

**IN THE SUPREME COURT OF OHIO**

Geneva Area Recreational, Educational and Athletic Trust,	)	Case No. 2014-1778
	)	
Appellant,	)	Appeal from the Ohio Board of Tax Appeals
	)	
v.	)	BTA Case No. 2012-A-841
	)	
Joseph W. Testa, Tax Commissioner,	)	
	)	
Appellee.	)	

---

**APPELLANT GENEVA AREA RECREATIONAL, EDUCATIONAL  
AND ATHLETIC TRUST'S REPLY BRIEF**

---

Ryan M. Ellis (0078128)  
COUNSEL OF RECORD  
Stuart W. Cordell (0014777)  
Warren and Young PLL  
134 West 46<sup>th</sup> Street  
P.O. Box 2300  
Ashtabula, OH 44005-2300  
Telephone: (440) 997-6175  
Facsimile: (440) 992-9114  
[rellis@warrenyoung.com](mailto:rellis@warrenyoung.com)  
[scordell@warrenyoung.com](mailto:scordell@warrenyoung.com)

Mike DeWine (0009181)  
Ohio Attorney General  
David D. Ebersole (0087896)  
Assistant Attorney General  
30 East Broad Street, 25<sup>th</sup> Floor  
Columbus, OH 43215-3428  
Telephone: (614) 466-5967  
Facsimile: (614) 636-8331  
[David.Ebersole@OhioAttorneyGeneral.gov](mailto:David.Ebersole@OhioAttorneyGeneral.gov)

*Attorneys for Appellee, Joseph W. Testa,  
Tax Commissioner of Ohio*

Mary Jane Trapp (0005315)  
Thrasher, Dinsmore & Dolan LPA  
1400 West Sixth Street, Suite 400  
Cleveland, OH 44113  
Telephone: (216) 255-5431  
Facsimile: (216) 255-5450  
[mjtrapp@tddl.com](mailto:mjtrapp@tddl.com)

*Attorneys for Appellant Geneva Area  
Recreational, Educational and Athletic  
Trust*

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
INTRODUCTION .....	1
ARGUMENT .....	2
I.    The Court Should Reject the Tax Commissioner’s Incorrect Assertion that SPIRE has no Formal Charitable Policy for Providing Services.....	2
II.   The Court Should Reject the Tax Commissioner’s Incorrect Assertion that the Record Contains “No Concrete Evidence” of SPIRE Providing Services at a Reduced Fee.....	4
III.  The Court Should Reject the Tax Commissioner’s Incorrect Assertion that Roni Lee, LLC and SPIRE are Not Separate Institutions.....	6
IV.   The Court Should Reject the Tax Commissioner’s Misinterpretation of SPIRE’s Financial Records.....	7
V.    The Court Should Reject the Tax Commissioner’s Invented “Quid Pro Quo” Legal Standard for Charitable Use.....	8
VI.   The Court Should Reject the Tax Commissioner’s Inaccurate Assertion that SPIRE Engages in “Quid Pro Quo” Transactions and/or Private Commercial Activity .....	10
VII.  The Court Should Reject the Tax Commissioner’s Inaccurate Assertion That “Charity” Under Ohio Law Encompasses Only Pure Gifts .....	11
VIII. The Court Should Reject the Tax Commissioner’s Summary Dismissal of Binding and Analogous Precedent.....	12
IX.   The Court Should Reject the Tax Commissioner’s Incorrect Interpretation of R.C. 5709.121 .....	14
A.  The Tax Commissioner incorrectly asserts that R.C. 5709.121(A)(2) does not apply if the ownership and use of the property coincide .....	14
B.  The Tax Commissioner misstates the “made available under the director or control” standard .....	15

C. The Tax Commissioner misstates the “in furtherance of or incidental to” standard .....16

D. The Tax Commissioner misstates the “view to profit” standard .....17

X. The Court Should Reject the Tax Commissioner’s Misapplication Of the Prospective Use Standard .....18

A. The Tax Commissioner misstates the evidence .....18

B. The Tax Commissioner incorrectly presents inapposite case law as controlling precedent .....19

CONCLUSION.....20

**TABLE OF AUTHORITIES**

<b><u>Cases</u></b>	<b><u>Page</u></b>
<i>Am. Soc. for Metals v. Limbach</i> , 59 Ohio St.3d 38, 569 N.E.2d 1065 (1991).....	9
<i>Am. Chemical Soc. v. Kinney</i> , 69 Ohio St.2d 167, 431 N.E.2d 1007 (1982).....	17
<i>B.F. Goodrich Co. v. Lindley</i> , 58 Ohio St.2d 364, 390 N.E.2d 330 (1979).....	19
<i>Bay Mechanical &amp; Elec. Corp. v. Testa</i> , 133 Ohio St.3d 423, 2012-Ohio-4312, 978 N.E.2d 882.....	19
<i>Bethesda Healthcare, Inc. v. Wilkins</i> , 101 Ohio St.3d 420, 2004-Ohio-1749, 806 N.E.2d 142.....	10
<i>Carney v. Cleveland City Sch. Dist. Pub. Library</i> , 169 Ohio St. 65, 67, 157 N.E.2d 311 (1959) .....	11, 18-19
<i>College Preparatory School for Girls v. Evatt</i> , 144 Ohio St. 408, 413, 59 N.E.2d142 (1945).....	13
<i>Community Health Professionals, Inc. v. Levin</i> , 113 Ohio St.3d 432, 2007-Ohio-2336, 866 N.E.2d 478 .....	14, 15, 17
<i>Dialysis Clinic, Inc. v. Levin</i> , 127 Ohio St.3d 215, 2010-Ohio-5071, 938 N.E.2d 329.....	10, 15
<i>First Baptist Church of Milford v. Wilkins</i> , 110 Ohio St.3d 496, 2006-Ohio-4966, 854 N.E.2d 494.....	9
<i>Gerke v. Purcell</i> , 25 Ohio St. 229.....	12
<i>Herb Soc. Of Am v. Tracy</i> , 71 Ohio St.3d 374, 376, 643 N.E.2d 1132 (1994).....	12
<i>Highland Park Owners, Inc. v. Tracy</i> , 71 OhioSt.3d 405, 644 N.E.2d 284 (1994).....	12
<i>Holy Trinity Protestant Episcopal Church of Kenwood v. Bowers</i> , 172 Ohio St. 103, 173 N.E.2d 682 (1961) .....	19

