others, together with the settled law, conclusively defeat GaREAT’s claim to charitable exemption.

B. Tax exemption statutes are “strictly construed” against the party claiming exemption and the property owner bears the burden to show entitlement to exemption.

This Court has long and uniformly held that “[t]he rationale justifying a tax exemption is that there is a present benefit to the general public *** sufficient to justify the loss of tax revenue. *First Baptist Church of Milford v. Wilkins*, 110 Ohio St.3d 496, 2006-Ohio-4966, ¶ 10 (internal citation omitted). As early as the 1850, this Court recognized that tax exemption burdens non-exempt property and taxpayers, as follows: “If property, employed in one kind of business, is exempted from taxation, the burden will necessarily fall more heavily on property employed in other pursuits.” *Cincinnati College v. State*, 19 Ohio 110, 115 (1850).

Since tax exemption places a burden on the tax base, tax exemption is appropriate only where there is a public benefit sufficient to justify loss of tax revenue.

This Court has further echoed *Cincinnati College* to explain that tax exemption statutes are “in derogation of equal rights” of all other taxpayers,” and thus must be “strictly construed” against exemption. *Anderson/Maltbie Partnership v. Levin*, 127 Ohio St.3d 178, 2010-Ohio-4904, ¶ 16. “The principle of strict construction requires that the statute’s language be construed against the exemption, meaning that the onus is on the taxpayer to show that the language of the statute ‘clearly express[es] the exemption’ in relation to the facts of the claim. *Id.*, quoting *Ares, Inc. v. Limbach*, 51 Ohio St.3d 102, 104 (1990).

Further, the General Assembly has expressly provided that “the burden of proof shall be placed on the property owner to show that the property is entitled to exemption.” R.C. 5715.271; *Northeast Ohio Psychiatric v. Levin*, 121 Ohio St.3d 292, 2009-Ohio-583, ¶ 19. “The fact that the burden is on the taxpayer means that ‘in all doubtful cases exemption is denied.’” *Anderson/Maltbie Partnership* at ¶ 16.

Against this background, this Court should hold that the BTA reasonably and lawfully affirmed the Commissioner’s final determination as not “clearly unreasonable or unlawful” because GaREAT did not satisfy its burden to show clear entitlement to charitable exemption.

Proposition of Law No. II:

Realty is not used exclusively for charitable purposes under R.C. 5709.12 or R.C. 5709.121 where is it used for quid pro quo, i.e. fee-for-service, transactions at market rates rather than to provide goods or services to the general public without regard for ability to pay and without hope or expectation of gain or profit.

The definition of “charity” in Ohio tax cases reflects the long-held and settled principle that tax exemption is appropriate only where there is a benefit to the general public (or a sub-

class of the general public with a particularized need) to justify loss of tax revenue. In *Planned Parenthood Ass'n v. Tax Commissioner*, this Court defined “charity” as follows:

[C]harity is the attempt in good faith, spiritually, physically, intellectually, socially and economically to advance and benefit mankind in general, or those in need of advancement and benefit in particular, **without regard to their ability to supply that need from other sources and without hope or expectation, if not with positive abnegation, of gain or profit by the donor or by the instrumentality of the charity.**

5 Ohio St.2d 117, syllabus, 120 (1966) (Emphasis added). Among other requirements, then, charitable activity requires *both* (a) the provision of goods or services without regard for ability to pay and (b) charitable intent to provide goods or services without a view to gain or profit.

As detailed below, GaREAT fails in each respect. The BTA found, and the record shows, that GaREAT does not use the subject realty to provide goods or services without regard for ability to pay. The BTA further found that GaREAT has no charity policy. Further, GaREAT lacks charitable intent, as it uses the subject property for commercial quid pro quo, *i.e.* fee-for-service, transactions. GaREAT’s activities and use of the property thus fail to comport with the *Planned Parenthood* definition of charitable activity and exemption must be denied.

A. GaREAT does not use the property exclusively for charitable purposes because it does not provide goods or services without regard for ability to pay. As the BTA expressly held, GaREAT has not provided any “concrete evidence” that the subject realty is used to provide goods or services for a reduced fee. *BTA Decision and Order*, at 4.

Exemption is defeated in this case solely on the basis that GaREAT does not, and has not provided evidence showing, that it uses its sports facilities and undeveloped land to provide goods or services without regard for ability to pay. Pursuant to the definition of “charity” under *Planned Parenthood*, charitable goods or services must be provided “without regard to * * * ability to supply that need from other sources,” *i.e.* **without regard for ability to pay.** But that is not true of the goods and services provided in this case. The BTA made two factual findings

central to its holding in this regard: first, that there is “no concrete evidence” that GaREAT provides goods or services without regard for ability to pay; and second, that GaREAT has “no formal policy for providing goods or services without regard for ability to pay.”

1. GaREAT does not use its sports complexes and undeveloped land to provide goods or services without regard for ability to pay and has provided “no concrete evidence” of such.

As the BTA found, the subject realty is not used to provide goods or services without regard for ability to pay. *BTA Decision and Order*, at 4. The BTA expressly found that the property is used mostly for “quid pro quo transactions”, *i.e.* fee-for-service transactions, and that there is “no concrete evidence” that the property is used to provide goods or services “for a reduced fee.” *Id.* The BTA noted that there is no “listing of users of [facilities] corresponding to the fee paid and the fee normally charged.” *Id.* In so finding, the BTA rejected the testimony of GaREAT Chief Operating Officer Jeffrey Orloff that GaREAT provides athletic leagues, clubs, facility rentals, *even banquet hall rentals for weddings*, all based upon ability to pay. Hr. Tr. 112-115 (leagues, clubs, facility rentals, Spire Academy); Hr. Tr. 136 (weddings).

There is no such evidence because GaREAT does not actually use its property exclusively for charitable purposes. For example, batting cages are made available to paying customers rather than on a sliding fee scale based upon financial need. Hr. Tr. 82, Supp. 82. The batting cages are made available on the same basis as the other activities at GaREAT’s facilities, for example athletic clubs, leagues, and tournaments. These activities are more fully discussed in the following Section B regarding “quid pro quo,” *i.e.* fee-for-service, transactions.

Mr. Orloff even admitted that there are at least two *for-profit* businesses operating on the property, specifically Michael Johnson Performance, Inc. and All Star Physical Therapy and Wellness. Appellee’s Ex. 21, Supp. 650-660; Hr. Tr. 152, Supp. 152 (Johnson Performance); Hr.

Tr. 169, Supp. 169 (All Star Physical Therapy). These for-profit businesses operate with a view to profit and do not provide services on a charitable basis.

Further demonstrating that GaREAT does not actually provide goods or services on a charitable basis, Mr. Orloff admitted that GaREAT does not ask its customers to provide documentation showing their financial condition when requesting discounted goods or services. Hr. Tr. 114-115, Supp. 114-115. According to Mr. Orloff, GaREAT's multi-million dollar operation follows the honor system when, if ever, it provides goods or services based upon ability to pay. Hr. Tr. 113-115, Supp. 113-115. Mr. Orloff testified as follows: "And I want to be clear that when we [offer discounts based upon ability to pay], we're not requiring somebody to provide, you know, multitudes of documentation. It's – We're based on an honor system and a culture that surrounds that honor system." Hr. Tr. 113-115, Supp. 113-115.

Particularly remarkable in this regard is the admission policy for GaREAT's boarding program where elite high school athletes attend an *off-premises* boarding school while training for their sport at GaREAT. Hr. Tr. 92-93, 108, Supp. 92-93, 108. Mr. Orloff testified that, despite allegedly offering financial aid to athletes who attend the boarding school, at no time during the admissions process does GaREAT ask athletes to provide *any* documentation showing financial condition. Mr. Orloff testified that "we just trust folks" and "we just believe them and - usually you can tell." Hr. Tr. 157, 178, Supp. 157, 178. But absent records showing financial condition, GaREAT cannot reliably know whether or to what extent it provides goods or services based upon a student-athlete's ability to pay.

