COURT OF APPEALS, STATE OF COLORADO 101 West Colfax Avenue, Suite 800 Denver, Colorado 80202	
Colorado Board of Assessment Appeals Docket Nos.: 44682;44670;44667; 44672 44683; 44674;44681;44677	
Petitioner-Appellees: Grand County Board of Commissioners, Larimer County Board Of County Commissioners, Scott G. Cast, David Habecker, Barbara M. Hoffman, Wesley E. Hoffman, and Lucille M. Younglund, and **Appellee:** Board of Assessment Appeals v. **Respondent-Appellant:** Colorado Property Tax Administrator, and **Intervenor-Appellant:** YMCA of the Rockies.	▲**COURT USE ONLY**▲ Case No. 07CA422 11 CA 725
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OPENING BRIEF	

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It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

/s/ Grant T. Sullivan
Grant T. Sullivan

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Respondent-Appellant, the Colorado Property Tax Administrator ("PTA"), through the Colorado Attorney General's office, files this Opening Brief.

INTRODUCTION

The Colorado Constitution and state statutes provide for a tax exemption for real and personal property used for religious worship or charitable purposes. COLO. CONST. art. X. § 5; §§ 39-3-106(1), 39-3-108(1), C.R.S. (2011). In two separate proceedings, the Board of Assessment Appeals ("BAA") overturned the determinations of the PTA that portions of properties owned by the YMCA of the Rockies ("YMCA") were exempt under both the religious and charitable exemptions.

In this consolidated appeal, the PTA and YMCA appeal the BAA's decisions under both the religious and charitable exemptions. The BAA's decisions should be reversed and the PTA's determinations upheld because (1) the BAA applied incorrect legal standards and committed an Establishment Clause violation when it concluded YMCA did not qualify for the religious exemption; and (2) the BAA misapplied

Colorado statutory law and ignored the PTA's regulations when it decided YMCA was not entitled to even a partial charitable exemption.

STATEMENT OF THE ISSUES

1. Whether the BAA committed an Establishment Clause violation, applied an incorrect legal standard, and ignored the Colorado Supreme Court's binding *Maurer* decision when it overturned the PTA's determination and concluded that YMCA's Christian camps do not qualify for the religious exemption from property tax?

2. Whether the BAA misapplied sections 39-3-106.5(2) and 108(1)(a) C.R.S. (2011), and failed to defer to the PTA's regulations when it overturned the PTA's decision and determined that YMCA's properties were not entitled to even a partial charitable exemption from tax?

STATEMENT OF THE CASE

I. Nature of the Case, Course of Proceedings, and Disposition Below.

The PTA agrees with and adopts by reference YMCA's statement of the case. *See* C.A.R. 28(i). The PTA includes the following additional explanation of the case for further development.

A. Religious Proceedings

In December 2003, YMCA submitted to the PTA applications for determinations that portions of its Estes Park Center ("EPC") property in Larimer County and Snow Mountain Ranch ("SMR") property in Grand County were exempt from property tax under the religious exemption. Ex. I – E1, Filing ID 39648282; Ex. I – S1, Filing ID 39648288.[1] Certain parts of the properties deemed "commercial operations" were not part of the YMCA's religious mission, such as the

[1] The record from the 2006 religious proceedings includes eleven (11) hard copy volumes transmitted from the BAA's Administrator. The record from the 2010 charitable proceedings is accessible on LexisNexis, Colorado State BAA, case no. 53058. In those instances where the religious exhibits were re-submitted at the later charitable hearing, citation is to LexisNexis.

livery, and thus were excluded from the application by YMCA. Ex. G19, Vol. 3, p. 149, ll. 1-5, p. 155, ll. 3-5, Filing ID 39647697.

An initial review of the applications was conducted by property tax specialist Karen Dvorak. *Id.* at Vol. 2, p. 177. Ms. Dvorak conducted a field inspection of both the EPC and SMR properties, spending a full day at each property to observe and note how the properties are being used, the improvements on the properties, and the individuals on the properties. *Id.* at Vol. 2, pp. 202, 207-208.

Following her field inspections, Ms. Dvorak requested additional information from YMCA to make an informed decision concerning whether any or all of the properties qualified for the religious exemption. *Id.* at Vol. 2, pp. 209-11; Religious Record, Vol. III, pp. 1406, 1477 (Resp. PTA Ex. R-1). Specifically, she requested information concerning the square footage of property used for non-exempt purposes, the amount of time such property was used for non-exempt purposes, and the income derived from any non-exempt purposes. *Id.*; *see generally* § 39-3-106.5(2), C.R.S. (2011) (allowing full exemption if non-exempt uses, adjusted for partial usage, do not exceed 208 hours

during calendar year). In a detailed response, YMCA explained that it views *all* uses of its EPC and SMR properties to be related to its Christian mission because of the role of the YMCA staff in the guests' activities and the impact of YMCA's Christian environment on guests who visit the properties. Ex. I – S2, p.1, Filing ID 39671615; Ex. I - E2, p.1, Filing ID 39671451.

After additional explanation by YMCA, *see* Ex. I – E3, Filing ID 39671717; Ex. I – S3, Filing ID 39671840; Ex. I – E4, Filing ID 39671945; Ex. I – E5, Filing ID 39672024, Ms. Dvorak issued comprehensive written recommendations to her supervisor, Exemptions Manager Stan Gueldenzopf, that the properties be exempted for religious worship, with only small exceptions for the livery and staff housing excluded by YMCA. Religious Record, Vol. III, pp. 1390-1405, 1431-76 (Resp. PTA Ex. R-1). Ms. Dvorak's recommendations included meticulous discussion of the YMCA and its properties, the improvements on the properties, and how the properties are used. She noted, for example, that the SMR property includes a large chapel for "worshipping, hymn singing, counseling, Biblical teaching, memorial

services, fellowship, devotionals, intergenerational experiences ... and interdenominational holiday worship services for the community." *Id.* at 1393. She explained how "all guests" may participate in a wide range of "distinctly religious activities," *id.* at 1394, how SMR is used by many surrounding ministerial pastoral associations, *id.* at 1395, and how it serves as a "major Christian conference center for church groups and other Christian groups in Colorado and throughout the country." *Id.*

Further, Ms. Dvorak analyzed both Colorado case law and statute, explaining that the PTA is restricted by law from inquiring into whether particular activities of an organization constitute religious worship, and that the owner's declaration that their uses are in furtherance of its religious mission shall be presumptive as to the religious purposes for which such property is used. *Id.* at 1399, 1440. Both Mr. Gueldenzopf and the PTA herself, Mary Huddleston, agreed with Ms. Dvorak's recommendations. Ex. G19, Vol. 3, p. 115, Filing ID 39647697. Accordingly, YMCA's properties were exempted by the PTA.