<i>Hubbard Press v. Tracy</i> , 67 Ohio St.3d 564, 621 N.E.2d 396 (1993).....	9
<i>Lutheran Book Shop v. Bowers</i> , 164 Ohio St. 359, 131 N.E.2d 219 (1955).....	9
<i>Olmsted Falls Bd. of Edn. v. Tracy</i> , 77 Ohio St.3d 393, 674 N.E.2d 690 (1997).....	9
<i>Ohio Masonic Home v. Bd. of Tax Appeals</i> , 52 Ohio St.2d 127, 370 N.E.2d 465 (1977).....	9
<i>Ohio Operating Engineers Apprenticeship Fund v. Kinney</i> , 61 Ohio St.2d 359, 402 N.E.2d 511 (1980) .....	11
<i>Seven Hills Schools v. Kinney</i> , 28 Ohio St.3d 186, 503 N.E.2d 163 (1986).....	9
<i>Socialer Turnverein v. Bd. of Tax Appeals</i> , 139 Ohio St. 622, 41 N.E.2d 710 (1942).....	9
<i>State v. Brown</i> , 119 Ohio St.3d 447, 2008-Ohio-4569, 859 N.E.2d 149 .....	17
<i>The Chapel, Inc. v. Testa</i> , 129 Ohio St.3d 21, 2011-Ohio-545, 950 N.E.2d 142.....	12
<i>True Christianity Evangelism v. Zaino</i> , 91 Ohio St.3d 117, 742 N.E.2d 638 (2001).....	12
<i>Vick v. Cleveland Mem. Med. Found.</i> , 2 Ohio St.2d 30, 206 N.E.2d 2 (1965).....	9

**Administrative Decisions**

**Page**

<i>Bethesda Healthcare, Inc. v. Zaino</i> , BTA No. 00-J-1591, 2002 Ohio Tax LEXIS 1523 (Sept. 20, 2002) <i>aff'd</i> , 101 Ohio St.3d 420, 2004-Ohio-1749, 806 N.E.2d 142 .....	13
<i>Cincinnati v. Tracy</i> , BTA No. 93-X-75, 1996 Ohio Tax LEXIS 817 (June 21, 1996).....	13
<i>Corpus Christi Athletic Assn., Inc. v. Limbach</i> , BTA No. 89-J-722 1991 Ohio Tax LEXIS 1526 (Nov. 29, 1991) .....	13

*Dialysis Clinic v. Wilkins*, BTA Case No. 2006-V-2389 (Nov. 24, 2009) .....11

*Fair Park Swimming Pool Assn. v. Limbach*, BTA No. 84-B-26,  
1987 Ohio Tax LEXIS 559 (May 13, 1987) .....13

**Statutes**

**Page**

R.C. 5709.12 .....8

R.C. 5709.12(B) .....20

R.C. 5709.121 ..... 2, *passim*

R.C. 5709.121(A)(2) .....14, 15, 16, 20

## INTRODUCTION

The Tax Commissioner was faced with the unenviable task of attempting to comprehend and defend a deeply defective BTA Decision. Unfortunately, in order to bolster the BTA's Decision, the Tax Commissioner presents arguments in its Merit Brief that are not based on the evidentiary record but instead on blanket assertions, pure speculation, and inaccurate factual assumptions.

For example, the Tax Commissioner claims numerous times that SPIRE has no formal charitable policy for providing services and that the record contains "no concrete evidence" of SPIRE providing services at a reduced rate. Both statements are false and are based on the BTA's demonstrably incorrect statements that are entitled to no deference.

In addition, the Tax Commissioner claims for the very first time that SPIRE and Roni Lee, LLC (the record property owner) are not actually separate and distinct entities. This completely new argument has no basis in either law or the record and is disproved by both.

Further, the Tax Commissioner grossly misstates SPIRE's financial records and claims SPIRE has generated millions of dollars in revenue when it has actually suffered millions of dollars in net losses.

The Tax Commissioner also distorts and misapplies the applicable law. The Tax Commissioner summarily dismisses analogous case law illustrating that the activities occurring on the SPIRE Property qualify as charitable under Ohio law. Instead, the Tax Commissioner attempts to create at least two new legal standards for charitable use under Ohio law. The first is that the existence of "quid quo pro transactions" – a phrase which does not appear in the applicable statutes or in this court's decisions – precludes charitable exemption. The second is

that “charity” only encompasses pure gifts. Neither is supported by the applicable statutes or this court’s decisions.

Further, the Tax Commissioner attempts to engraft additional requirements onto R.C. 5709.121 and this court’s prospective use standard despite instructing this court to strictly construe the law.

Overall, the Tax Commissioner takes an extremely cynical and dismissive view of SPIRE’s commendable charitable mission and activities, including the culture of moral character it intends to instill in its community. Accordingly, the court should reject the Tax Commissioner’s arguments and reverse the BTA’s Decision.