Thus, the record firmly supports the BTA's express finding that GaREAT provided no "concrete evidence" to support its claim to use the subject realty exclusively for charitable

purposes. Instead, the record reflects the opposite; GaREAT uses the property for fee-for-service transactions at market rates that are quintessentially non-charitable.

2. *The BTA found that GaREAT does not have a charity policy or any policy to provide goods or services without regard for ability to pay.*

Further, and also as the BTA expressly found, GaREAT does not have a charity policy. The BTA expressly held that “appellant’s witness testified that it had no formal policy for providing services without regard to the ability to pay.” *BTA Decision and Order*, at 4. In so finding, the BTA rejected GaREAT’s contention that it has an unwritten and written charity policy. *First*, the BTA found that GaREAT does not have a charity policy despite Mr. Orloff’s testimony that GaREAT has an oral tradition to provide goods and services based upon the customer’s ability to pay. Hr. Tr. 95, Supp. 95. GaREAT’s claims in briefing are no more availing, but merely a misguided attempt to have this Court reweigh the evidence.

Second, the BTA expressly rejected GaREAT’s alleged (unsigned and undated) written charity policy as “unreliable hearsay” that has not been “authenticated.” *BTA Decision and Order*, at 4; Ex. F, Supp. 672. Rather than lay a foundation and authenticate the alleged policy, Mr. Orloff testified under oath that he did not know when the document was created or when he had first seen it. Hr. Tr. 94, 97, Supp. 94, 97. The alleged policy therefore may have been written as late as the BTA hearing in 2013, and well after the 2010 tax year at issue.

The alleged policy is also suspect because GaREAT failed to produce it in response to the Commissioner’s discovery requests prior to BTA hearing. When the Commissioner asked GaREAT to identify its charity policy, with language mirroring the *Planned Parenthood* definition of charity, GaREAT objected on the basis that the interrogatory is “impermissibly vague and nonsensical.” Appellee’s Ex. 16, p. 3, 10, 11, Supp. 630 (Interrogatory #22). But later, at BTA hearing, GaREAT voluntarily introduced its alleged charity policy, with language

mirroring the definition of “charity” in *Planned Parenthood*. Appellant’s Ex. F, Supp. 672. GaREAT never explained why the alleged policy was not provided in the first instance.

Further, GaREAT does not advertise the alleged charity policy, which assures that even if it were in place during 2010 it would have little or no practical effect. Hr. Tr. 82-84, Supp. 82-84. Mr. Orloff testified that GaREAT relies on word of mouth, customer-initiated inquiries, and a statement on its current website to promote its alleged charity policy. Hr. Tr. 82, Supp. 82. The current website, however, was implemented in 2011, *i.e.* more recently than the 2010 tax year here. Hr. Tr. 96-97, Supp. 96-97. Mr. Orloff was not sure whether the alleged policy was available on the old website in place during the 2010 tax year. Hr. Tr. 96-97, Supp. 96-97.

Thus, even if it were supposed that GaREAT had a charitable policy during 2010, the alleged charitable policy was not publicly available in writing. Absent a conscientious effort to promote awareness about the alleged policy, potential users of the policy would be largely or completely unaware that it exists. Potential consumers would not actually receive discounted goods or services and the alleged policy would have little or no practical effect. Thus the record firmly supports the BTA’s finding that GaREAT does not have a charity policy.

Based upon the BTA’s factual findings, as the record supports, GaREAT does not provide goods or services without regard for ability to pay, on the subject realty or elsewhere. GaREAT’s claim to charitable exemption must fail on this basis alone.

B. “Charity” requires an institution to provide a gift, “without hope or expectation, if not with positive abnegation, of gain or profit.” Where, as here, GaREAT’s transactions are conducted with the hope or expectation of a “quid pro quo” at arm’s length, *e.g.* through fee-for-service transactions at market rates, the transactions are not “charitable.”

Independently, GaREAT’s claim to charitable exemption is defeated because the goods and services provided at its state-of-the-art sports complex are provided with a view to profit.

Planned Parenthood and its progeny require that charitable goods or services be provided to the general public (or a sub-class of the general public with a particularized need) without a view to profit, *i.e.* “without the hope or expectation of gain or profit.” As detailed below, the record is replete with evidence that GaREAT does not provide goods and services, on the subject realty or elsewhere, without the hope or expectation of gain or profit.

1. *Purely quid pro quo, i.e. fee-for-service, transactions at market rates are non-charitable transactions that do not qualify as “charity” under Ohio law.*

“Charity” under *Planned Parenthood* and its progeny requires that charitable activities must, as a necessary but not sufficient condition for exemption, contribute to the general public “without hope or expectation, if not with positive abnegation, of gain or profit.” *Planned Parenthood Ass’n v. Tax Commissioner*, 5 Ohio St.2d 117, syllabus, 120 (1966). In other words, giving without the hope or expectation of gain or profit is a necessary but not sufficient condition for charitable activity in Ohio. *Purely quid pro quo* transactions alone, without *any* form of charitable intent, simply are not charitable under Ohio law.

In *Bethesda Healthcare, Inc. v. Wilkins*, for example, this Court denied charitable exemption for a state-of-the-art fitness center that charged members market-based rates to use the fitness center. 101 Ohio St.3d 420, 2004-Ohio-1749, ¶¶ 13, 38. The non-charitable transactions in *Bethesda* were private quid pro quo, *i.e.* fee-for-service, transactions that do not constitute charity under Ohio law. Fitness center patrons paid a membership fee because they wished to benefit from something given in return, namely use of the fitness center. On the other side of the transaction, the fitness center provided the fitness center in order to obtain the pecuniary benefits of membership fees. In the *Bethesda* transactions and others like them, there is something exchanged for something else, *i.e.* a quid pro quo.

Parties enter into quid pro quo transactions to further their own private benefit, because they would like to receive something in exchange for what is given. Such transactions do not carry with them the “publicness” that has been the touchstone of Ohio real property tax exemption law. *First Baptist Church of Milford v. Wilkins*, 110 Ohio St.3d 496, 2006-Ohio-4966, ¶ 10, citing *White Cross Hosp. Ass’n v. Bd. of Tax Appeals*, 38 Ohio St.2d 199, 201 (1974) (“[t]he rationale justifying a tax exemption is that there is a present benefit to the general public *** sufficient to justify the loss of tax revenue.”). If Bethesda did not provide the fitness center, the fitness center patrons would not pay their membership fees. If the patrons did not pay their membership fees, Bethesda would not provide the fitness center.

There can be little doubt that the Court’s well-developed charitable property tax exemption jurisprudence is replete with private quid pro quo transactions held to be non-charitable. In each of the following cases, among others, the Ohio Supreme Court held that property used for private quid pro quo transactions does not qualify for charitable exemption:

- In *Olmsted Falls Bd. of Ed. v. Tracy*, a social club that used property for activities funded with membership dues paid by dues-paying members did not qualify for charitable exemption, notwithstanding some non-member participants in club activities. 77 Ohio St.3d, 393, 397 (1997).
- In *Socialer Turnverein v. Bd. of Tax Appeals*, a social club that used property for activities funded with membership dues paid by dues-paying members did not qualify for charitable exemption. 139 Ohio St. 622 (1942).
- In *Seven Hills Schools v. Kinney*, a 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. 28 Ohio St.3d 186, 188 (1986).
- In *Ohio Masonic Home v. Bd. of Tax Appeals*, property used for commercial farming and the sale of crops in exchange for money did not qualify for exemption. 52 Ohio St.2d 127, 130 (1977).
- In *First Baptist Church of Milford v. Wilkins*, a non-profit corporation that used property to operate a custom print shop for sales to churches and persons

affiliated with church did not qualify for charitable exemption. 110 Ohio St.3d 496, 2006-Ohio-4966, ¶¶ 3-5.