The Grand County Commissioners, Larimer County Commissioners, and several pro se parties appealed the PTA's determination to the BAA. YMCA intervened.

At the four-day hearing in August of 2006, both Ms. Dvorak and Mr. Gueldenzopf testified on behalf of the PTA. Both explained how the PTA is restricted by Colorado statute from inquiring into whether the activities constitute religious worship. *Id.* at Vol. 3, pp. 23, 26, 29, 118. Ms. Dvorak also explained she relied on a Colorado Supreme Court case, *Maurer v. Young Life*, 779 P.2d 1317 (Colo. 1989), that held a similar Christian camp qualified for the religious exemption. Ex. G19, Vol. 3, p. 64, Filing ID 39647697.

In addition, Ms. Dvorak explained she determined that even uses that are not overtly religious, such as children roller skating, were exempt because, according to YMCA, "they are in the atmosphere of their Christian principles, and I cannot question that." *Id.* at Vol. 3, p. 30. She further explained that even non-religious groups that visit the properties, such as the Wells Fargo Business Credit group, do not result in disqualification because the group is "exposed to [YMCA's] core

values, their mission." *Id.* at Vol. 3, p.41, ll. 3-4. Indeed, YMCA's marketing director, Ms. Van Horn, testified that exposing visitors to their core values is the driving force behind their mission: "We can't serve our Christian mission unless people come to our property, and so, again, it's my job to get them there, and then it's our job to serve them in a Christian environment." *Id.* at Vol. 4, p. 10, ll. 11-19.

Mr. Gueldenzopf likewise testified concerning the PTA's limitations under the governing statutes, *id.* at Vol. 3, p. 118, and how the PTA evaluates each and every application for religious exemption on a case-by-case basis. *Id.* at Vol. 3, p. 129, 144. When asked about uses by non-religious visitors and groups, Mr. Gueldenzopf's response was two-fold. First, he explained that the PTA evaluates the mission and purposes of only the owner seeking the exemption, not the individuals who might visit the property. *Id.* at Vol. 3, pp. 121, 131. Second, Mr. Gueldenzopf testified that, even if the uses or purposes of the non-religious visitors were relevant, there need not be an overt religious use or activity to qualify for the exemption:

> [I]t may still be within their mission to have those people come to use their property, again, to further their mission through the way they conduct their camp. Although it may be not overtly religious, there may be some hope in that some low-key subtle message will get across to them.

Id. at Vol. 3, p. 143, ll. 11-15.

Mr. Gueldenzopf expounded:

> I mean, it is established that the Y's mission, their mission, again, is to open up the camp, have people come. If they participate in an overtly religious activity ... is great. If people don't, that's okay, too, but that exposes those visitors to the Y's – core values and the approach they have in operating their camps.

Id. at Vol. 3, p. 147, l. 20 – p. 148, l. 1. Counsel for YMCA succinctly summed up the PTA's approach to uses that are not overtly religious when he inquired of Mr. Gueldenzopf about exemption applications by churches:

> Q When a church applies for an exemption, do you ask the church to produce a list of all its individual members?
> A No.
> Q Do you ask whether everyone in the church service is paying attention?
> A No.

Id. at Vol. 3, p. 152, ll. 5-10.

The BAA ultimately overturned the PTA's determination that YMCA's properties qualified for the religious exemption. Religious Record, Vol. 1, pp. 466-72 ("Religious Order"). It reasoned that the religious exemption should not be granted to YMCA because the properties were open to the general public regardless of faith, many guests "d[id] not participate in any overtly Christian activities," and groups "with no patently Christian purpose" visited the properties. Religious Order at 6. The BAA was also critical of YMCA's marketing materials that omitted express mention of religion and the fact that public school children, who purportedly may not be exposed to religious messages, were provided access to the properties. *Id.*

YMCA appealed the Religious Order to this Court. This Court stayed the appeal pending the PTA's charitable purpose determination. *See* Ex. 2 to YMCA Op. Br.

B. Charitable Proceedings.

Following the stay of the religious appeal in case number 07CA422, the PTA reviewed YMCA's charitable exemption claims. The applications sought exemption under the general charitable exemption

category established in section 39-3-108(1)(a), C.R.S. (2011). The results of the PTA's analysis are reflected in detailed memorandums dated July 28, 2009 and October 14, 2009. Resp. Ex. A, pp. DPT 0036, 0088 (EPC) & 0251, 0273 (SMR), Filing ID 39594605.[2]

Ms. Dvorak reviewed YMCA's stated mission and purposes as well as its organization, facilities, fundraising, fees, programs and activities. Ms. Dvorak examined the ways in which YMCA claimed to provide a "gift" under "Gray's Rule" as embodied in the PTA's exemption regulations and Colorado case law. *See* Rule IV.A.1, 8 C.C.R. § 1304-2 (defining "charity"); *United Presbyterian Ass'n v. Bd. of County Comm'rs of the County of Jefferson*, 167 Colo. 485, 494-95, 448 P.2d 967, 971-72 (1968) (adopting Gray's Rule).

Ms. Dvorak noted that "[u]sually only one 'gift' is required to meet the definition of a charity," but YMCA claimed it provides charitable gifts in several ways. Resp. Ex. A, p. 280, Filing ID 39594605. She considered YMCA's activities in the following areas:

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[2] Respondent PTA's Exhibit A consists of three sections. EPC documents are at DPT 0001-0247. SMR documents are at DPT 0248-0350, and a "correspondence" section begins at DPT 0351.

- Bringing people under the influence of education;
- Bringing people under the influence of religion;
- Providing relief from disease, for example through YMCA's Kidney Center;
- Helping people establish themselves in life; and
- Otherwise lessening the burdens of government by providing facilities without charge or for a nominal fee.

Id. at 280-81.

Ms. Dvorak concluded that YMCA provided a "gift" and satisfied the basic requirements for exemption for charitable purposes. *Id.* at 292 ("An examination of the actual physical use of the property has determined that the property qualifies for exemption because it is used for strictly charitable purposes."). She noted that the "YMCA is not subsidized by any government entity; but the consistent low-cost or free use of the educational areas, program buildings, and historical buildings by municipal organizations, schools, and government groups is of intrinsic value to the community." *Id.* at 293; *see also id.* (further discussing the ways YMCA provides a "gift").

Ms. Dvorak then considered whether the exemption must be reduced or denied due to any non-charitable use of the property under section 39-3-106.5, C.R.S. (2011), or as a result of any payments in excess of the limits in section 39-3-116, C.R.S. (2011). Based on her calculations, Ms. Dvorak recommended that two percent of SMR and one percent of EPC be denied exemption as used for non-qualifying purposes exceeding statutory limitations. *Id.* at 298. Subsequently, as a result of additional information, Ms. Dvorak revised her recommendation to conclude that four percent of SMR and three percent of EPC be denied. *Id.* at pp. 36-38. The PTA entered Final Determinations accordingly. *Id.* at 2-35, 249-50.