### **ARGUMENT**

#### **I. THE COURT SHOULD REJECT THE TAX COMMISSIONER’S INCORRECT ASSERTION THAT SPIRE HAS NO FORMAL CHARITABLE POLICY FOR PROVIDING SERVICES**

The Tax Commissioner cannot resolve the BTA’s paradoxical determinations regarding SPIRE’s charitable policy. On one hand it found SPIRE has no formal charitable policy for providing services. Then inexplicably, it also acknowledged SPIRE actually has a written charitable policy, but then treats it dismissively as “unreliable hearsay.” (BTA Decision 4). (App. A9). The Tax Commissioner states over half a dozen times the allegation that SPIRE has no formal charitable policy for providing services. (Tax Commissioner’s Merit Brief (“TC Br.”) 1, 6, 14, 17, 20, 22). Thankfully, repetition does not make a false statement true. The Tax Commissioner is simply repeating the BTA’s demonstrably incorrect statement, and the record reveals no reliable and probative support for the BTA’s incongruous factual determination.

The BTA ignored the evidence presented at the hearing regarding SPIRE’s charitable policy, claiming, without evidentiary basis, that Mr. Orloff “testified that [SPIRE] had no formal policy for providing services without regard to ability to pay.” (BTA Decision 4). (App. A9).

The hearing transcript reflects SPIRE Chief Operating Officer, Jeffrey Orloff, actually testified that SPIRE's Board of Directors officially adopted a charitable policy to offer its services, facilities, and programs to all individuals without regard to their ability to pay for them. (Tr. 30-31, Ex. F). Mr. Orloff never once stated SPIRE had no formal charitable policy. It appears nowhere in the hearing transcript, and the Tax Commissioner does not and cannot cite to any instance.

Next, the Tax Commissioner, like the BTA before it, acknowledges SPIRE actually has a written charitable policy, but argues it is "unreliable hearsay." (TC Br. 2, 6, 14, 15, 17, 22). Even if SPIRE's written policy were actually "unreliable hearsay," which it is not, Mr. Orloff indisputably testified that SPIRE's written statement of charitable policy merely reflects SPIRE's actual mode of operation from day one of SPIRE's inception. (Tr. 95). He also testified that SPIRE's charitable policy is advertised on SPIRE's website, and is well-known by SPIRE's staff, which communicates it to the general public on a daily basis. (Tr. 95-97, 99-100). He further explained on numerous instances how each of SPIRE's facilities and services are provided based on a party's ability to pay consistent with SPIRE's charitable policy, which are detailed below (Tr. 19, 21, 25, 31, 34, 38, 39, 42, 43, 45, 56, 58, 82, 93, 94, 95, 99, 100, 101, 102, 104, 112, 134, 135, 157).

The Tax Commissioner cannot have it both ways. Either SPIRE has a formal charitable policy or it does not. Since both the Tax Commissioner and the BTA have acknowledged SPIRE actually has a formal charitable policy, whether written or not, and the record indicates that it does, the Tax Commissioner's references to the contrary are without reliable and probative support in the record.

Perhaps recognizing one of many fatal flaws in the BTA Decision, the Tax Commissioner tries to support its argument by re-litigating a discovery dispute regarding an interrogatory objection that the BTA's Hearing Examiner resolved in favor SPIRE. (TC Br. 22). At the evidentiary hearing, the BTA's Hearing Examiner sustained SPIRE's objection when the Tax Commissioner attempted to reference it. (Tr. 98). Therefore, the Tax Commissioner's references to such matters in its Merit Brief do not constitute part of the official record and are not properly before this court. The Tax Commissioner's comments in this regard should be disregarded.

Accordingly, the court should reject the Tax Commissioner's arguments regarding SPIRE's charitable policy as misstatements of the evidentiary record.

**II. THE COURT SHOULD REJECT THE TAX COMMISSIONER'S INCORRECT ASSERTION THAT THE RECORD CONTAINS "NO CONCRETE EVIDENCE" OF SPIRE PROVIDING SERVICES AT A REDUCED FEE**

There is no reliable and probative support for the BTA's factual determination that the record contains "no concrete evidence" of SPIRE providing services at a reduced fee. The Tax Commissioner simply repeats this error over a dozen times in its brief, but the record is replete with evidence of SPIRE providing no fee or reduced fee services. (TC Br. ii, 1, 4, 5, 6, 12, 14, 17, 19, 20, 21, 34, 40, 45, 46). Mr. Orloff testified about numerous examples of SPIRE providing services for free or at reduced rates, including the following:

- SPIRE allows people to use the facilities for free. (Tr. 25).
- A young man referred by a social services agency was provided sports programming for free. (Tr. 30-31).
- None of the students at SPIRE Academy are paying full tuition. (Tr. 38, Exhibit H).
- SPIRE paid for a student's education at Andrews Osborne Academy. (Tr. 39-40).
- SPIRE provides food at SPIRE Fuel to teams at no cost or for what they can afford to pay. (Tr. 45).

- SPIRE hosts Geneva High School graduations for free. (Tr. 51-52).
- SPIRE provides its facilities and services to USA Track and Field for free. (Tr. 53).
- SPIRE provides facilities for Paralympians free of charge. (Tr. 54).
- SPIRE provides free wellness programming for the military. (Tr. 54-55).
- SPIRE provides the facilities, food, and services for military funerals free of charge. (Tr. 56).
- SPIRE provides use of the facilities to the U.S. Army for free. (Tr. 119).
- Dr. Seeds provides a health and wellness seminar for free. (Tr. 128).
- SPIRE provides use of the facilities to the State Highway Patrol for anti-drinking presentations to students for free. (Tr. 130).
- SPIRE has provided use of the facilities for birthday parties for free. (Tr. 134).

SPIRE introduced the piece of evidence the BTA claimed it wanted to see – “a listing of users of the facility corresponding to the fee paid and the fee normally charged.” (BTA Decision, p. 4). (App. A9). Specifically, SPIRE presented an exhibit containing a redacted listing of enrolled SPIRE Academy students and the amount of tuition each student actually paid. (Tr. Ex. H). Faced with this compelling evidence, the Tax Commissioner interjects a new and quite cynical argument for the first time that SPIRE’s marketing strategy is that of a commercial enterprise --the full tuition price may be “artificially high to attract student-athletes.” (TC Br. 12, 34). This argument is purely speculative and is not based on any actual finding contained in the BTA Decision.