- In *Hubbard Press v. Tracy*, a nonprofit corporation that used property as a printing operation to “manufacture, print, publish, and sell” church materials did not qualify for charitable exemption. 67 Ohio St.3d 564, 566 (1993).
- In *American Society for Metals v. Limbach*, a non-profit corporation that used property for fee-based educational instruction and fee-based conferences for the presentation of scientific papers and lectures on metallurgy did not qualify for charitable exemption. 59 Ohio St.3d 38, 40 (1991).
- In *Lutheran Book Shop v. Bowers*, a 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. 164 Ohio St. 359 (1955).

While a purely quid pro quo transaction is quintessentially non-charitable in nature, still giving “without hope or expectation, if not positive abnegation, of gain or profit” is a *necessary but not sufficient* component of charity under Ohio law. For instance, this Court has, time and again, denied charitable exemption to affordable housing provided at below-cost rates due to the “distinctly residential,” and private, use of the premises. *E.g. NBC-USA Housing, Inc. – Five v. Levin*, 125 Ohio St.3d 394, 2010-Ohio-1553, ¶¶ 6-9; *Philada Home Fund v. Bd. of Tax Appeal*, 5 Ohio St. 135 (1966). In these situations, the predominantly private and residential use of the property defeats exemption notwithstanding “giving” through below-cost rate rents.

Against this foundation, quid pro quo, *i.e.* fee-for-service, transactions at market rates do not fit within the definition of “charity” set forth in *Planned Parenthood* or the Court’s well-developed jurisprudence on charitable property tax exemption law.

2. *A gift is a necessary but not sufficient component of “charity,” which requires charitable intent to give “without the hope or expectation, if not positive abnegation, of gain or profit.”*

Property is sometimes used in charitable and non-charitable ways, leading to a fact-intensive inquiry turning upon the “totality of the circumstances.” *Bethesda Healthcare, Inc. v.*

Wilkins, 101 Ohio St.3d 420, 2004-Ohio-1749, ¶ 38. For example, in *Bethesda, Olmstead Falls Bd. of Ed, First Baptist Church of Milford*, and *American Society for Metals*, among other cases, non-profit corporations used property *in part* to provide goods or services without the expectation of profit, but not in a way adequate to warrant exemption. The Court thusly held in *Bethesda*, charitable exemption turns upon the “totality of the circumstances,” both in the quantity and quality of charitable activity conducted on the property. *Bethesda*, at ¶ 38.

To explain this fact-intensive inquiry, this Court and other state supreme courts have held that “charity is a gift,” which carries with it an element of benevolent intent. *Dialysis Clinic, Inc. v. Wilkins*, BTA Case No. 2006-V-2389 (Nov. 24, 2009), unreported, aff’d *Dialysis Clinic v. Levin*, 127 Ohio St.3d 215, 2010-Ohio-5071 (citing *Provena Covenant Med. Center v. Dept. of Revenue*, 384 Ill.App.3d 734 (2008), aff’d *Provena Covenant Med. Center v. Dept. of Revenue*, 236 Ill.2d 368 (2010)), Appx. 139-158, 196-242. In *Dialysis Clinic v. Wilkins*, the BTA, as later affirmed by this Court, explained that benevolent intent is a necessary but not sufficient condition for charity:

‘Charity’ is an act of kindness or benevolence. There is nothing particularly kind or benevolent about selling somebody something. ‘Charity’ is ‘generosity and helpfulness[,] esp[ecially] toward the needy or suffering’ (Merriam-Webster’s Collegiate Dictionary 192 (10th ed. 2000)) — not merely helpfulness, note, but generosity. ‘Generosity’ means ‘liber[ality] in giving.’ Merriam-Webster’s Collegiate Dictionary 484 (10th ed. 2000). **To be charitable, an institution must give liberally. Removing giving from charity would debase the meaning of charity, and we resist such an assault upon language.**

Id. (Emphasis added internal citations omitted). The BTA went on to explain that some transactions carry with them components of both gifts and exchanged goods or services:

[A] gift is, by definition, free goods or services: ‘something voluntarily transferred by one person to another without

compensation' (Merriam- Webster's Collegiate Dictionary 491 (10th ed. 2000)). Defining 'gift' in any other way would do violence to the meaning of the word. **One can make a gift by charging nothing at all. Or one can make a gift by undercharging a person, that is, charging less than one's cost** *** and in that case, part of the goods or services is given without compensation. *** For a gift (and, therefore, charity) to occur, something of value must be given for free.

Id. (Emphasis added and internal citations omitted).

Upon appeal, this Court agreed with the BTA in *Dialysis Clinic, Inc.* that a gift is a necessary but not sufficient component of charity. The Court specifically held that the “BTA [reasonably and lawfully] echoed the commissioner’s position that **the provision of free, unreimbursed care constitutes an essential part of a tax-exemption claim[.]**” *Dialysis Clinic, Inc. v. Levin*, 127 Ohio St.3d 215, ¶ 32 (Emphasis added). In *Dialysis Clinic, Inc. v. Levin*, a kidney dialysis center did not qualify for charitable exemption due to its policy that care provided to indigent patients was not a “gift” and, further, such care could be refused based upon inability to pay. *Id.* at ¶ 34. Absent a “gift,” this Court found charity lacking, denied charitable exemption, and affirmed the BTA’s decision and order below. *Id.* at ¶ 34.

The Supreme Court of Michigan has likewise held that gifts are a necessary but not sufficient component of charity. In *Retirement Homes of the Detroit Ann. Conf. of the United Methodist Church v. Sylvan Township*, for instance, the Supreme Court of Michigan held that “charity is a gift.” 416 Mich. 340, 348-49 (1982) (internal citations omitted). There, the court held that apartments designed for retirees to live independently were not entitled to charitable exemption because the retirees did not “receive any significant benefit that they did not pay for. There [was] no ‘gift’ to residents.” *Id.* at 350, Appx. 245.

Several other state supreme courts have also held that gifts are an essential component of charity for property tax exemption purposes. *Utah County v. Intermountain Health Care, Inc.*,

709 P.2d 265, 269, 276 (1985) (a gift may exist through quid pro quo transactions where there is nothing exchanged or where there is a “substantial imbalance in the exchange between the charity and the recipient of its services.”), Appx. 262-294; *Provena Cov. Med. Center v. Dept. of Rev.*, 236 Ill.2d 368, 401 (2010) (“If it were not a gift, it could not be charitable.”), Appx. 235; *Bd. of Assessment Appeals v. AM/FM Int’l.*, 940 P.2d 338, 347 (1997) (citing *United Presbyterian Ass’n v. Bd. of Cty. Comm’rs*, 167 Colo. 485, 494-95 (Colo. 1968)), Appx. 86-96, 253-261; *Western Mass. Lifecare Corp. v. Bd. of Assessors of Springfield*, 434 Mass. 96, 102-03 (2001) (citing *Boston Chamber of Comm. v. Assessors of Boston*, 315 Mass. 712, 716 (1944)), Appx. 295-303, 97-101; *Croixdale, Inc. v. County of Washington*, 726 N.W.2d 483, 487-88 (2007) (Minnesota), Appx. 127-138.