The counties appealed the PTA's determination to the BAA. At the hearing in 2010, the parties presented extensive evidence to the BAA of YMCA's programs, activities and finances. PTA Exemptions Manager Stan Gueldenzopf testified and explained the PTA's determination that YMCA met the requirements for charitable exemption. He testified that YMCA established through their activities and programs that they provide a "gift" consistent with the

requirements for exemption. He stated, "[T]heir fee setting procedures and how they generate revenues … are designed to come close, but not completely cover their costs." Vol. III, p. 92, ll. 5-7, Filing ID 39570527. Further, "the two and a half percent ... of their annual [maintenance], was to be covered by contributions." *Id.* at ll. 8-10.

Mr. Gueldenzopf further explained, "We looked at other things as well in terms of discounts, the waiver of fees, the donation of the certain number of memberships each year ...." *Id.* at ll. 11-13. The sum of YMCA's mission and activities "was sufficient in our mind to conclude that they were providing a charitable gift as is required by the statutes and regulations ...." *Id.* at ll. 17-19.

Though the PTA concluded that YMCA's properties were used for charitable purposes, it reduced the exemption according to statutory limitations and as specified in the PTA's regulations. Mr. Gueldenzopf explained the PTA's general, three-part analysis under the statutes, reducing the exemption as required by sections 39-3-106.5 and 116, for EPC and SMR by three percent and four percent, respectively. Vol. III, pp. 95-100, Filing ID 39570527. He explained that religious and

governmental groups are excluded by statute. *See* § 39-3-116(2)(b) ("or such person or organization is otherwise exempt"). Therefore, no reduction is made for uses by such groups. Vol. III, p. 96, ll. 5-23, Filing ID 39570527.

For charitable groups, Mr. Gueldenzopf explained that the PTA "look[s] at the group itself and again, to see if the … use is exempt and then we see if they are paying more than the dollar a year plus an equitable portion of expenses." *Id.* at 97, ll. 3-7. He explained that the factors include both the amount of space and the amount of time that it is used by a particular user, and that the calculations are reflected in the PTA spreadsheets. *See* Resp. Ex. A, pp. DPT 0040 (EPC), 0255 (SMR), Filing ID 39594605.

He further explained that the PTA in its spreadsheets has a formula implementing the statute's limits on the amount of use by and income derived from commercial groups. Vol. III, p. 97, l. 12 – p. 99, l. 13, Filing ID 39570527; *see* § 39-3-106.5(2)(a) & (b), C.R.S. (2011) (providing property continues to be exempt if non-qualifying uses are less than 208 adjusted hours during calendar year *or* such uses result in

less than $25,000 of rental income). *See also* Rule I.B.27, 8 C.C.R. § 1304-2 ("Calculating Adjusted Hours"). When the 208 adjusted hour and income limits are surpassed, the percentage of taxable value is based on the total amount of non-qualifying use, including the first 208 hours. *Id.* at Rule V.B.4.

Following the hearing, the BAA stated in its "Factual Findings," that the "YMCA's pricing model does not cover the total operational costs for the properties, and it relies on charitable contributions and volunteer support." Order, pp. 3-4, Filing ID 39565072 ("Charitable Order"). Further, the BAA found that "[w]ithout donations, [YMCA] would be insolvent and bankrupt." *Id.* at 4. The BAA found that YMCA "tries to meet the needs of participants by reducing the rate or using scholarship funds and waiving fees if members cannot afford them." *Id.*

Despite these and other findings recognizing YMCA's charitable activities, the BAA substituted its judgment for the PTA's and denied the charitable exemption in its entirety. The BAA based its denial on two reasons. "First, Respondent [PTA] wrongly applied its burden, which is a statutory presumption against exemption ...." *Id.* at 10. The

BAA stated that the PTA lacked information needed "to show that Petitioner, YMCA, qualified for exemption based on the actual use of the facility and [the PTA and YMCA] used an overly broad definition for charitable, which included all uses by families except 6% of the families who stated in the Ciruli Survey that they did not participate in YMCA activities." *Id.*

"Second," the BAA ruled, even if YMCA would otherwise be exempt, "YMCA no longer qualifies because YMCA's non-exempt use exceeds what is allowed by statute: less than two hundred eight hours or less than twenty-five thousand dollars of gross rental income." *Id.* The BAA did not apply the statutory and regulatory formulae to calculate "adjusted hours" to reach a different conclusion regarding the percentage of non-exempt use. Rather, making certain assumptions, the BAA concluded that, with over 208 hours of non-exempt use, the exemption must be denied in its entirety. *Id.* at 11.

II. Statement of the Facts

The PTA agrees with and adopts by reference YMCA's statement of facts. *See* C.A.R. 28(i).

SUMMARY OF THE ARGUMENT

Regarding the religious exemption, the BAA concluded YMCA's properties did not qualify because they were not used "solely and exclusively" for religious purposes as interpreted by the BAA. The BAA's interpretation is the wrong legal standard. To prevent Establishment Clause violations, the Colorado Supreme Court held in *Maurer*, 779 P.2d at 1335, that property is exempt if "*primarily* used for religious worship and reflection or for purposes *necessarily incidental* to the exempted primary uses." (emphasis added). Likewise cognizant of the Establishment Clause, the General Assembly has forbidden government officials from inquiring into whether particular activities of religious organizations constitute religious worship. § 39-3-106(2), C.R.S. (2011). The BAA ignored this proscription when it proceeded to dissect and scrutinize YMCA's internal operations—an analysis not required by the religious exemption.

Concerning the charitable exemption, the BAA misapplied the law governing charitable exemptions, imposing too harsh a burden on YMCA. Further, the BAA denied the exemption because, it concluded,

non-exempt uses exceeded 208 hours per year. Again, the BAA misapplied the law. Even when property is used on an occasional, non-continuous basis for non-exempt uses, the property remains *fully* exempt if "used for such purposes for less than two hundred eight hours, adjusted for partial usage if necessary on the basis of the relationship that the amount of time and space used for such other purpose bears to the total available time and space, during the calendar year." § 39-3-106.5(2)(a). Pursuant to the statute, the PTA promulgated regulations to calculate the "adjusted hours" for reducing the exemption when the non-exempt uses exceed 208 adjusted hours per year. The BAA failed to conform its analysis to statute and the PTA's regulation, requiring reversal.

Accordingly, both the BAA's religious and charitable exemption determinations must be reversed.

ARGUMENT

I. The BAA's decision denying the religious exemption must be reversed because it violates the Establishment Clause and is contrary to Colorado statute and binding case law.

