

**In the**  
**Supreme Court of Ohio**

COLUMBUS CITY SCHOOL DISTRICT	:	
BOARD OF EDUCATION,	:	
	:	
Appellee,	:	Case No. _____
	:	
v.	:	On appeal from the
	:	Ohio Board of Tax Appeals
JEFF MCCLAIN,	:	
TAX COMMISSIONER OF OHIO, -and-	:	BTA Case No. 2018-649
HAWTHORN GROVE, LLC,	:	
	:	
Appellants.	:	

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**NOTICE OF APPEAL OF JEFF MCCLAIN, TAX COMMISSIONER OF OHIO**

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*Board of Education*

## **NOTICE OF APPEAL**

Appellant, Jeff McClain, Tax Commissioner of Ohio (“Tax Commissioner”), hereby gives notice of his appeal as of right, pursuant to R.C. 5717.04, to the Supreme Court of Ohio, from a Decision and Order of the Ohio Board of Tax Appeals (“Board”), journalized and entered on May 28, 2020. A true and accurate copy of this Decision and Order is attached as Exhibit A.

This appeal involves an application for real property tax exemption filed by appellant, Hawthorn Grove, LLC (“Hawthorn Grove”), requesting that the subject property be exempt for being used exclusively for charitable purposes, under R.C. 5709.12. In a May 3, 2018 final determination, the Tax Commissioner determined that the subject property was exempt. However, in a May 28, 2020 Decision and Order, the Board reversed the Tax Commissioner’s final determination, concluding that Hawthorn Grove’s use of the subject property did not qualify for exemption under R.C. 5709.12.

Accordingly, the Tax Commissioner assigns the following errors in the Board’s May 28, 2020 Decision and Order:

1. As a matter of fact and law, the Board’s May 28, 2020 Decision and Order was unreasonable and unlawful.
2. The Board erred in determining that the subject property was not used exclusively for charitable purposes and thus not entitled to exemption under R.C. 5709.12.
3. The Board erred in determining that the primary use of the subject property is for a private residence for the individuals living there – despite also having acknowledged that such housing is “part of a larger network of services provided to those individuals,” all of whom have significant mental health issues, addiction disorders, and/or a history of homelessness.

4. The Board erred in failing to determine that the subject property was used primarily to provide a “safety net” of permanent supportive services to its residents, and that the on-site housing provided is but one element of the wraparound services provided to them.

5. The Board erred in misapplying this Court’s decision in *NBC-USA Housing, Inc.-Five v. Levin*, 125 Ohio St.3d 394, 2010-Ohio-1553, to the facts in this case.

a. Whereas here, the subject property was part of a network of permanent supportive services, *NBC-USA Housing* involved a “home for the aged,” as that term is expressly defined in R.C. 5709.13.

b. This Board also erred in failing to distinguish *NBC-USA Housing*, inasmuch as the subject property was not used primarily as a private residence.

6. The Board erred in refusing to apply its decision in *88/96 LP v. Wilkins*, BTA No. 2005-A-55, 2007 Ohio Tax LEXIS 1018 (July 20, 2007). In *88/96 LP*, the Board granted exemption for property that was used *not only* to provide subsidized housing for tenants, but *also* to provide services not normally provided in a traditional subsidized housing setting – and thus served as “permanent affordable housing linked to a safety net.” *Id.* at \*18-26.

a. In so doing, the Board erred in ignoring that, on multiple occasions, it has reiterated its finding from *88/96 LP* that “permanent affordable housing linked to a safety net used to provide services that help the individuals develop life skills” is used exclusively for charitable purposes. *E.g., Talbert Servs., Inc. v. Testa*, BTA No. 2012-2131, 2013 Ohio Tax LEXIS 6016, at \*5 (Nov. 7, 2013).

b. Such subsequent Board decisions also have included *NBC-USA Housing, Inc. v. Levin*, BTA No. 2006-N-1492, 2009 Ohio Tax LEXIS 538, at \*18 (Apr. 21, 2009), which determined that property is used for an exempt purpose “when the use of specific

services was an integral requirement for all residents as a condition for admission" to that property. This Court affirmed the Board's decision in *NBC-USA Housing* in the decision discussed above. *See* 2010-Ohio-1553.

c. Moreover, the Board's refusal to apply 88/96 LP to this case is erroneously predicated upon the notion that the subject property is used primarily for a private residential purpose.

WHEREFORE, for the above reasons, this Court should:

- (1) Reverse the Board's May 28, 2020 Decision and Order as unreasonable and unlawful, and
- (2) Remand this matter for issuance of an Order affirming, in its entirety, the Tax Commissioner's May 3, 2018 final determination, thus granting Hawthorn Grove's application for real property tax exemption.