Similarly, the U.S. Supreme Court has held that a “gift” excludable from income for federal income tax purposes must be given with “detached and disinterested generosity.” I.R.C. § 102; *Commissioner v. Duberstein*, 363 U.S. 278, 285-86 (1960), Appx. 112-123. In *Duberstein*, the president of an iron and metal company, Duberstein, referred potential customers to the president of another metal company, Berman. *Duberstein*, 363 U.S. at 280-81. Because Duberstein’s leads were so helpful to Berman’s business, Berman bought a Cadillac for Duberstein. *Id.* For federal income tax purposes, Duberstein then claimed that the Cadillac was a non-taxable gift.

The U.S. Supreme Court disagreed with Duberstein that the Cadillac was a gift because the “donative intent” was lacking. Instead, the Court held that the Cadillac was “at bottom a recompense for Duberstein’s past services, or an inducement for him to be of further service in the future.” *Id.* at 291-92. As a matter of law, the Court held that a gift must be given with “detached and disinterested generosity.” *Id.* at 285-86. By contrast, quid pro quo exchanges

such as the Cadillac that Berman provided Duberstein for services rendered are the very antithesis of charity and giving. *Id.* at 285-86 (citing *Robertson v. U.S.*, 343 U.S. 711, 714 (1952) (“And, conversely, ‘where the payment is in return for services rendered, it is irrelevant that the donor derives no economic benefit from it.’”), Appx. 249-252; *see also Hernandez v. Commissioner*, 490 U.S. 680 (1989) (charges for spiritual training or “auditing” services are not deductible charitable contributions under I.R.C. § 170), Appx. 179-195.

In summary, common definitions of charity identify a “gift” as a necessary but not sufficient component of charity. A gift, in turn, is something given without consideration therefor, or where a donor gives something of much greater value than what is received. The inquiry into whether property is used charitably to provide a gift without the hope or expectation of profit then turns upon whether the donor carried the requisite intent to give. *Dialysis Clinic, Inc. v. Wilkins*, BTA Case No. 2006-V-2389 (Nov. 24, 2009), unreported, *aff’d Dialysis Clinic v. Levin*, 127 Ohio St.3d 215, 2010-Ohio-5071, Appx. 139-157; *see also Duberstein*, 363 U.S. at 285-86.

3. *Due to the benefits that GaREAT receives from the commercial transactions on the property, non-use of the undeveloped land, and holding the undeveloped land for future sale, GaREAT does not use the property exclusively for charitable purposes because it has a “hope or expectation of profit.”*

Substantially all of GaREAT’s activities on the subject realty are private quid pro quo, *i.e.* fee-for-service, transactions at market rates. GaREAT annually generates over one million dollars in revenue from private quid pro quo transactions in which GaREAT derives a fee for providing goods or services. *See* GaREAT’s Profit & Loss Statements, Appellee’s Ex. 6, Ex. 7, Ex. 8 and Ex. 9, Supp. 577-608. These activities are not charitable because they are not without

regard for ability to pay. But such activities independently fail to qualify as charitable because they do not demonstrate charitable intent or “detached and disinterested generosity.”

As discussed, quid pro quo transactions for goods or services at market-based rates do not qualify as “charitable.” The existence of some charge for a good or service does not defeat exemption *per se*. But, exemption is defeated where charges are substantially based upon *market rates* rather than without regard for ability to pay and in order to advance or benefit the general public or a sub-class of the general public with a particularized need. *Planned Parenthood*.

In *Bethesda*, for example, this Court denied charitable exemption for a state-of-the-art fitness center that charged members *market-based rates* to use the fitness center. *Bethesda* at ¶ 13, ¶ 38. While there were some scholarships available to those who could not afford to purchase a membership, the level of scholarships did not warrant exemption. *Id.* at ¶ 38. Based upon to the totality of the circumstances, then, the Court denied exemption. *Id.* at ¶ 37.

Similarly, here, a Geneva citizen might give money to GaREAT for a membership to the GaREAT fitness center—Spire Fit—because that citizen wishes *to benefit* from the exercise facilities. S.T. 35-36, Supp. 35-36 (Spire Fit rate schedule). On the other side of the transaction, GaREAT provides the exercise facilities to the Geneva citizen because it would like *to benefit* from the citizen’s membership fees. Appellee’s Ex. 9, Supp. 593-608 (2011 Profit & Loss statement showing that Spire Fit generated \$27,389.50 in revenue). There is a quid pro quo transaction.

Each party to a Spire Fit membership agreement enters that agreement, not to benefit the general public with charitable intent, *i.e.* without the hope or expectation of profit, but rather to benefit themselves. If the member did not pay, GaREAT would not provide the fitness services. More fundamentally, the memberships are not available without regard for ability to pay based

upon need. Such transactions are not charitable and are characteristic of all GaREAT's activities and all the realty at issue here.

Like Spire Fit, GaREAT's other activities are not charitable because they are not provided without regard for ability to pay and lack charitable intent.

First, GaREAT's facility rentals are not charitable. Mr. Orloff testified that GaREAT rents each of its four major facilities (indoor track, outdoor track, field and courts building, and aquatic center) for a fee designed to be competitive with the market rate. Hr. Tr. 196, 120-121, 132, 148, 156, Supp. 196, 120-121, 132, 148. The major athletic facilities are available to the public and organizations hosting major events. Hr. Tr. 120-121, Supp. 120-121. Such events include the Mid-American Conference Women's Volleyball Championships at the field and courts building, the Big Ten Indoor Track and Field Championships at the indoor track building, and the NCAA Division II Swimming and Diving Championships at the aquatic center. Hr. Tr. 46, 140, 196, Supp. 46, 140, 196.

As an example, the Big Ten rented the indoor track and field building for \$25,000 to \$30,000. Hr. Tr. 140-141, Supp. 140-141. As another example, GaREAT has a revenue sharing agreement with the Geneva Area City Schools pursuant to which it provides the outdoor stadium for football games for a fee measured by a portion of the gate receipts. Appellee's Ex. 13, at 6, Supp. 618; Hr. Tr. 147, Supp. 147. In addition, the banquet and meeting hall in the indoor track and field building may be rented for a fee to host such events as parties, weddings, corporate events and outings, business meetings and large conferences. Hr. Tr. 132-135, Supp. 132-135. Luxury suites in the indoor track and field building may be rented as well. These facility rentals are not charitable because GaREAT provides the facilities in return for compensation at market-based rates, not to benefit the general public or those with a particularized need.

Second, GaREAT also hosts athletic leagues and camps for a fee, ranging to a variety of sports for participants of all ages. The fee to participate in these leagues and camps is usually hundreds of dollars. S.T. 168-183, Supp. 388-403; Appellee's Ex. 6, 7, and 9, Supp. 577-608 (GaREAT profit and loss statements). Once again, this arrangement is a private quid pro quo transaction where the participant pays a market based fee for the ability to participate in athletic activity, which is not charitable.

Third, GaREAT has not satisfied its burden to show that its program where elite high school athletes attend an off-premises boarding school while training for their sport at GaREAT is operated charitably. Hr. Tr. 92-93, 108, Supp. 92-93, 108. Nearly half of the price of the boarding program is for the off-premises educational component at Andrews Osbourne Academy, which fee GaREAT does not control. Hr. Tr. 91-93, Supp. 91-93. The Andrews Osbourne fee pays for schooling, room, board, and transportation services to and from GaREAT. Hr. Tr. 108, Supp. 108.