A. Standard of Review and Preservation

Under subsections 24-4-106(7) and (11)(e), C.R.S. (2011), this court must "hold unlawful and set aside [any] agency action" that it determines to be "otherwise contrary to law." *See also* § 39-2-117(6), C.R.S. (2011) (appeals of BAA's decision to court of appeals heard according to section 24-4-106(11), C.R.S. (2011)). Although the ultimate determination of whether property qualifies for a tax exemption involves "mixed issues of law and fact," *EchoStar Satellite, L.L.C. v. Arapahoe County Bd. of Equalization*, 171 P.3d 633, 635 (Colo. App. 2007), the evidence presented to the BAA in this case was undisputed. The BAA's dispositive error turns on a question of constitutional and statutory interpretation, which this court reviews de novo. *See Washington County Bd. of Equalization v. Petron Dev. Co.*, 109 P.3d 146, 149 (Colo. 2005); *C.P. Bedrock, LLC v. Denver County Bd. of Equalization*, 259 P.3d 514, 517 (Colo. App. 2011).

In determining the meaning of a statute, a court's central task is to ascertain and give effect to the intent of the General Assembly. *People v. Dist. Ct.,* 713 P.2d 918, 921 (Colo. 1986). The language at issue must be read in the context of the statute as a whole and the context of the entire statutory scheme. *See id.*; *Bynum v. Kautzky,* 784 P.2d 735, 737 (Colo. 1989). Thus, the court's interpretation should give consistent, harmonious, and sensible effect to all parts of a statute. *Jefferson County Bd. of Equalization v. Gerganoff*, 241 P.3d 932, 935 (Colo. 2010). Similar principles govern the interpretation of constitutional provisions. *Bruce v. City of Colo. Springs*, 129 P.3d 988, 992 (Colo. 2006).

Pursuant to C.A.R. 28(k), the PTA preserved its argument concerning YMCA's entitlement to the religious exemption—including assertions concerning the Establishment Clause, the applicable legal standard and governing presumption—in its written closing argument before the BAA. Religious Record, Vol. I, pp. 0415-16, 0423.

B. Background of the Property Tax Administrator and Board of Assessment Appeals

The PTA is a constitutionally-created position that is appointed by the state board of equalization. COLO. CONST. art. X, § 15(2). She is charged with "administering the property tax laws and such other duties as may be prescribed by law ...." *Id.*

Pursuant to state statute, the PTA is the head of the Division of Property Taxation in the Department of Local Affairs. § 39-2-101, C.R.S. (2011). She is required to "possess knowledge of the subject of property taxation and of the laws of this state relating thereto and shall have demonstrated ability and experience in the field of property taxation." § 39-2-102, C.R.S. (2011). The PTA is statutorily-authorized to adopt rules and regulations, §§ 39-2-108; 39-2-117(7), C.R.S. (2011), and is empowered to compel compliance with her unappealed orders and appealed orders approved by the Board of Assessment Appeals, § 39-2-121, C.R.S. (2011).

Among her duties, the PTA assists and cooperates "in the administration of all laws concerning the valuing of taxable property,

the assessment of same, and the levying of property taxes." 39-2-109(1)(b). She prepares and publishes manuals, appraisal procedures, and instructions concerning the methods of appraising and valuing land and improvements, and may require assessors to utilize them when valuing and assessing taxable property. § 39-2-109(1)(e). She may also prepare and furnish assessors with forms required to be filed with the PTA, § 39-2-109(1)(f), (1)(h), C.R.S. (2011), and call meetings of assessors, § 39-2-109(1)(g), C.R.S. (2011).

Regarding claimed tax exemptions, the PTA is directed by statute to "examine and review each application submitted, and, if it is determined that the exemption therein claimed is justified and in accordance with the intent of the law, the exemption shall be granted ...." § 39-2-117(1)(a)(II), C.R.S. (2011).

The BAA is a three-member, quasi-judicial tribunal created within the Department of Local Affairs. § 39-2-123(1)-(2), C.R.S. (2011). It is charged with hearing appeals from orders and decisions of the PTA. § 39-2-125(1)(b)(I), C.R.S. (2011). Such appeals are heard in accordance with the applicable provisions of the State Administrative Procedure

Act. §§ 39-2-125(1); 24-4-101, *et seq.*, C.R.S. (2011). Where, as here, the BAA's decision is against one or more of the petitioners, the decision is appealable to the court of appeals. §§ 39-2-117(6); 24-4-106(11), C.R.S. (2011).

C. The BAA's Order runs afoul of the Establishment Clause and Colorado statute.

The BAA's decision must be reversed because it improperly inquires into whether the uses of the properties constitute religious worship worthy of recognition by the government through a tax exemption, contrary to both the Establishment Clause and section 39-3-106(2), C.R.S. (2011).

Since the earliest days of Colorado statehood, this jurisdiction has provided in its constitution a tax exemption for property used by religious organizations. That exemption states, "Property, real and personal, that is used solely and exclusively for religious worship ... shall be exempt from taxation, *unless otherwise provided by general law*." COLO. CONST. art. X, § 5 (emphasis added); *see also* § 39-3-106(1), C.R.S. (2011) (codifying exemption in statute); *McGlone v. First Baptist*

Church, 97 Colo. 427, 431, 50 P.2d 547, 549 (1935) (stating Constitution leaves "it absolutely within the power of the Legislature to limit, modify, or abolish the exemptions provided by the Constitution.").

Nowhere has the General Assembly abrogated this religious exemption. To the contrary, the legislature has correctly recognized the barrier between church and State by clarifying that the PTA may challenge a property's owner's religious declaration on only narrow, specified grounds. Section 39-2-117(1)(b)(II), C.R.S. (2011), states the PTA may challenge the owner's declaration

> *only* upon the grounds [1] that the religious mission and purposes are not religious beliefs sincerely held by the owner of such property, [2] that the property being claimed as exempt is not actually used for the purposes set forth in such application, or [3] that the property being claimed as exempt is used for private gain or corporate profit.

Id. (emphasis added)[3]. The rationale for narrowly limiting the grounds for denial is clear: under the Establishment Clause, the State cannot and should not be in the business of determining what constitutes religious worship worthy of recognition by the government through a tax benefit. *Cf. Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (articulating three-prong test under Establishment Clause, including final prong—that statute must not foster excessive entanglement with religion). Instead, the declaration by the property owner setting forth the religious purpose and mission qualifying him for the exemption "shall be presumptive as to the religious purposes for which such property is used." § 39-2-117(1)(b)(II), C.R.S. (2011). If the PTA is unable to determine from the owner's application whether he qualifies for the religious exemption, the PTA is authorized to "require additional

[3] Although not entirely clear, the PTA understands the counties to be alleging that the PTA should have denied the religious exemption on the second ground—that the property being claimed as exempt is not actually used for the religious purposes set forth in such application. *See* Religious Record, Vol. I, p. 0367 (Grand County closing argument); *id.* at 0374-75 (Larimer County closing argument). The record, however, contradicts the counties' assertion. *See id.* at 0397-402 (YMCA closing argument summarizing record evidence establishing that properties are used for religious purposes).

information, *but only to the extent that the additional information is necessary to determine the exemption status of the property*." *Id.* (emphasis added).