Further, the Tax Commissioner repeatedly characterizes the BTA Decision as “rejecting” Mr. Orloff’s testimony regarding SPIRE’s charitable policy and free/reduced services. (TC Br. 5, 6, 13, 20, 22, 33). This is not accurate. The BTA *ignored* Mr. Orloff’s testimony regarding

these subjects. The BTA never states in its Decision that it was rejecting Mr. Orloff's testimony or that he lacked credibility as a witness. The Tax Commissioner should not be permitted to assign a basis for the BTA's Decision that is not contained in the Decision itself.

While the BTA may be entitled to deference in *resolving* factual disputes, neither it nor the Tax Commissioner is entitled to *create* its own facts. Accordingly, the court should reject the Tax Commissioner's arguments regarding SPIRE's free/reduced services as misstatements of the evidentiary record.

### **III. THE COURT SHOULD REJECT THE TAX COMMISSIONER'S INCORRECT ASSERTION THAT RONI LEE, LLC AND SPIRE ARE NOT SEPARATE INSTITUTIONS**

As demonstrated in SPIRE's Merit Brief, the BTA erred as a matter of law by failing to find that the SPIRE Property "belongs to" SPIRE for purposes of the charitable use statutes. (SPIRE Merit Brief Proposition of Law No. 1). This error alone merits reversal of the BTA Decision.

Perhaps recognizing this possibility, the Tax Commissioner creates an entirely new and novel argument to support the BTA's holding. The argument contains no reference to law or evidence in the record. For the very first time, the Tax Commissioner alleges that SPIRE "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 [SPIRE], namely Ron and Tracy Clutter." (TC Br. 3). The Tax Commissioner argues without any precedential or statutory support that SPIRE somehow has a burden "to show charitable intent despite its close relationship with the for-profit Roni Lee LLC" and that "Mr. Clutter controls [SPIRE] as President (officer), director, and founder." (TC Br. 38).

This argument is unavailing. First, the Tax Commissioner has simply created a new legal burden that is not contained in the charitable use statutes or in this court's decisions. Second, the

Tax Commissioner completely misstates the evidentiary record. While Mr. and Mrs. Clutter are the sole owners of Roni Lee, LLC, Mr. Clutter is not the sole officer or director of SPIRE. (Tr. Ex. 16). SPIRE contains three other officers (a Vice President, a Secretary, and a Treasurer) and four independent directors on its board. (Tr. 192, 205-06, Ex. 16). If SPIRE were actually structured as the Tax Commissioner alleges, the Internal Revenue Service would not likely recognize SPIRE as a public charity exempt from federal income taxes, which it indisputably does. (Tr. 20-21, Ex. B).

Accordingly, the Tax Commissioner's novel argument devoid of factual and legal basis should be disregarded.

#### **IV. THE COURT SHOULD REJECT THE TAX COMMISSIONER'S MISINTERPRETATION OF SPIRE'S FINANCIAL RECORDS**

Every institution appears profitable based on only one side of the ledger. The Tax Commissioner claims several times that SPIRE generates "millions of dollars in revenue," suggesting that the receipt of large revenues is inherently inconsistent with charitable activity. (TC Br. i, 4, 5, 34). The Tax Commissioner even creates a chart alleging to depict SPIRE's annual revenue for 2009 through 2011, excluding contributions. (TC Br. 5). However, the Tax Commissioner also excludes *expenses*. These figures represent *gross* revenues

When expenses are included, SPIRE's net losses, excluding contributions, were in excess of \$2 Million in 2009, nearly \$4 Million in 2010, and nearly \$7 Million in 2011. (Tr. Ex. 6, 7, 8, 9) (TC Br. 5). As Mr. Orloff testified, SPIRE's annual gross revenue does not even come close to covering its annual operating costs—a result to be expected given SPIRE's openness to anyone regardless of ability to pay. (Tr. 32).

Because of this, and by design, SPIRE relies on charitable donations from the community to make up the difference and sustain its operations. (Tr. 33). SPIRE is obviously an expensive

facility to maintain and operate. Charitable exemption is therefore crucial for SPIRE to remain open to the community and to those who cannot afford to pay for its services.

Accordingly, the court should reject the Tax Commissioner's highly misleading manipulation of SPIRE's financial data.

**V. THE COURT SHOULD REJECT THE TAX COMMISSIONER'S INVENTED "QUID PRO QUO" LEGAL STANDARD FOR CHARITABLE USE**

The main purpose of the Tax Commissioner's Merit Brief appears to be to recast the legal standard for charitable use in Ohio. According to the Tax Commissioner, "[r]ealty is not used exclusively for charitable purposes under R.C. 5709.12 or R.C. 5709.121 where it is used for quid pro quo, i.e., fee-for-service, transactions at market rates." (TC Br. 18). In essence, the Tax Commissioner alleges that because SPIRE generally charges for its services, it is engaged in private commercial activity rather than charitable activity. This is not the law in Ohio.

First, the Tax Commissioner mischaracterizes the hearing testimony over a dozen times by claiming all of SPIRE's services are offered at "market-based" rates. (TC Br. i, ii, 2, 4, 5, 18, 22, 23, 24, 26, 30). Each and every instance is incorrect. Mr. Orloff specifically testified about numerous instances in which SPIRE's rates are below market. (Tr. 32-33, 109-110, 135-36). More importantly, anyone who is unable to pay is not required to do so. (Tr. 25). That is the essence of SPIRE's charitable mission. Unlike strictly market-based operations, no one is excluded from using SPIRE's facilities due to his or her inability to pay.