While Mr. Orloff testified that admissions to the boarding school program is based upon ability to pay, the BTA rejected that contention because the admissions process to the boarding program is so loosely structured that it is not actually based upon ability to pay. Hr. Tr. 38, Supp. 38. Mr. Orloff testified that, despite offering reduced tuition to athletes who attend the boarding school, at no time during the admissions process does GaREAT ask athletes to provide *any* documentation to show their financial condition. Mr. Orloff stated, "we just trust folks" and "we just believe them and -- usually you can tell." Hr. Tr. 157, 178, Supp. 157, 178. Without records showing athletes' financial condition, however, GaREAT cannot reliably know whether or to what extent it provided goods or services based upon a student-athlete's ability to pay.

Further, GaREAT's arguments regarding "flexible payment arrangements" are contrary to the relevant BTA testimony. GaREAT brief, at 18. The record actually shows that GaREAT collects delinquent fees for the boarding school program. Hr. Tr. 105-106, Supp. 105-106. Collecting bad debts from those who cannot afford to pay is not charitable because it is not without the hope or expectation of profit and without regard for ability to pay.

GaREAT did provide a document purporting to show that charges for its boarding program are provided on a discounted basis, but that document does not show whether or to what extent fees for GaREAT's coaching services are reduced. Appellant's Ex. H, Supp. 673-674; Hr. Tr. 105-106, Supp. 105-106. The BTA held that this document was unreliable, *i.e.* not "concrete evidence," and only provided "some indication" of reduced fees. In fact, the document does not show charitable activity because the reduced coaching fees are just as one would expect with a commercial enterprise attempting to attract customers. If no one pays the full fee, then the full fee is just a benchmark for actual rates – not evidence of reduced fees. If this were charitable, any business could set artificially high rates and then claim to conduct charitable activity.

The BTA further held that if the document showed any reduced fee services at all, it showed only a *de minimus* amount. *BTA Decision and Order*, at 4. GaREAT only purported to assist 30 students with coaching services. That pales in comparison to other non-charitable activities occurring on the premises, which raise millions of dollars in revenue. Thus, GaREAT's boarding program is non-charitable like the other activities occurring on the property.

Fourth, the food sold on the subject property through the Spire Fuel restaurant and event concessions is not provided on a charitable basis. Instead, fees are charged for the price of the food at rates based upon cost. Hr. Tr. 127, Supp. 127 (Spire Fuel), 167, Supp. 167 (concessions). Patrons are not permitted to bring their own food into the field and courts

building, for example, instead they are required to purchase food from GaREAT. Hr. Tr. 121-122, Supp. 121-122. This fee-for-food model is not a charitable one.

Fifth, the areas that GaREAT rents to for-profit businesses such as Michael Johnson Performance, Inc. and All Star Physical Therapy and Wellness are not charitable. All Star Physical Therapy pays \$4,473 per month to GaREAT to rent space that it uses to serve the public and athletes engaging in athletic activity on the subject property. Appellee's Ex. 20, Supp. 639-649; Hr. Tr. 169, Supp. 169 (All Star Physical Therapy). Michael Johnson charges GaREAT \$150,000 per year to provide athletic performance training to GaREAT athletes. Appellee's Ex. 21, Supp. 650-660; Hr. Tr. 152, Supp. 152 (Johnson Performance). These for-profit businesses operating on the property are not charitable, but instead operating with a view to profit.

Sixth, GaREAT undeveloped land is not used exclusively for charitable purposes either. Sparsely used, vacant and/or undeveloped property is not used charitably because such property may be held for sale in future. That is, institutions may hold exempt property with a view to profit merely by holding it tax-free as it appreciates in value and later realizing a profit upon its sale. *American Chemical Soc. v. Kinney*, 69 Ohio St. 2d 167, 172-173 (1982) (Brown, J., dissenting). Unused property is not affirmatively used charitable and also serves a non-charitable use because it may be held for future sale *and with a view to profit to the titleholder*.

Here, roughly 118 acres of the 163 acre property at issue in this case is undeveloped land that is not currently being used for any purpose. Hr. Tr. 158, Supp. 158. As GaREAT stated on its application for exemption, and as Mr. Orloff confirmed through testimony, the undeveloped land "may be sold to businesses for commercial development." S.T. 325, Supp. 545; *see also* S.T. 73, 103, 248, Supp. 293, 323, 468 (other references to commercial development at GaREAT). In fact, Mr. Orloff testified that roughly 20% of this property is currently held for

future sale. Hr. Tr. 200-201, Supp. 200-201. The future commercial development may include a hotel, restaurant and office space. S.T. 236, Supp. 546. Holding property for commercial development or future sale, as GaREAT does, does not constitute charitable use, let alone exclusive charitable use. In fact holding property for sale has the opposite effect, showing that GaREAT uses the property with a view to profit. The undeveloped land therefore cannot qualify for exemption.

Seventh, the use of property would still be charitable, even if it were supposed, contrary to the record, that GaREAT donated revenue from otherwise non-charitable activities in other commendable purposes. GaREAT brief, at 33, citing *Galvin v. Masonic Trust*. Proceeds from quid pro quo transactions conducted on one piece of land are not charitable even if they are reinvested in commendable activities at another location. See e.g., *Dialysis Clinic* at ¶ 33; *Hubbard Press v. Tracy*, 67 Ohio St.3d 564, 566 (1993). GaREAT thus cannot show entitlement to exemption based upon hypothetically reinvested revenues.

For all the above reasons, the use of GaREAT's sports complex and undeveloped land are not used exclusively for charitable activities and exemption is defeated.

C. GaREAT cannot establish exclusive charitable use of the property based upon prospective use.

Moreover, the undeveloped land cannot qualify for exemption based upon prospective rather than current use. Pursuant to this Court's prospective use doctrine, property may be deemed exempt when an institution is *reasonably certain* to put the property towards an exempt use. *Ohio Operating Engineers Apprenticeship Fund v. Kinney*, 61 Ohio St. 2d 359, 362-63 (1980) (applying a "reasonably certain" standard to the prospective use doctrine). GaREAT, however, has not demonstrated that it will put the undeveloped property to an exempt use in the future with reasonable certainty because: (1) GaREAT has not shown that the allegedly planned

use of the property will be charitable; instead, it has shown planned commercial and/or residential use; and (2) GaREAT has not shown that it will build with reasonable certainty.

First, even if GaREAT follows through with its alleged plan to develop the undeveloped property, future use of the undeveloped land is unquestionably non-charitable. That is, GaREAT is planning commercial development on the property, residential dormitory development for its student-athletes, to sell the property, and/or to conduct more of the same non-charitable activities as it currently conducts on the developed portion of the subject realty. Future commercial use is with a view to profit such that it is not charitable. *Carney v. Cleveland City Sch. Dist. Pub. Lib.*, 169 Ohio St. 65, syllabus (1959) (commercial use defeats exemption based upon prospective use). The alleged future dormitory use is primarily private and residential use that is not charitable. *NBC-USA Housing; Philada Home Fund*. And holding property for sale is a profit-minded use that is not charitable. Thus, GaREAT has not even alleged future charitable use, even if it can show that it will build in the future with reasonable certainty.

Second, GaREAT cannot show that it has reasonably certain plans to use the property for exempt purposes in the future because it has not shown any objective manifestations of intent to do so. *See Ohio Operating Engineers*. That is, GaREAT has not shown that it has firm plans to develop the property or that the future development would be for an exempt use.

Most notably, GaREAT's failure to *actually* build on the subject property is extremely strong evidence that it does not have the requisite intent to put the property towards an exempt use. *See B.F. Goodrich Co. v. Lindley*, 58 Ohio St.2d 364, 365 (1979) ("If [the consumer's purpose] comes under attack, actual use has evidentiary value tending to illuminate that purpose and may assist the fact-finder in a reasonable rationalization of an order denying the claimed exception in whole or in part."); *Bay Mechanical v. Testa*, 133 Ohio St.3d 423, 2012-Ohio-4312,

¶ 24 (actual behavior is evidence of intent); *Holy Trinity Protestant Episcopal Church v. Bowers*, 172 Ohio St. 103, 107 (1961) (the claimant must provide “tangible evidence” of intent to use property for an exempt use in order to qualify under the prospective use doctrine).