Were there any remaining doubt concerning the prohibition on the PTA scrutinizing whether particular conduct constitutes religious worship, the General Assembly removed any such doubt when enacting section 39-3-106(2), C.R.S. (2011). That provision states in unequivocal terms

> that religious worship has different meanings to different religious organizations; *that the constitutional guarantees regarding establishment of religion and the free exercise of religion prevent public officials from inquiring as to whether particular activities of religious organizations constitute religious worship*; that many activities of religious organizations are in the furtherance of the religious purposes of such organizations; that such religious activities are an integral part of the religious worship of religious organizations; and that activities of religious organizations which are in furtherance of their religious purposes constitute religious worship for purposes of section 5 of article X of the Colorado constitution.

Id. (emphasis added).

Here, the BAA denied the religious exemption not based on one of the three narrow grounds identified in section 39-2-117(1)(b)(II), but rather because, according to its interpretation, the properties were not used "solely and exclusively" for religious worship. *See* Religious Order at 5-6. Besides being the wrong legal standard, the BAA's interpretation improperly inquires into whether YMCA's conduct and the conduct of its guests constitute religious worship—exactly what is prohibited by the Establishment Clause and section 39-3-106(2). For example, the BAA denied the exemption because certain guests did not participate in "overtly Christian activities" and others used YMCA's facilities with "no patently Christian purpose." Religious Order at 6. The BAA's conclusion of course begs the questions—why is having an "overt" or "patent" Christian experience more favored than having an inward, private Christian experience on the properties? Government officials using such criteria as a basis for awarding tax benefits both flies in the face of Establishment Clause jurisprudence and runs afoul of section 39-3-106(2).

In short, Colorado's statutory framework providing for a religious exemption strikes the delicate balance between properly determining whether an owner's religious beliefs are bona fide and sincerely held—criteria the PTA would apply to any claimant of the exemption, regardless of the particular faith involved—and improperly scrutinizing whether the owner's uses sufficiently further the identified religious purposes. *See Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 10 (1989) (stating the "nonsectarian aims of government and the interests of religious groups often overlap" and "[g]overnment need not resign itself to ineffectual diffidence because of exaggerated fears of contagion of or by religion, so long as neither intrudes unduly into the affairs of the other.").

But here, the BAA went beyond the delicate balance struck by statute to improperly inquire into whether particular activities of YMCA and its guests constitute religious worship worthy of recognition through a tax exemption. Because the BAA's action is banned by both the Establishment Clause and section 39-3-106(2), its Order must be reversed.

D. The BAA failed to apply the governing legal standard from the Colorado Supreme Court's *Maurer* decision concerning religious exemptions.

In addition to violating the Establishment Clause and Colorado statute, the BAA failed to apply the governing legal standard in religious exemption cases as articulated in the Colorado Supreme Court's seminal case, *Maurer*, 779 P.2d 1317. This error, too, provides an independently sufficient basis to overturn the BAA's decision.

The nuanced interaction between the Establishment Clause and the religious exemption provided by state statute has been addressed in several Colorado decisions. *See, e.g., Catholic Health Initiatives Colorado v. City of Pueblo*, 207 P.3d 812, 818 (Colo. 2009) (collecting cases indicating a statute "violates the Establishment Clause when it fosters an excessive government entanglement with religion" (internal quotations omitted)); *Maurer*, 779 P.2d at 1333 n.21 (collecting cases and rejecting narrow construction of religious exemption out of concern over "detailed governmental inquiry" into religion); *General Conference of Church of God-7th Day v. Carper*, 192 Colo. 178, 181, 557 P.2d 832,

834 (1976) (rejecting argument that religious exemption violates Establishment Clause).

Among them is *Maurer*, where Colorado Supreme Court was attuned to the potentiality that the religious exemption, if interpreted too narrowly, might improperly thrust government intrusion into the internal operations of religious organizations. 779 P.2d at 1332-33 & n.21. It accordingly reaffirmed its preference for "receptiveness" towards exemptions implementing the "constitutional policy of support for charitable and religious endeavors." *Id.* at 1332 (citing *General Conference*, 192 Colo. at 182, 557 P.2d at 834; *Kemp v. Pillar of Fire*, 94 Colo. 41, 44-45, 27 P.2d 1036, 1037 (1933)). The Court recognized that such "receptiveness" "represents an exception to the general rule that the presumption is against tax exemption and the burden is on the one claiming exemption to establish clearly the right to such relief." 779 P.2d at 1332 n.20.

To implement its receptiveness, the *Maurer* Court ultimately adopted the following legal standard: property will be exempt if "*primarily* used for religious worship and reflection or for purposes

necessarily incidental to the exempted primary uses." *Id.* at 1335 (emphasis added); *see also id.* at 1331 (stating "the Board could and did conclude that any nonreligious aspects of these activities were necessarily incidental to the religious worship"); *id.* at 1332 (stating evidence "indicates that any nonreligious aspects of the outdoor activities sponsored by Young Life are necessarily incidental" to its religious worship and reflection); *id.* at 1334 ("facilities at Young Life's properties were primarily used for lodging associated with religious programs conducted on Young Life's properties").

Applying its "necessarily incidental" standard, the *Maurer* Court determined that Young Life's properties—properties that are indistinguishable from EPC and SPC in terms of both activities and the owner's religious purpose—qualified for the religious exemption. The Court held that, although "not all" of the activities that take place at the Young Life camps are "inherently religious," they are used by Young Life as "effective vehicles for presenting the gospel during the course of the day and for building relationships so that the campers will be more receptive to the gospel ...." 779 P.2d at 1331. The same is true here.

Nevertheless, the BAA failed altogether to apply the "necessarily incidental" standard. Instead, it applied a "solely and exclusively" standard, which it construed as a sufficiently religious standard. Religious Order at 5. This erroneous standard permeates the BAA's Order, appearing no less than five times in its six-page order. *See* Religious Order at 5 (stating the state Constitution "exempts from taxation real and personal property that is used solely and exclusively for religious worship); *id.* (stating Colorado statute "exempts from property taxation real and personal property that is owned and used solely and exclusively for religious purposes"); *id.* ("stating "the Board was not convinced that the subject properties are used solely and exclusively for religious purposes"); *id.* at 6 ("As further evidence that the YMCA facilities are not used solely and exclusively for religious purposes, ..."); *id.* at 7 (stating certain nominal chapels on the properties qualify "as exempt property owned and used solely and exclusively for religious purposes").