Second, none of the cases the Tax Commissioner cites in support of this new legal standard declare that an institution was not a charity because of "private quid pro quo" transactions. In addition, none of the cases are even applicable to the Tax Commissioner "quid pro quo" argument or analogous to SPIRE's activities.

Some of these cases involved institutions that severely limited the use of the property to only a select few. *See, e.g., Olmsted Falls Bd. of Edn. v. Tracy*, 77 Ohio St.3d 393, 674 N.E.2d 690 (1997) (the court found the institution was a fraternal, social organization that held social and fraternal activities only to dues-paying members); *Socialer Turnverein v. Bd. of Tax Appeals*, 139 Ohio St. 622, 41 N.E.2d 710 (1942) (the institution and its programs were only available to dues-paying members).

Other cases involved whether an institution used certain portions of its property consistent with its main charitable activities. *See, e.g., Seven Hills Schools v. Kinney*, 28 Ohio St.3d 186, 503 N.E.2d 163 (1986) (separate property used as a clothing exchange to generate cash), *Ohio Masonic Home v. Bd. of Tax Appeals*, 52 Ohio St.2d 127, 370 N.E.2d 465 (1977) (separate property used as a farming operation); *First Baptist Church of Milford v. Wilkins*, 110 Ohio St.3d 496, 2006-Ohio-4966, 854 N.E.2d 494 (a separate institution used the property as a printing operation and for apartments); *Hubbard Press v. Tracy*, 67 Ohio St.3d 564, 621 N.E.2d 396 (1993) (property used to operate a printing plant).

The final two cases involved institutions devoted solely to generating profit. *See, e.g., Am. Soc. for Metals v. Limbach*, 59 Ohio St.3d 38, 569 N.E.2d 1065 (1991) (institution held educational courses that made a net profit); *Lutheran Book Shop v. Bowers*, 164 Ohio St. 359, 131 N.E.2d 219 (1955) (institution ran a book shop that printed religious materials and supplies).

Under the actual legal standard for charitable use, the determinative factor is the *use of the property* rather than the fact that some revenues are collected and received from those who have the means. *Vick v. Cleveland Mem. Med. Found.*, 2 Ohio St.2d 30, 206 N.E.2d 2 (1965) (emphasis added). As SPIRE demonstrated in its Merit Brief, the SPIRE Property is used to

provide services to the public for the benefit of mankind intellectually, physically, and socially (SPIRE Merit Brief 20-24).

SPIRE has cited numerous cases and BTA decisions acknowledging that similar activities are charitable under Ohio law. (*Id.*) Further, SPIRE has cited numerous cases and BTA decisions approving of charitable institutions charging fees, including membership fees, to cover their operating costs and to fund their charitable activities. (*Id.*) See also, *Dialysis Clinic, Inc. v. Levin*, 127 Ohio St.3d 215, 2010-Ohio-5071, 938 N.E.2d 329, ¶ 40 (an institution need *not* show a particular percentage of unreimbursed services if it proves its commitment to providing its services on a nondiscriminatory basis).

Accordingly, the court should reject the Tax Commissioner’s baseless “quid pro quo” argument.

**VI. THE COURT SHOULD REJECT THE TAX COMMISSIONER’S INACCURATE ASSERTION THAT SPIRE ENGAGES IN “QUID PRO QUO” TRANSACTIONS AND/OR PRIVATE COMMERCIAL ACTIVITY**

Even if the legal standard for charitable use involved the existence of “quid pro quo transactions,” which it does not, SPIRE is not engaged in private commercial activity.

The Tax Commissioner’s attempt to analogize SPIRE Fit to that at issue in *Bethesda Healthcare, Inc. v. Wilkins*, 101 Ohio St.3d 420, 2004-Ohio-1749, 806 N.E.2d 142 as example of a prohibited “quid pro quo” transaction fails. There is no evidence in this record to support the commissioner’s blanket assertion that if a Geneva resident purchases a membership to SPIRE Fit, the Geneva resident only wants to benefit from the facilities, and SPIRE only wants to benefit from the membership fees.

Moreover, *Bethesda* is factually distinguishable. In *Bethesda*, the applicant operated a fitness facility that was open only to dues-paying members and their guests, with minimal access for the general public. The exemption was denied because only a small, pre-determined number

of memberships were given away through scholarships, and the facility itself was not open to the public at large. *Id.* at ¶ 38.

By contrast, Mr. Orloff testified that free and discounted memberships are available at SPIRE *to all who are unable to pay* the regular rates. (Tr. 33-34). SPIRE does not turn away anyone who is unable to pay for its services, programs, or facilities, including tuition, program fees, and facility rental and user fees. (Tr. 30-31, Ex. F, Ex. G). SPIRE does not exist for the purpose of collecting membership fees nor is the SPIRE Property limited to only a few pre-determined scholarships or discounted memberships, as was the case in *Bethesda*. For example, each student enrolled at SPIRE Academy pays a different rate based on his or her ability to pay, and not one pays full tuition. (Tr. 38-41, Ex. H).

As this court has instructed, the “strict construction” of statutes “must be tempered with reason.” *Ohio Operating Engineers Apprenticeship Fund v. Kinney*, 61 Ohio St.2d 359, 402 N.E.2d 511 (1980) citing *Carney v. Cleveland City Sch. Dist. Pub. Library*, 169 Ohio St. 65, 67, 157 N.E.2d 311 (1959). If the Tax Commissioner’s version of “charitable use” were to prevail, the majority of active charities in the State of Ohio would not even qualify as “charitable institutions” under Ohio law.

Accordingly, the court should reject the Tax Commissioner’s argument that SPIRE is engaged solely in private commercial activity as contrary to the evidentiary record.