In addition, GaREAT cannot show prospective use because it has no funds in place to build. As this Court has explained, having funds in place to build is “perhaps most important of all” to show prospective use. *Holy Trinity*, at 107 (“perhaps most important of all, funds raised”). Mr. Orloff testified that GaREAT has no funds in place to build dormitories or other new facilities. Hr. Tr. 163-64, Supp. 163-164. GaREAT also has no drawings or blueprints for the alleged future dormitories. Hr. Tr. 163-64. The only alleged drawings, which were not produced or included in the record, pertain to the alleged future commercial use of the land. Thus, GaREAT’s property is not entitled to charitable exemption based upon prospective use.

D. Exemption is defeated because GaREAT has not satisfied its burden to show charitable intent to use the property “without hope or expectation of profit” absent a showing of internal controls or other measures to prevent self-dealing through the for-profit Roni Lee LLC or other means.

Though exemption is clearly defeated due to the non-charitable nature of the goods and services provided on the property, exemption is independently defeated on another ground because GaREAT has not satisfied its burden to show charitable intent despite its close relationship with the for-profit Roni Lee LLC. The subject realty where GaREAT operates is held in fee by Roni Lee and “leased” to GaREAT for a nominal sum. Ron and Tracy Clutter are the only members of Roni Lee and Mr. Clutter controls GaREAT as President (officer), director, and founder. S.T. 254 (Roni Lee LLC members); Appellee Ex. 16, at Interrogatory 11 (GaREAT listing GaREAT officers and directors), Supp. 626; S.T. 18 (initial GaREAT directors), Supp. 238. Mr. Clutter also contributed nearly \$26 million to GaREAT, as the sole “contributor” to GaREAT listed on its tax returns for 2008, 2009, and 2010. Hr. Tr. 67; IRS forms 990, at Ex.1,

at 16, Ex. 2, at 17, and Ex. 3, at 17. Through the Clutters, then, Roni Lee and GaREAT are intimately connected to one another.

In light of its relationship with Roni Lee, GaREAT has not satisfied its burden to show precautions in internal decision-making to prevent self-dealing and/or private inurement of future gains to individuals with “hope or expectation of profit.” GaREAT, could effectively distribute revenue to individuals through Roni Lee and rewritten lease terms, other contracts, or other means. On this record, GaREAT has not satisfied its burden to show charitable intent “without the hope or expectation of profit” under *Planned Parenthood* due to its intimate relationship with the for-profit Roni Lee LLC. R.C. 5715.271.

E. GaREAT cannot establish exclusive charitable use of its property through its reliance on inapposite decisional law and misplaced analogies.

GaREAT relies heavily upon inapposite case law and misplaced analogies in an attempt to establish itself as a “charitable institution” and show “exclusive charitable use” of the sports complex and undeveloped land. Nearly every case or analogy that GaREAT relies upon is a situation where recreational services are provided without regard for ability to pay, and distinguishable from the case at bar on that basis. For example, GaREAT inappropriately analogizes its non-charitable sports facilities to the YMCA. GaREAT brief, at 16-17. GaREAT is clearly distinct from the YMCA because the YMCA makes its facilities available to consumers based upon ability to pay, *i.e.* financial need, and without a view to profit, but GaREAT does not.

GaREAT further attempts to analogize its non-charitable use of the property to case law that is clearly distinguishable. *First*, GaREAT mistakenly relies upon this Court’s *True Christianity* doctrine. GaREAT argues that its facilities and vacant land are used charitably because “the dissemination of useful information to benefit mankind is, traditionally, charity.” GaREAT brief, at 20-21, quoting *Herb. Soc. of Am. v. Tracy*, 71 Ohio St.3d 374 (1994).

True Christianity and *Herb Soc.* are inapplicable because those cases addressed situations where property was used to provide tangible personal property to the general public at no charge. In *True Christianity*, the property was used for the preparation and dissemination of religious literature to the general public (*not* to a particular religious denomination). In *Herb Soc.*, headquarters for an herbal society were used to store and ship books and pamphlets at no charge, provide a free library, and answer questions about herbs at no charge. By contrast to *True Christianity* and *Herb Soc.*, GaREAT does not provide goods or services without regard for ability to pay and its property is not open to the general public at no charge. GaREAT further fails to operate “without the hope or expectation of gain or profit.” The BTA expressly held that GaREAT has not shown “concrete evidence” of providing goods or services without regard for ability to pay and that any benefit to the community from GaREAT’s property is merely “tangential” to non-charitable activities. *BTA Decision and Order*, at 4.

Second, GaREAT reliance upon *Highland Park Operators v. Tracy, Inc.* and *The Chapel, Inc. v. Testa* is misplaced because GaREAT does not hold its realty open to the public free of charge. GaREAT brief, at 21-22. In *Highland Park* and *The Chapel*, recreational areas, such as for jogging, boating, swimming, fishing, softball, or soccer were held open to the public free of charge, and this Court found such use charitable. GaREAT relies upon several other non-binding BTA decisions for this same proposition.⁴

⁴ *Fair Park Swimming Pool Assn. v. Limbach*, BTA No. 84-B-26 (May 13, 1987), unreported (community pool open to the public exempt); *Corpus Christi Athletic Assn., Inc. v. Limbach*, BTA No. 89-J-722 (Nov. 29, 1991), unreported (soccer and baseball fields exempt where \$5 fee for membership in recreational leagues was waived upon showing of financial need); *Cincinnati v. Tracy*, 93-X-75 (Jun. 21, 1996), unreported (indoor rowing facility where “the public was exhorted to participate” and facility “did not exclude the public” exempt); *Bethesda Healthcare, Inc. v. Zaino*, BTA No. 00-J-1591 (Sep. 20, 2002), unreported (running track “available to the public at all times” exempt), *aff’d* 101 Ohio St.3d 420, 2004-Ohio-1749.

But the case at bar is in stark contrast to the recreational areas held open to the public in *Highland Park Operators*, *The Chapel*, and the other BTA cases GaREAT relies upon because GaREAT does not have a charity policy and does not hold its facilities open to the public without charge. Instead, as the BTA found, GaREAT facilities are provided to customers at market-based fees that are not discounted. Further, as discussed *supra* at 18-36, GaREAT's facility rentals, athletic leagues and camps, workout gym, and other activities are all non-charitable.

Third, GaREAT cannot establish exclusive charitable use of the property or charitable institution status through a misplaced analogy to *College Preparatory School for Girls v. Evatt*, 144 Ohio St. 408 (1945). GaREAT brief, at 21. In *College Preparatory School*, this Court granted exemption for the school playground held by a charitable educational private school that was held open to the public at no charge when not used by the school. But *College Preparatory School* is inapplicable because GaREAT is not an educational institution, does not hold property open to the general public without charge, and does not provide charitable goods or services.

For these reasons, GaREAT is not comparable to the YMCA or the fact patterns in this Court's decisional law including *True Christianity*, *Herb. Soc.*, *Highland Park Operators*, *The Chapel*, or *College Preparatory School*. When the definition of "charity" is applied to the activities conducted on the property and the BTA's factual findings, there is no question that the property is not "used exclusively for charitable purposes" under R.C. 5709.12 or R.C.5709.121.