In contrast, *Maurer*'s "necessarily incidental" standard appears nowhere in the BAA's Order. It is axiomatic that the BAA's employing

an incorrect legal standard requires that its decision be set aside. *See Jefferson County Bd. of County Comm'rs v. S.T. Spano Greenhouses, Inc.*, 155 P.3d 422, 426-27 (Colo. App. 2006).

Although the modifying phrase "solely and exclusively" appears in the Constitution and in statute, it has been interpreted broadly by the Colorado Supreme Court so as to avoid the government "entanglement" proscribed by the Establishment Clause. *See People v. Thomas*, 867 P.2d 880, 883 (Colo. 1994) ("When possible, statutes are to be construed in such manner as to avoid questions of their constitutional validity."). Indeed, for this exact reason, the Colorado Supreme Court recently reaffirmed the "necessarily incidental" standard in *Catholic Health*, 207 P.3d at 818-19. *Catholic Health*'s express embrace of this broad standard, therefore, defeats the BAA's suggestion that *Maurer* was abrogated upon the repeal of section 39-3-101(1)(e), C.R.S. (1982). *See* Religious Order at 6.

Beyond ignoring binding precedent from the Colorado Supreme Court, upholding the BAA's interpretation of the "solely and exclusively" standard will undoubtedly compound the BAA's

Establishment Clause violation by further upending the delicate balance struck by the General Assembly when enacting sections 39-2-117(1)(b)(II) and 39-3-106(2). As indicated by YMCA in its brief, the BAA's analysis necessarily immerses the government in the forbidden business of evaluating what conduct is sufficient to constitute religious worship. YMCA Op. Br. at 26.

For example, the BAA's Order supported its denial, in part, because YMCA's properties are open to the general public and school children regardless of faith or lack of faith. Religious Order at 5-6. Yet most churches openly welcome visitors to their worship services regardless of their faith. The exempt property in *Maurer*, for instance, was open to the general public as a motel. 779 P.2d at 1339, 1341, 1344 (Mullarkey, J., concurring in part and dissenting in part). Likewise, the properties in *Maurer* were available for use by school, community, and other nonreligious groups. *Id.* at 1328-29. What level of closure to the general public would be sufficient to satisfy the BAA's subjective criterion? More importantly, how can closure to the general public advance the undisputedly religious activity of putting "Christian

principles into practice through programs, staff and facilities in an environment that builds healthy spirit, mind and body *for all*," as stated in YMCA's mission statement? Ex. I – E1, p. 9, Filing ID 39648282 (emphasis added). In addition to contravening its own preference for "overt" and "patent" Christian experiences, the BAA's conclusion produces religious favoritism towards inward-looking, private religious groups—a discriminatory treatment banned by the Establishment Clause.

Similarly, the BAA's Order criticizes YMCA's marketing materials for lacking "any mention of religion." Religious Order at 6. Putting aside the factual falsity of this assertion, *see* Ex. G19, Vol. 4, p. 10-13; Filing ID 39647697; Ex. I – E8, Filing ID 39672174, which alone justifies reversal, *see* § 24-4-106(7) (reversal of agency order merited if "based upon findings of fact that are clearly erroneous"), the BAA fails to answer why overt religious marketing is required in the first place. YMCA has concluded that it can promote its Christian message more effectively not by having religious rhetoric leap off the page, but rather by creating marketing materials that are attractive "for all." YMCA Op.

Br. at 43. As stated by Ms. Van Horn, YMCA's marketing director, "[Y]ou want them to open the publication .... We can't serve our Christian mission unless people come to our property, and so, again, it's my job to get them there, and then it's our job to serve them in a Christian environment." Ex. G19, Vol. 4, p. 10, ll.11-19, Filing ID 39647697.

The BAA's act of requiring overt religious marketing material is akin to the government exercising control over the organization's religious message by interfering in the hiring of its ministers—a result the U.S. Supreme Court flatly rejected on Establishment Clause grounds very recently. *See Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, __ U.S. __, __, 2012 WL 75047, *7 (Jan. 11, 2012). The salient point is that YMCA should get to decide how best to further its Christian mission in its marketing materials, not the BAA. *See* § 39-3-106(2) ("many activities of religious organizations are in the furtherance of the religious purposes of such organizations").

Because the BAA applied the incorrect legal standard when determining whether YMCA's properties qualified for the religious exemption, its decision must be reversed.

E. The BAA's Order must be reversed because it erroneously applied an adverse presumption against the PTA and YMCA.

In addition to applying an incorrect legal standard, the BAA erroneously applied a dispositive presumption that was adverse to the PTA and YMCA. Accordingly, the BAA's decision must be reversed.

In a typical exemption case, there is a judicial "presumption in Colorado against tax exemption." *General Motors Corp. v. City and County of Denver*, 990 P.2d 59, 74 (Colo. 1999) (citing *Mesa Verde Co. v. Board of County Comm'rs*, 178 Colo. 49, 57, 495 P.2d 229, 233-34 (1972)). However, as alluded to above, there is an exception to this presumption for cases involving religious and charitable exemptions. *See Maurer*, 779 P.2d at 1332 n. 20. Although the burden remains on the taxpayer to establish clearly the right to the exemption, *Colo. Dep't of Revenue v. Woodmen of the World*, 919 P.2d 806, 810 (Colo. 1996), the

exception recognizes the "policy of receptiveness towards 'exemptions implementing the constitutional policy of support for charitable and religious endeavors.'" *Maurer*, 779 P.2d at 1332 (quoting *General Conference*, 192 Colo. at 182, 557 P.2d at 834).

Here, the PTA alerted the BAA to the exception in its written closing argument. Religious Record, Vol. I, p. 0415. Yet the BAA chose to ignore the exception and applied the typical presumption *against* tax exemption. *See* Religious Order at 5 ("The firmly established rule is that the presumption is against tax exemption" (internal quotations omitted)). It is black letter law that erroneously applying (or failing to apply) a presumption in favor of one party over another requires reversal of the lower tribunal's decision. *See, e.g., Mile Hi Concrete, Inc. v. Matz*, 842 P.2d 198, 206 (Colo. 1992); *Garcia v. Huber*, 252 P.3d 486, 490 (Colo. App. 2010) (citing *Wiesner v. Huber*, 228 P.3d 973, 976 (Colo. App. 2010)).

Therefore, because the BAA erroneously applied an adverse presumption against the PTA and YMCA, its decision must be reversed.

F. Undisputed evidence establishes as a matter of law that the PTA was correct in granting YMCA the religious exemption.

If the court agrees that reversal is required in light of one or more of the BAA's above errors, the PTA asserts that remand may be unnecessary. Rather, because the evidence presented to the BAA was undisputed, this Court may determine, as a matter of law, whether the portions of the properties in YMCA's religious exemption application qualify for the religious exemption. *See American Water Works Ass'n v. Bd. of Assessment Appeals*, 38 Colo. App. 341, 345, 563 P.2d 359, 362 (1976) (reversing BAA's denial of charitable exemption and stating, "we conclude that the undisputed evidence establishes as a matter of law that AWWA's property is used for strictly charitable purposes."), *overruled in part on other grounds by Bd. of Assessment Appeals v. AM/FM Int'l*, 940 P.2d 338, 346 n.16 (Colo. 1997). The undisputed evidence as summarized in the PTA's and YMCA's written closing arguments below, as well as YMCA's exhaustive recitation of facts in its

opening brief, clearly establishes YMCA's entitlement to the religious exemption.