## **VII. THE COURT SHOULD REJECT THE TAX COMMISSIONER’S INACCURATE ASSERTION THAT “CHARITY” UNDER OHIO LAW ENCOMPASSES ONLY PURE GIFTS**

The Tax Commissioner attempts to bootstrap its “charity is a gift” argument from the BTA’s decision in *Dialysis Clinic v. Wilkins*, BTA Case No. 2006-V-2389 (Nov. 24, 2009), and other non-binding cases from several other state courts. (TC Br. 28). But while this court affirmed the BTA in *Dialysis Clinic*, it did not adopt the BTA’s language in its opinion. The Tax

Commissioner's claim that this court has held that "charity" under Ohio law encompasses only pure gifts is not supported by one case from this court. (TC Br. 27).

Interestingly, the Tax Commissioner cites the Internal Revenue Code's gift tax provisions in support of this argument. (TC Br. 29). Once again trying to have it both ways, the Tax Commissioner later dismisses SPIRE's indisputable status as a public charity under the Internal Revenue Code because "Ohio tax law is separate and distinct from federal law." (TC Br. 46).

In actuality, this court's long-settled definition of a charity goes well beyond the Tax Commissioner's contention. *See Gerke v. Purcell*, 25 Ohio St. 229, paragraph four of the syllabus (1874) ("A charity, in a legal sense, includes not only gifts for the benefit of the poor, but endowments for the advancement of learning, or institutions for the encouragement of science and art, without any particular reference to the poor"). The Tax Commissioner's reliance on irrelevant out-of-state authority is inapposite. Accordingly, the court should reject the Tax Commissioner's argument that "charity" only encompasses pure gifts because it is not the applicable legal standard in Ohio.

#### **VIII. THE COURT SHOULD REJECT THE TAX COMMISSIONER'S SUMMARY DISMISSAL OF BINDING AND ANALOGOUS PRECEDENT**

The Tax Commissioner's reliance on out-of-state authority demonstrates the weakness of the commissioner's legal position; so, too, does the commissioner's attempt to distinguish Ohio precedent. For example, the Tax Commissioner summarily distinguishes *True Christianity Evangelism v. Zaino*, 91 Ohio St.3d 117, 742 N.E.2d 638 (2001), *Herb Soc. of Am v. Tracy*, 71 Ohio St.3d 374, 376, 643 N.E.2d 1132 (1994), *Highland Park Owners, Inc. v. Tracy*, 71 Ohio St.3d 405, 644 N.E.2d 284 (1994), and *The Chapel, Inc. v. Testa*, 129 Ohio St.3d 21, 2011-Ohio-545, 950 N.E.2d 142 as inapplicable because the institutions in those cases allegedly provided use of property at no charge. (TC Br. 39-40). However, all of these cases illustrate that

providing educational services and recreational facilities, as SPIRE does, is recognized as charitable activity under Ohio, which the Tax Commissioner refuses to acknowledge.

The Tax Commissioner's hasty descriptions of *Fair Park Swimming Pool Assn. v. Limbach*, BTA No. 84-B-26, 1987 Ohio Tax LEXIS 559 (May 13, 1987), *Corpus Christi Athletic Assn., Inc. v. Limbach*, BTA No. 89-J-722, 1991 Ohio Tax LEXIS 1526 (Nov. 29, 1991), *Bethesda Healthcare, Inc. v. Zaino*, BTA No. 00-J-1591, 2002 Ohio Tax LEXIS 1523 (Sept. 20, 2002), *aff'd*, 101 Ohio St.3d 420, 2004-Ohio-1749, 806 N.E.2d 142, and *Cincinnati v. Tracy*, BTA No. 93-X-75, 1996 Ohio Tax LEXIS 817 (June 21, 1996), only serve to further support SPIRE's exemption claim. Like the property at issue in those cases, the SPIRE Property is open to the public, and SPIRE waives or reduces fees based on ability to pay. In addition, these cases clearly illustrate how the BTA ignored its own precedent to deny exemption to the SPIRE Property.

The Tax Commissioner also must attempt to distinguish *College Preparatory School for Girls v. Evatt*, 144 Ohio St. 408, 413, 59 N.E.2d 142 (1945) in order to support the commissioner's claim that no educational activity actually occurs at SPIRE, (TC Br. 1, 11, 33, 41). However, *College Preparatory* illustrates that providing educational services for a fee, such as SPIRE Academy, qualifies as charitable activity so long as services are provided to some at no charge. *College Preparatory* further illustrates that "education" includes both mental and physical education. Therefore, it is inaccurate for the Tax Commissioner to say no educational activity occurs at the SPIRE Property. As Mr. Orloff testified, Andrews Osborne Academy provides the intellectual component at its facilities, while SPIRE provides the physical training component at its facilities. (Tr. 35, 89).

Accordingly, the court should reject the Tax Commissioner's summary dismissal of binding and analogous precedent.

**IX. THE COURT SHOULD REJECT THE TAX COMMISSIONER'S INCORRECT INTERPRETATION OF R.C. 5709.121**

The proper interpretation and application of a statute presents a question of law subject to do novo review. While the Tax Commissioner presents a series of arguments regarding the proper interpretation of R.C. 5709.121, which were not advanced by the BTA as reasons for denying tax exemption to the SPIRE Property (TC Br. 46-50), the commissioner (and for that matter the BTA) fails to comprehend the import of SPIRE'S argument below.

The BTA held that the SPIRE Property "belonged to" Roni Lee, LLC, and thus refused to consider whether SPIRE was a charitable institution or satisfied the elements of R.C. 5709.121(A)(2). Now, the Tax Commissioner must, in effect, attempt to supplement the unreasonable and unlawful BTA Decision by adding alleged facts and supply missing legal arguments in an attempt to rewrite the statute.