Proposition of Law No. III:

Real property does not qualify for exemption pursuant to R.C. 5709.121 where it belongs to a non-charitable institution with non-charitable core activities and cannot satisfy a strict construction standard of "exclusive charitable use."

GaREAT's claim to exemption under R.C. 5709.121 independently fails for three additional reasons: the fee owner of the property, Roni Lee LLC, is not a "charitable

institution”; GaREAT, as a long-term lessee, is not a “charitable institution”; and the use of the property does not satisfy the strict construction standard for “exclusive charitable use” under R.C. 5709.121.

Traditionally, the longstanding charitable exemption statute in Ohio, R.C. 5709.12, requires that ownership and the claimed exempt use coincide in the same entity for property to achieve tax exempt status. *First Baptist Church of Milford, Inc.*, at ¶12 (internal citations omitted). R.C. 5709.121, on the other hand, provides exemption for charitable exemption where ownership and claimed exempt use of the property do not coincide in the same entity.

R.C. 5709.121(A)(2) provides, in pertinent part as follows:

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

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

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

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

Thus, realty may be exempt under division (A)(1) where a charitable institution makes realty available to another party under a lease or contractual arrangement for “other charitable, educational, or public purposes.” Exemption is also available under division (A)(2) where it belongs to a “charitable institution” and it is “made available under the direction or control of

such institution *** for use in furtherance or incidental to its charitable, educational, or public purposes and not with the view to profit.” As discussed below, exemption must fail under R.C. 5709.121 because GaREAT cannot establish either itself or Roni Lee LLC as a charitable institution nor show “exclusive charitable use” within the meaning of R.C. 5709.121.

A. The fee owner of the subject realty, Roni Lee LLC, is not a charitable institution and the BTA properly denied exemption under R.C. 5709.121 on that basis.

GaREAT wrongly contends that the BTA committed reversible error for failing to find whether GaREAT is a charitable institution. GaREAT brief, at 16, 34. Rather than address GaREAT charitable institution status, the BTA held that the subject realty “belonged to” the title holder of the realty, Roni Lee LLC, which leases the property to GaREAT under a 99-year lease. *BTA Decision and Order*, at 5. Appellant’s Ex. D, Supp. 661-664 (Ground Lease Agreement). The BTA further held that, as owner, Roni Lee, LLC is not a charitable institution because it is a for-profit limited liability company. *BTA Decision and Order*, at 5. Roni Lee LLC is also not a charitable institution because it does have charitable activities. There is no assertion, let alone a showing in the record, that Roni Lee LLC engages in any type of charitable activities. Thus, the subject realty belongs to a non-charitable institution and exemption fails under R.C. 5709.121.

The BTA did not err in this regard because the lease here does not transfer ownership to GaREAT, *i.e.* “belong to” GaREAT, under R.C. 5709.121. That is, GaREAT has not satisfied its burden to show that the lease actually limits Roni Lee’s control and ownership of the subject realty. Roni Lee, LLC and GaREAT may be both controlled by Ron Clutter and his wife, Tracy. Mr. and Mrs. Clutter are the only members of Roni Lee and Mr. Clutter controls GaREAT as President (officer), director, and founder. S.T. 254 (members of Roni Lee LLC); Appellee Ex.

16, at Interrogatory 11, Supp. 626; S.T. 18, Supp. 238 (GaREAT directors). There is no showing of internal controls in GaREAT's activities and decision-making to prevent self-dealing.

Since GaREAT failed to show that it is independent from Roni Lee, the lease may not limit Roni Lee's control and ownership of the property. Through control of both entities, the Clutters may be able to alter or terminate the lease at any time. Further, GaREAT has not offered any evidence that the lease was disclosed to third parties who may have relied upon its existence, as through recording with the county recorder. In its analysis of R.C. 5709.121, the BTA therefore did not err in addressing whether Roni Lee, LLC is a charitable institution, in finding that Roni Lee is not a charitable institution due to its for-profit organization, and in failing to address whether GaREAT is a charitable institution.

Assuming *arguendo* that the BTA erred in failing to address whether GaREAT is a charitable institution, there are other independent grounds for affirming denial of exemption. *First*, as discussed in the following Section B, GaREAT is not a charitable institution just as the property is not used exclusively for charitable purposes. *Second*, the non-charitable use of the property discussed in Proposition of Law No. II, and below in Section C, also independently defeats exemption. Thus, even if the BTA erred in failing to address whether GaREAT is a charitable institution, exemption nevertheless fails under R.C. 5709.121.

B. GaREAT is not a charitable institution because its core activities, which are conducted exclusively on the subject realty, are not charitable.

GaREAT is not a charitable institution under R.C. 5709.121 because its core activities do not accord with the standard of "charity" set forth in *Planned Parenthood* and its progeny. "An institution is 'charitable' under R.C. 5709.121 only if its core activities qualify as charity under the standards for determining the charitable use of property pursuant to R.C. 5709.12." *Dialysis Clinic, Inc. v. Levin*, at ¶27. Whether an institution is a "charitable institution" under

R.C. 5709.121 depends upon “the charitable activities of the taxpayer seeking exemption.” *OCLC Online Computer Library Ctr., Inc. v. Kinney*, 11 Ohio ST.3d 198, 201 (1984). “Activities have been deemed charitable if they accord with the standard of charity that [the Ohio Supreme Court has] developed when determining the charitable use of property directly under R.C. 5709.12(B).” *Dialysis Clinic* at ¶ 27 (internal citation omitted).

Since GaREAT operates exclusively on the subject realty, the inquiry into whether GaREAT is a charitable institution is materially the same as the inquiry into the use of the property. The relevant facts are all the same and the BTA made all the necessary factual findings. As discussed in Proposition of Law No. II, these activities, *i.e.* GaREAT’s core activities, are not charitable. GaREAT’s facility rentals, athletic leagues and camps, gym memberships, cafeteria, and boarding program, among other activities, are all activities conducted on a non-charitable basis. The BTA expressly held that GaREAT has provided “no concrete evidence” that it provides goods or services for a reduced fee, does not have a policy to do so, and any benefits that GaREAT provides to the community are “tangential” to its non-charitable activities. *BTA Decision and Order*, at 4. Thus, for similar reasons that the property is not used exclusively for charitable purposes, GaREAT is not a charitable institution.

GaREAT’s status as a non-profit corporation does not mean that it is a “charitable institution. As this Court explained in *American Jersey Cattle Club*, nonprofit property owners such as GaREAT may profit *as an entity*, even if the profit is reinvested elsewhere rather than distributed to individuals. 152 Ohio St. 506, 510 (1950) (“The fact, that a corporation is one not for profit, does not mean that its enterprises may not be conducted for gain, profit or net income. It is necessary to distinguish between gain, profit or net income to the incorporators or members and gain, profit or net income to the corporation as a legal entity.”).

Nor does GaREAT's 501(c)(3) status under the Internal Revenue Code establish GaREAT as a charitable institution. Ohio tax law is separate and distinct from federal law. An interpretation of Ohio law equating charitable exemption with 501(c)(3) status would greatly expand the scope of charitable exemption in Ohio. *Dialysis Clinic*, at ¶20-21.

For all these reasons, GaREAT is not a charitable institution and exemption under R.C. 5709.121 is defeated on that basis alone.

C. GaREAT cannot establish its claim to exemption under the strict construction standard for “exclusive charitable use” set forth under division (A)(1) or division (A)(2) R.C. 5709.121.

Since GaREAT bases its claim to exemption heavily upon a misreading of R.C. 5709.121, the Commissioner must explain that GaREAT cannot satisfy a “strict construction” standard for “exclusive charitable use” under R.C. 5709.121(A)(1) or (A)(2). Still, the reasons that GaREAT's claim fails under R.C. 5709.121 are materially same as those discussed above in Proposition of Law No. II. The property is not used exclusively for charitable activities and no “concrete evidence” of such. The subject realty is not used for “other charitable, educational, or public purposes” under (A)(1) for the same reasons discussed in Proposition of Law No. II.