II. The BAA misapplied the law regarding charitable exemptions, requiring reversal.

A. Standard of Review and Preservation

Decisions of the BAA are reviewed under section 24-4-106(11). *See* § 39-2-117(6). Under subsections 24-4-106(7) and (11)(e), this court must set aside agency action that is contrary to law. The facts of this case are not in dispute. Therefore, review is de novo. *Evans v. Romer*, 854 P.2d 1270, 1274 (Colo. 1993), *cert. denied*, 510 U.S. 959 (1993) (correctness of legal conclusions based on undisputed facts a question of law subject to independent review on appeal).

The PTA preserved its argument concerning YMCA's entitlement to the charitable exemption in her written closing argument before the BAA, PTA Closing Arg., pp. 2-3, 12-13, Filing ID 39563520, and Rebuttal Closing Arg., pp. 6-7, Filing ID 39564368. Further, PTA Exemption Manager, Stan Gueldenzopf, testified at the charitable

hearing in support of the PTA's decision, explaining the PTA's analysis, reasoning and conclusions. Vol. III, pp. 95-102, Filing ID 39570527.

B. The BAA erred as a matter of law by failing to apply statute and regulations to determine the partial exemption based on non-exempt use, and instead simply disqualified the entire property.

The PTA followed the statute concerning charitable exemptions, appropriately applying the limitations in sections 39-3-116 and 106.5, C.R.S. (2011), as well as the PTA's own regulations. The BAA erred as a matter of law by rejecting the charitable exemption based on erroneous calculations that do not follow the law requiring a calculation for "adjusted hours" for non-qualifying use.

The PTA concluded that there were 284 adjusted hours of non-qualifying uses at EPC, and 336 adjusted hours at SMR, Resp. Ex. A, pp. DPT 0038, 0040 (EPC) & 0253, 0255-56 (SMR), Filing ID 39594605, resulting in three and four percent reductions, respectively. The BAA concluded that because there was, in its opinion, insufficient evidence to prove that family users were actually using the property for YMCA's purposes, *all* family use must be disqualified. Charitable Order at 11

("As discussed above, the Board finds that family use is a non-exempt use."). Therefore, the BAA concluded the exemption must be denied in total. *Id.* The BAA failed to utilize or even discuss the requirement of section 106.5 to adjust for partial usage, if necessary, based on the time and space used. It simply ignored this language, as well as the regulation on "Calculating Adjusted Hours." Rule I.B.27, 8 C.C.R. § 1304-2.

The BAA concluded that the quantity of non-qualifying uses completely disqualified YMCA from claiming the exemption, stating, "YMCA no longer qualifies for the [charitable] exemption because YMCA's non-exempt use exceeds what is allowed by statute: less than two hundred eight hours or less than twenty-five thousand dollars of gross rental income." Charitable Order at 10. This was the cornerstone of the BAA's decision. *Id.* at 11 ("Similarly, using only non-exempt family use, the 208 hours threshold should be easily met").

In so holding, the BAA applied the wrong legal standard. Section 39-3-106.5(2)(a) provides that if real property that is otherwise exempt for charitable purposes is used for non-exempt purposes, such property

shall continue to be exempt if "[t]he property is used for such purposes for less than two hundred eight hours, adjusted for partial usage if necessary on the basis of the relationship that the amount of time and space used for such other purposes bears to the total available time and space, during the calendar year."

The BAA incorrectly construed this section to mean that the *entirety* of the exemption is forfeited if the adjusted hours of non-exempt uses exceed 208. To the contrary, this section, when construed with other relevant sections, permits a full, 100% exemption if the adjusted non-exempt uses are less than 208 hours, and allows for a *partial* exemption when the non-exempt uses exceed 208 adjusted hours. The amount of the partial exemption is determined based on the ratio of non-exempt adjusted hours to the hours in a calendar year—8760. *See* § 39-3-129(1), C.R.S. (2011) (stating PTA "may employ the ratio of the portion as measured in hours of any calendar year in which the property is … made available to and used by any business conducted for profit to the entire calendar year."). Because 284 divided by 8760 equals .0324, the PTA denied three percent of the EPC exemption.

Likewise, because 336 divided by 8760 equals .0383, the PTA denied four percent of the SMR exemption. Resp. Ex. A, pp. DPT 0040 (EPC) & 0255-56 (SMR), Filing ID 39594605. *See* Rule I.B.28, 8 C.C.R. § 1304-2 (stating proportional rounding will be to nearest whole percent).

The PTA's regulations support this interpretation. Specifically, Rule I.B.27, 8 C.C.R. § 1304-2, provides: "Total number of hours during the previous calendar year for which property was used for purposes other than the purposes specified in 39-3-106 to 39-3-113, C.R.S., may be adjusted for partial usage. This adjustment may be made for calculations dealing with 39-3-106.5, C.R.S. and 39-2-117(1)(b)(II), 3(a)(1), and 3(b)(II), C.R.S." *See also* Rule V.B.4, 8 C.C.R. § 1304-2 ("Should ... non-qualifying use exceed the stated limits, the percentage of taxable value will be based on the total amount of non-qualifying use."). Under this regulatory authority, the PTA regularly grants partial exemptions when the adjusted, non-exempt uses exceed 208 hours.

The PTA's interpretation of its statutory responsibility and its own regulations should be given deference. *Chevron U.S.A., Inc. v.*

Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984); *Woodmen*, 919 P.2d at 817; *Besch v. Jefferson County Bd. of County Comm'rs*, 20 P.3d 1195, 1196 (Colo. App. 2000). Because the PTA, not the BAA, is charged with the actual administration and enforcement of the property tax statutes, greater deference should be afforded to its interpretation over the BAA's. *See Woodmen*, 919 P.2d at 817.

Moreover, the PTA's regulation allowing partial charitable exemptions should come as no surprise. Colorado cases have long recognized the propriety of partial charitable exemptions. *See, e.g., Hanagan v. Rocky Ford Knights of Pythias Bldg. Ass'n*, 101 Colo. 545, 548-49, 75 P.2d 780, 781 (1938); *Western v. Slavonic Ass'n v. Property Tax Adm'r*, 835 P.2d 621, 622 (Colo. App. 1992) (stating question presented as whether fraternal organization was entitled to a complete *or partial* exemption for tax year).