**A. The Tax Commissioner incorrectly asserts that R.C. 5709.121(A)(2) does not apply if the ownership and use of the property coincide**

The Tax Commissioner's argument seeking to impose an additional legal requirement for charitable use that is not set forth in the statute itself should be rejected as a matter of law. The argument that R.C. 5709.121(A)(2) does not apply in this case because the "use and ownership" of the SPIRE Property allegedly "coincide" has no legal support. (TC Br. 42, 49).

As this court has repeatedly held, R.C. 5709.121 provides an alternative method for a "charitable institution" to satisfy the "exclusive use" standard in R.C. 5709.12(B). *Community Health Professionals, Inc. v. Levin*, 113 Ohio St.3d 432, 2007-Ohio-2336, 866 N.E.2d 478, ¶ 18 ("If the institution is charitable, its property may be exempt if it uses the property exclusively for

charitable purposes **OR** it uses the property under the terms set forth in R.C. 5709.121”) (emphasis added).

This alternative method is available to any property “belonging to” a charitable institution, even if the institution both owns and “uses the property under the terms set forth in R.C. 5709.121.” *Id.* Although the court noted in *Dialysis Clinic, Inc. v. Levin*, 127 Ohio St.3d 215, 2010-Ohio-5071, 938 N.E.2d 329, ¶¶22-24, that ownership and use “need not coincide” in order for property belonging to a charitable institution to be tax exempt under R.C. 5709.121, the phrase “need not coincide” is not the same as “must not” or “shall not” coincide, as the Tax Commissioner is apparently arguing. Tellingly, the Tax Commissioner cites no case law to support its interpretation.

In addition, even if the Tax Commissioner’s legal standard were valid, which it is not, the Tax Commissioner’s factual assertions are demonstrably incorrect. It is simply wrong for the Tax Commissioner to state that the SPIRE Property is not being used by third parties, given the undisputed evidence that it is being used by hundreds of people on a regular basis, including adults, children, families, seniors, community leagues, traveling club leagues, students, Paralympians, Olympians, and training camps. (Tr. 33-53, 111-113).

Accordingly, the court should reject the Tax Commissioner’s argument because it is incorrect as a matter of law based on the plain language of the statute and this court’s precedent in *Community Health* and because it is demonstrably incorrect.

**B. The Tax Commissioner misstates the “made available under the direction or control” standard**

Offering a third paradoxical argument, the Tax Commissioner concedes that the SPIRE Property is used by others, but then argues that SPIRE does not maintain direction or control

over the SPIRE Property under R.C. 5709.121(A)(2) because of the existence “contractual arrangements.” (TC Br. 42, 46, 49-50).

First, the Tax Commissioner’s argument is based entirely on unsupported blanket assertions and factual assumptions. The Tax Commissioner, citing no law whatsoever, asserts that only R.C. 5709.121(A)(1) rather than (A)(2) applies when a contract is involved, and that these provisions are “mutually exclusive.” (TC Br. 49).

Once again citing no law or facts, the Tax Commissioner asserts that “[o]bligations 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.” (TC Br. 49-50). However, one could just as easily assume that SPIRE would absolutely insist on maintaining direction and control when it contracts with a third party for the use of SPIRE’s multi-million dollar, one-of-a-kind facilities.

In fact, that is exactly what Mr. Orloff’s testimony demonstrates. In the Big 10 contract, to which the Tax Commissioner specifically refers, Mr. Orloff testified that there are numerous limitations on what the Big 10 can do on the SPIRE Property. (Tr. 141). In addition, Mr. Orloff testified that SPIRE provides “everything,” including the facilities, officials, food, transportation, hotel room availability, security, and parking assistance. (Tr. 140). By contrast, the Big 10 only controls the aspects of the competition. (Tr. 142-43). One cannot seriously argue that SPIRE is not maintaining “direction” as well as “control” over the SPIRE Property under such an arrangement.

Accordingly, the Court should reject the Tax Commissioner’s “made available under the direction or control” argument because it contains an incorrect statement of law based on unsupported assumptions and because it is demonstrably incorrect.

**C. The Tax Commissioner misstates the “in furtherance of or incidental to” standard**

Contrary to the Tax Commissioner’s assertion, SPIRE did not argue “*any use in furtherance of or incidental to*” charitable use is sufficient to satisfy this element. Instead, SPIRE simply recited the court’s standard in *Community Health* that requires a functional relationship between the use of the property and the charitable purpose of the institution. (SPIRE Merit Brief 29-30).

It is, in fact, the Tax Commissioner who attempts to change the plain language of the statute by arguing the court must instead require “*substantial and essential use in furtherance of or incidental to*” charitable use and must impose new “quantity” and “quality” standards, none of which are found in the statute itself. (TC Br. 47).

SPIRE simply requests that the court apply the language as written and as interpreted by the court itself. By attempting to add words and requirements, the Tax Commissioner does exactly that which it accuses SPIRE – impose words into the statute. This is not permitted. *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 859 N.E.2d 149, ¶ 37 (holding that a court has a “duty to apply a statute as written and not to read words into a statute that the legislature did not place there”). The fact that the Tax Commissioner demands strict statutory construction only to contradict itself in the same paragraph further demonstrates the weakness of its argument.

Accordingly, the Court should reject the Tax Commissioner’s argument regarding the “in furtherance of or incidental to” standard because it contains an incorrect statement of law.

**D. The Tax Commissioner misstates the “view to profit” standard**

With respect to the unimproved acreage of the SPIRE Property, the Tax Commissioner cites the dissenting opinion in *Am. Chemical Soc. v. Kinney*, 69 Ohio St.2d 167, 431 N.E.2d 1007 (1982), for the position that holding property tax-free for the purpose of later realizing a profit constitutes a “view to profit.” (TC Br. 35). First, a dissenting opinion contains no force of law. Second, as SPIRE has demonstrated in its Merit Brief and as further demonstrated below, SPIRE

is not merely holding onto the unimproved acreage for appreciation purposes. SPIRE has devoted the unimproved acreage to exempt uses.