Respectfully submitted,

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Attorney General of Ohio

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*Counsel for Appellant,  
Jeff McClain, Tax Commissioner of Ohio*

**In the**  
**Supreme Court of Ohio**

COLUMBUS CITY SCHOOL DISTRICT	:	
BOARD OF EDUCATION,	:	
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Appellee,	:	Case No. _____
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v.	:	On appeal from the
	:	Ohio Board of Tax Appeals
JEFF MCCLAIN,	:	
TAX COMMISSIONER OF OHIO, -and-	:	BTA Case No. 2018-649
HAWTHORN GROVE, LLC,	:	
	:	
Appellants.	:	

**PRAECIPE**

**TO THE SECRETARY OF THE OHIO BOARD OF TAX APPEALS:**

Pursuant to R.C. 5717.04, appellant, Jeff McClain, Tax Commissioner of Ohio, hereby requests that the Ohio Board of Tax Appeals (“Board”) file with the Supreme Court of Ohio, 65 South Front Street, Columbus, Ohio 43215, a certified transcript of the record of the Board’s proceedings in the above-captioned matter, including any evidence considered by the Board in rendering its decision in that matter.

Respectfully submitted,

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*Counsel for Appellant,  
Jeff McClain, Tax Commissioner of Ohio*

## **CERTIFICATE OF SERVICE**

I certify that, on this 29th day of June, 2020, a true copy of the foregoing "Notice of Appeal of Jeff McClain, Tax Commissioner of Ohio" and "Praecipe" was served by: (1) electronic filing with the Ohio Supreme Court; (2) electronic filing with the Ohio Board of Tax Appeals; and (3) certified mail upon the following:

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*Counsel for Appellant, Hawthorn Grove, LLC*

/s/ Daniel G. Kim  
*Counsel for Appellant, Jeff McClain, Tax Commissioner of Ohio*

**OHIO BOARD OF TAX APPEALS**

COLUMBUS CITY SCHOOLS  
BOARD OF EDUCATION, (et. al.), )  
Appellant(s), ) CASE NO(S). 2018-649  
vs. )  
JEFFREY A. MCCLAIN, TAX )  
COMMISSIONER OF OHIO, (et. ) DECISION AND ORDER  
al.), )  
Appellee(s).

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Entered Thursday, May 28, 2020

Mr. Harbarger, Ms. Clements, and Mr. Caswell concur.

The appellant board of education ("BOE") appeals final determinations of the Tax Commissioner granting an application for exemption from real property taxation for parcel number 010-034539-00, located in Franklin County, Ohio. This matter is now considered upon the notice of appeal, the transcript certified by the Tax Commissioner, the record of the hearing

before this board regarding this property, the record of the hearing for BTA No. 2018-1184, which was incorporated into the record for this appeal, and the written argument of the parties.

The property is owned by Hawthorne Grove LLC, which is made up of the managing member, Hawthorne Grove, Inc., and investors who provided funding for construction and benefit from the project's tax credits. Community Housing Network ("CHN") is the majority shareholder of Hawthorne Grove, Inc., and manages the property. CHN is an agency connected to the Franklin County Alcohol, Drug, and Mental Health Board ("ADAMH") and is part of the ADAMH community continuum of care and Community Shelter Board. CHN provides housing for individuals with significant mental health issues, addiction disorders, and a history of homelessness. Samantha Shuler, CHN's CEO, testified that CHN is the residential part of the network that provides wraparound services for individuals that would otherwise end up in more restrictive institutions, homeless, or in prison.

The subject property is improved with a 40-unit residential facility that was constructed in 2014 through the use of low-income housing tax credits ("LIHTC"), and included funding directly from ADAMH. CHN developed the subject property to provide permanent supportive housing for individuals that have some disability that interrupts their daily living skills. The property receives a project-based subsidy for the 39 restricted units for that amount which the resident is unable to pay, while the last unit is set aside for a resident manager. Each resident is required to sign a lease and to pay rent, with the potential for eviction if they fail to pay or otherwise abide by the terms of the lease. With respect to services, CHN provides some services onsite, including planning and service coordination with other agencies working with ADAMH.

The findings of the Tax Commissioner are presumptively valid. *Alcan Aluminum Corp. v. Limbach*, 42 Ohio St.3d 121 (1989). Consequently, it is incumbent upon a taxpayer

challenging a determination of the commissioner to rebut the presumption and to establish a clear right to the requested relief. *Belgrade Gardens v. Kosydar*, 38 Ohio St.2d 135 (1974); *Midwest Transfer Co. v. Porterfield*, 13 Ohio St.2d 138 (1968). In this regard, the taxpayer is assigned the burden of showing in what manner and to what extend the commissioner's determination is in error. *Federated Dept. Stores, Inc. v. Lindley*, 5 Ohio St.3d 213 (1983). Further, exemption from taxation remains the exception to the rule, and a statute granting an exemption must be strictly, rather than liberally, construed. See *Faith Fellowship Ministries, Inc. v. Limbach*, 32 Ohio St.3d 432 (1987); *Anderson/Maltbie Partnership v. Levin*, 127 Ohio St.3d 178, 2010-Ohio-4904. See also *Bethesda Healthcare Inc. v. Wilkins*, 101 Ohio St.3d 420, 2004-Ohio-1749.