Exemption likewise fails under division (A)(2). To qualify for exemption under division (A)(2) of R.C. 5709.121, property “must be made available under the direction or control” of a charitable institution for a “use in furtherance or incidental to” the owner's charitable purpose and “not with the view to profit.” GaREAT cannot satisfy any of these three conjunctive elements and each is discussed below in turn.

First, assuming *arguendo* that GaREAT and/or Roni Lee LLC are charitable institutions (they are not), GaREAT still cannot show that the sports complexes and undeveloped land at issue are used “in furtherance of or incidental to” GaREAT's or Roni Lee's charitable purposes.

GaREAT argues otherwise only by misconstruing division (A)(2) and applying an impermissibly broad reading. According to GaREAT, “[t]his element is satisfied if there is a functional relationship (even if only “incidental”) between the use of the property and the charitable purpose of the institution.” GaREAT brief, at 29, citing *Community Health Professionals, Inc v. Levin*, 113 Ohio St.3d 432, 2007-Ohio-2336, ¶ 21. GaREAT believes there is no quantitative element to exclusive charitable use, and property is exempt where there is *any de minimus* qualitative relationship between the use of the property and the alleged purpose of the institution.

But it is not just “any” “use in furtherance of or incidental to” the owner’s charitable purpose under division (A)(2) that is required to qualify for exemption. A strict standard must be applied such that there is a substantial and essential “use in furtherance of or incidental to” the owner’s charitable purposes. And GaREAT does not apply a strict construction standard when it inserts the word “any” before the statutory phrase “use in furtherance or incidental to” charitable purposes. To do so, would be to read the “exclusive charitable use” requirement under division (A)(2) as “any *de minimus* charitable use.”

Tax exemption statutes must be strictly construed because they are provided as a matter of legislative grace and in derogation of equal rights of all other taxpayers. *Anderson/Maltbie Partnership v. Levin*, 127 Ohio St.3d 178, 2010-Ohio-4904, ¶ 16. Further, the taxpayer carries the burden to show entitlement to exemption. R.C. 5715.271; *Northeast Ohio Psychiatric*, at ¶ 19 (“none of the services that Northeast provides has been shown to be charitable in character.”). This Court must be mindful to construe R.C. 5709.121(A)(2) *against* exemption where there is any doubt as to whether the taxpayer has satisfied its burden.

To broadly construe R.C. 5709.121 not only runs counter to this bedrock principle, but also runs the risk that a broad interpretation will swallow up other statutory language and tax

exemption statutes that the General Assembly intended to have applied. In other words, when applying a strict construction standard to division (A)(2), the statute must be harmonized with the entire statutory scheme for real property exemption to give effect to all statutory language. R.C. 1.47(B); *Church of God in N. Ohio, Inc.*, 124 Ohio St.3d 36, 2009-Ohio-5939, at ¶ 30 (“a property owner may not evade the limitations imposed with respect to a specific tax exemption by claiming exemption under a broad reading of other exemption statutes.”).

If the phrase “in furtherance of or incidental to” were read as broadly as the GaREAT suggests, then R.C. 5709.12 would forbid exemption for use by a property owner, but the same use would be the basis for exemption under R.C. 5709.121 if carried out by another party instead. Through a shell game of sorts, landowners could secure exemption by simply organizing legal entities to hold their property and apply for exemption. This absurd result would hold form over substance and, more fundamentally, contravene the strict construction principles underlying Ohio real property tax exemption law.

Moreover, the case law GaREAT relies upon does not actually support its novel proposition of law, namely *Community Health Professionals, Inc. v. Levin*, *Girl Scouts-Great Trail Council v. Levin*, and *Bowers v. Akron City Hosp.* By contrast to the case at bar, in each of the cases GaREAT relies upon property was “an essential and integral part” of the provision of goods or services on a charitable basis. In *Community Health Professionals*, administrative offices were essential and integrally related to an owner-charitable institution’s core charitable activities of providing in-home nursing care. In *Girl Scouts*, a store operated by the Girl Scouts for essential Girl Scout equipment and materials constituted “an essential and integral part” of the Girl Scouts charitable activities. In *Bowers*, a hospital parking lot was again “an essential and integral part” of charitable health care services provided at a hospital.

GaREAT's property, by contrast, does not facilitate charitable activities because GaREAT and Roni Lee do not have core charitable activities, if any. Instead, as discussed in Proposition of Law No. II, the property is used chiefly for non-charitable activities, and the integral relation to charitable activity present in *Comm. Health Professionals*, *Girl Scouts*, and *Bowers* is absent. Accordingly, this Court should reject GaREAT's invitation to apply a *de minimus* standard to R.C. 5709.121(A)(2) that runs contrary to the plain statutory language, legislative intent, and fundamental strict construction principle.

Second, GaREAT's claim to exemption under R.C. 5709.121(A)(2) also fails because GaREAT does not make its sports facilities and vacant land available to others under "its direction or control" because GaREAT either operates the property itself or makes the property available to others through contractual arrangements. Where GaREAT uses the property itself, R.C. 5709.121 is altogether inapplicable because ownership and use coincide in the same entity. In these situations, charitable exemption is properly analyzed under R.C. 5709.12, and exemption is defeated as discussed in Proposition of Law No. II.

In situations where GaREAT makes its property available to another under a contractual arrangement, R.C. 5709.121(A)(2) is inapplicable. Rather, the mutually exclusive division (A)(1) controls where property is made available pursuant to a lease or other contractual arrangement, for instance when sports facilities are made available to the Big Ten for indoor track and field championships. As discussed, exemption fails under division (A)(1) as well.

Further, in lease or other contractual situations, exemption fails under division (A)(2) because GaREAT does *not* maintain "direction or control" over the property due to the contractual arrangement that transfers possession of the property. *See* R.C. 5321.02(B) (transfer of possession under a lease). Obligations negotiated *ex ante* under a lease and between parties

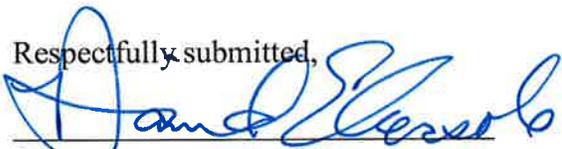
hardly amount to one party directing or controlling another party's current use of the property. A contractual agreement between parties is not direction from one party to another. Division (A)(2) is thus inapplicable because GaREAT cannot satisfy the direction or control requirement.

Third, the subject realty is not exempt because it is used with a view to profit. As extensively discussed *supra*, at 23-41, the commercial transactions conducted on the property with the hope or expectation of gain or profit, *i.e.* a view to profit. The facility rentals, sports leagues, gym memberships, food sales, coaching services (*e.g.* Michael Johnson and the boarding program), and physical therapy services (*i.e.* Dr. Seed's) are all provided with a view to profit rather than at reduced fees based upon financial need and ability to pay. Once again, exemption is defeated under R.C. 5709.121(A)(2).

Accordingly, GaREAT has not established any one element, let alone all three elements, required to qualify for exemption under R.C. 5709.121(A)(2).

CONCLUSION

For the reasons set forth above, the Court should affirm the reasonable and lawful Board of Tax Appeals decision upholding the appellee Tax Commissioner's denial of real property tax exemption for appellant GaREAT's state-of-the-art sports complex and undeveloped land.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Appellee Tax Commissioner's Merit Brief were served upon the following by U.S. regular mail this 22nd day of June, 2015.

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