**X. THE COURT SHOULD REJECT THE TAX COMMISSIONER'S MISAPPLICATION OF THE PROSPECTIVE USE STANDARD**

The Tax Commissioner attempts to apply this court's "prospective use" standard to the unimproved portions of the SPIRE Property. However, the BTA did not set forth any independent analysis for denying tax exemption to this acreage. (BTA Decision, p. 4) (App. A9). Therefore, the Tax Commissioner's arguments below are not only incorrect but also completely speculative.

**A. The Tax Commissioner misstates the evidence.**

The Tax Commissioner's references to future sale and commercial development are red herrings, which do not accurately reflect the evidence. Contrary to the Tax Commissioner's repeated assertions that the unimproved portions of the SPIRE Property are not exempt because they are being held for commercial development or future sale. (TC Br. 10-11, 35-36), Mr. Orloff testified that there have been inquiries regarding purchase of land, but SPIRE has no actual plans to lease or sell any property for commercial development or to develop it commercially itself. (Tr. 160-62). Mr. Orloff simply entertained the remote possibility. (Tr. 161). In addition, in the event any for-profit activities occurred in the future, Mr. Orloff made clear that they would not occur in relation to SPIRE or on land owned by SPIRE. (Tr. 160-62).

Despite the Tax Commissioner's constant repetition, Mr. Orloff's testimony hardly demonstrates that the unimproved portions of the SPIRE Property are *devoted to* "commercial development" or "future sale." It merely reflects the fact that SPIRE intends to build additional facilities and buildings on those portions, but such activities have not yet occurred. As the court has recognized, such activities are not required to have occurred before an exemption may be

granted. *Carney v. Cleveland City School Dist. Pub. Library*, 169 Ohio St. 65, 69, 157 N.E.2d 311 (1959) (holding “it is not necessary that actual physical use of property for an exempt purpose be commenced before it is entitled to be exempted from taxation. It is sufficient if it is acquired by the organization entitled to the exemption, with the intention of devoting it to an exempt use”).

Given the Tax Commissioner’s stubborn refusal to recognize *any* aspect of SPIRE’s charitable nature or *any* charitable uses of the SPIRE Property (even without local school board objection), it can hardly seem unreasonable for SPIRE to be resigned to the possibility that should it not prevail in its appeal, SPIRE could be forced to sell land to continue to exist.

**B. The Tax Commissioner incorrectly presents inapposite case law as controlling precedent**

The Tax Commissioner also presents a series of cases allegedly regarding prospective use which are clearly distinguishable from the present matter. For example, the Tax Commissioner cites *B.F. Goodrich Co. v. Lindley*, 58 Ohio St.2d 364, 390 N.E.2d 330 (1979) and *Bay Mechanical & Elec. Corp. v. Testa*, 133 Ohio St.3d 423, 2012-Ohio-4312, 978 N.E.2d 882 to suggest SPIRE must have actually built on the unimproved acreage to meet the prospective use standard. However, *B.F. Goodrich* involved a claim for a use tax refund and application of the “primary use” test. *Bay Mechanical* involved a challenge to a sales tax assessment. Neither involved the charitable use statutes or whether real property was exempt under the prospective use standard. The Tax Commissioner’s attempted analogy to these inapposite cases contradicts the court’s holding in *Carney, supra*, stating “actual use” of property is not necessary to obtain exemption.

Finally, the Tax Commissioner correctly cites *Holy Trinity Protestant Episcopal Church of Kenwood v. Bowers*, 172 Ohio St. 103, 173 N.E.2d 682 (1961) as requiring “tangible

evidence” of intent to use property. However, the Tax Commissioner fails to note that SPIRE has already presented such evidence. (SPIRE Merit Brief 36) (Tr. 58-60, 90-91, 200, Exhibit E).

Accordingly, the court should reject the Tax Commissioner’s arguments regarding the “prospective use” standard because of the Tax Commissioner’s misstatement of the factual record and its presentation of inapplicable case law.

### **CONCLUSION**

For the reasons set forth above and in SPIRE’s Merit Brief, SPIRE respectfully requests that the Court reverse the BTA’s Decision and remand with instructions to grant tax exemption to the SPIRE Property under R.C. 5709.12(B) and R.C. 5709.121(A)(2).

Respectfully submitted,

/s Ryan M. Ellis

\_\_\_\_\_  
Ryan M. Ellis (0078128)  
COUNSEL OF RECORD  
Stuart W. Cordell (0014777)  
Warren and Young PLL  
134 West 46th Street  
P.O. Box 2300  
Ashtabula, OH 44005-2300  
Telephone: (440) 997-6175  
Facsimile: (440) 992-9114  
[rellis@warrenyoung.com](mailto:rellis@warrenyoung.com)  
[scordell@warrenyoung.com](mailto:scordell@warrenyoung.com)

Mary Jane Trapp (0005315)  
Thrasher, Dinsmore & Dolan LPA  
1400 West Sixth Street, Suite 400  
Cleveland, OH 44113  
Telephone: (216) 255-5431  
Facsimile: (216) 255-5450  
[mjtrapp@tddl.com](mailto:mjtrapp@tddl.com)

*Attorneys for Appellant Geneva Area  
Recreational, Educational and Athletic  
Trust*

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of Appellant's Reply Brief was served via regular first-class mail, postage prepaid, on July 10, 2015, to Mike DeWine, Ohio Attorney General, David D. Ebersole, Assistant Attorney General, 30 East Broad Street, 25th Floor, Columbus, OH 43215-3428, Attorneys for Appellee Joseph W. Testa, Tax Commissioner of Ohio.

/s Ryan M. Ellis \_\_\_\_\_

Ryan M. Ellis