R.C. 5709.12(B) provides that “[r]eal and tangible personal property belonging to institutions that is used exclusively for charitable purposes shall be exempt from taxation.” Whether a property is entitled to an exemption under R.C. 5709.12 depends on the use of the property not on the nature of the institution. See *NBC-USA Hous., Inc.-Five v. Levin*, 125 Ohio St.3d 394, 2010-Ohio-1553, ¶17. In this case, there is no dispute that the subject property is used for residential purposes for those individuals who are served by ADAMH. CMH manages the property and receives rental payments from the tenants directly and through subsidies. The owner, Hawthorne Grove LLC, is a real estate holding company and does not directly provide any services to the individual tenants.

In *NBC-USA Housing*, the court held that the charitable-use exemption was unavailable for a government-subsidized apartment property for low-income handicapped and aged tenants. The court cited to a history of case law in support of the principle that “Real property owned by a nonprofit charitable corporation the stated purpose of which is to secure and operate

resident apartments for aged and needy persons is not exempt from taxation under Section 5709.12, Revised Code, even though it is shown that the rent intended to be charged is at or below cost, and in no event to result in a profit, and that it is expected that some persons unable to pay the full rental will be assisted by subventions from corporate funds.”” Id. at ¶¶6-7, quoting *Philada Home Fund v. Bd. of Tax Appeals*, 5 Ohio St.2d 135 (1966), syllabus. The court commented that the principle “reflects the consistent and longstanding doctrine that a *distinctly residential use* of real property defeats a claim of charitable exemption, even where attendant circumstances indicate the existence of charitable motives.” (Emphasis sic.) Id. at ¶9.

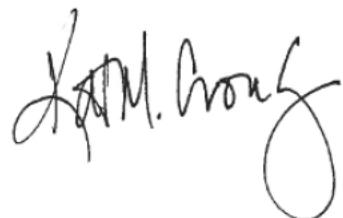
Hawthorne Grove argues that despite the residential component, this case is distinguishable from *NBC-USA Housing* because the subject property is not strictly residential because CHN provides additional wraparound services at the property. Hawthorne Grove further claims that the residential aspect of the property is distinct from the low-income housing in *NBC-USA Housing* because it is part of the “safety net” of services provided to residents that are disabled by residents with persistent mental illness, substance addiction, or have a dual diagnosis. We disagree. While the supportive housing provided may be part of a larger network of services provided to those individuals, the primary use of the subject property is as a private residence for the tenants living there. We also acknowledge Hawthorne Grove’s reliance on this board’s decision in *88/96 LP v. Wilkins* (July 20, 2007), BTA No. 2005-A-55, unreported. We find, however, that the court’s subsequent decisions have made clear that where a property is used primarily for a private residential purpose, it cannot qualify for exemption based on a charitable use, despite the circumstances of the residents.

Accordingly, based upon the foregoing, this board concludes that the BOE has established that the decision of the Tax Commissioner granting the requested exemption was in

error. Therefore, we hereby reverse the commissioner's final determination.

BOARD OF TAX APPEALS		
RESULT OF VOTE	YES	NO
Mr. Harbarger		
Ms. Clements		
Mr. Caswell		

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



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Kathleen M. Crowley, Board Secretary

Daniel Kim

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**From:** no-reply@bta.ohio.gov  
**Sent:** Monday, June 29, 2020 1:36 PM  
**To:** Daniel Kim  
**Subject:** BTA 2018-649: Higher Court Notice of Appeal Docketed



## Ohio Board of Tax Appeals

Rhodes

30 East Broad Street, 24

Columbus Ohio

Phone (614) 46

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Dear DANIEL G. KIM:

You are receiving this email because you are a party to the subject appeal, or because you have registered your interest in this case. An action has been taken on your appeal as noted below.

An action has been taken on:

- Case number: 2018-649
- Case name: COLUMBUS CITY SCHOOLS BOARD OF EDUCATION VS. JEFFREY A. MCCLAIN, TAX COMMISSIONER OF OHIO
- Action taken: Higher Court Notice of Appeal Docketed

### Next Steps

- Please login to the [Ohio BTA Resolution Center](#)
- Please go to case [2018-649](#) and see the Timeline for a history of the actions taken

Sincerely,

Clerk of the Ohio Board of Tax Appeals

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