Allowing the BAA's misconstruction to stand will have widespread and pervasive impact on hundreds, if not thousands, of partially exempt properties in Colorado. Accordingly, it should be reversed.

C. The BAA erred as a matter of law by applying an erroneous and adverse presumption, requiring reversal.

YMCA seeks an exemption from tax based on charitable use under section 39-3-108(1)(a). The fundamental basis for the charitable exemption is Article X, Section 5 of the Colorado Constitution, quoted above.

The power to construe the constitutional words "charitable purposes" rests with the courts of this state. *United Presbyterian*, 167 Colo. at 494, 448 P.2d at 971. *See* § 39-3-101, C.R.S. (2011) ("The general assembly recognizes that only the judiciary can make a final decision as to whether or not any property is used for charitable purposes within the meaning of the Colorado constitution"). Further, property used for charitable purposes "shall be *presumed* to be owned and used solely and exclusively for strictly charitable purposes and not for private gain or corporate profit ...." *Id.* (emphasis added).

This legislative declaration has longstanding decisional precedent, as well. "The general rule is that exemptions from taxation are strictly construed, but this rule is not applied with full vigor to the character of

exemptions under consideration." *Bishop, etc., of the Cathedral of St. John the Evangelist v. Treasurer of Arapahoe County*, 29 Colo. 143, 145, 68 P. 272, 272 (1901) (concerning school exemption). "This being the end to be attained, the meaning of the law must be ascertained by a construction within its spirit, purpose, and policy ...." *Id.*, 29 Colo. at 146, 68 P. at 273. Further, courts should adopt a "construction consonant with the spirit which prompted the adoption of the provisions in question, and which will give them full effect." *Id.*

More recently, *Maurer*, 779 P.2d at 1332, approved "a policy of receptiveness towards exemptions implementing the constitutional policy of support for *charitable* and religious endeavors." (emphasis added). As explained *supra*, the *Maurer* Court explained that "this policy represents an exception to the general rule that the presumption is against tax exemption ...." *Id.* at 1333 n. 20.

Here, the BAA stated clearly and repeatedly that it would employ the opposite presumption—that YMCA, in spite of the numerous, detailed and clearly charitable purposes and activities, does not qualify for exemption. *See* Charitable Order at 10 ("The firmly established rule

is that the presumption is against tax exemption" (internal quotations omitted)); *id.* ("Respondent wrongly applied its burden, which is a statutory presumption against exemption").

Specifically, the BAA concluded that without detailed documentation or evidence of each group and person's use of YMCA's facilities, it "was not presented with sufficient record keeping and information on YMCA's actual use of the property." *Id.* at 11. The BAA concluded, "Without such documentation, the Board has to *assume* that the use is non-qualifying." *Id.* (emphasis added). But in the charitable exemption context, the presumption against exemption does not operate. *See Maurer*, 779 P.2d 1333 n. 20. As in the religious proceedings, the BAA's application of an erroneous, adverse presumption against YMCA and the PTA requires reversal. *See, e.g*, *Mile Hi Concrete, Inc.*, 842 P.2d at 206; *Garcia*, 252 P.3d at 490 (citing *Wiesner*, 228 P.3d at 976).

D. The BAA held YMCA and the PTA to an incorrect evidentiary standard when it required proof of guests' actual uses.

In addition to applying an incorrect presumption, the BAA held the PTA and YMCA to an erroneous and insurmountable evidentiary burden.

The BAA concluded that it was not presented with sufficient record keeping and information concerning the "actual use" of the properties. Charitable Order at 9. In particular, the BAA stated, "YMCA admitted it did not keep records regarding *guests'* actual use of the facility." Charitable Order at 11 (emphasis added). The relevant inquiry, however, is not whether individual guests, or donees, used the property for a charitable purpose—it is whether the property owner, or donor, used the property for a charitable purpose. Requiring YMCA to prove that a particular boy scout visiting the camp actually used the property to pursue the charitable and educational goals that are typical of the Boy Scouts' organization, rather than to collect valuable gold deposits in river beds that he could later sell for a profit, holds YMCA to an impossible burden.

Contrary to the BAA's conclusion, the *owner's* use is the critical inquiry for exemption. *See Bd. of Assessment Appeals v. AM/FM International*, 940 P.2d 338, 343 (Colo. 1997) ("we are dealing with the issue of whether AM/FM [the owner/donor] used the Property 'for strictly charitable purposes'"); Rule IV.B.1, 8 C.C.R. § 1304-2 (listing the "goals and purposes of the [donor] entity and the organization's actual conduct" as the relevant inquiry when determining whether it provided a "gift"); *id.* at Rule IV.B.1.b (listing the "intent of the donors" as part of the relevant inquiry).

This conclusion is confirmed not only by the above case law but also by the PTA's regulation defining "user." That definition states that the "user" is the "person ... primarily responsible for the content of the activity for which that portion of the property is being used. Any person in attendance at that use is not a 'user', but is merely a participant." *Id.* at Rule I.A.27. Under this regulation, the PTA's interpretation of which is entitled to deference, the person or entity responsible for the content of the activities at EPC and SMR is YMCA and its staff. Those individual guests in attendance are merely "participants" whose

intentions and purposes in visiting the properties, like the profit-minded boy scout, are not considered under the exemption statutes and regulations. To the extent the "user" might be the larger visiting group, such as a Boy Scout troop that plans the content of its own activities, the PTA took this into account in its determination. Vol. III, p. 160, l. 19 – p. 161, l. 8, Filing ID 39570527.

Finally, the BAA's requiring evaluation of each guest's purposes is unworkable in at least one other respect. Under Gray's Rule, the "gift" must be

> for the benefit of an *indefinite number of persons*, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government.

United Presbyterian, 167 Colo. at 494-95, 448 P.2d at 971-72 (emphasis added) (internal quotations omitted).

Here, YMCA undisputedly operated its properties to benefit an indefinite number of persons. But the BAA has now held YMCA's

openness and hospitality against it when denying the exemption. How can YMCA open up its properties for charitable purposes to an indefinite number of people on the one hand, but on the other hand also monitor and record the intentions and purposes of those countless guests to ensure charitable ideals are held by all? Such an evidentiary standard imposes an impossible burden on charitable organizations.

In sum, the BAA applied an insurmountable, and erroneous, evidentiary standard on both the PTA and YMCA. In so doing, the BAA erred as a matter of law, requiring reversal.

E. The undisputed evidence establishes YMCA is entitled to partial charitable exemptions as determined by the PTA.

As with the religious exemption, the PTA asserts that the undisputed record in this case permits this Court to decide, as a matter of law, whether YMCA qualifies for partial charitable exemptions. As such, remand may be unnecessary. *See American Water*, 38 Colo. App. at 345, 563 P.2d at 632 (reversing BAA's denial of charitable exemption and stating, "we conclude that the undisputed evidence establishes as a matter of law that AWWA's property is used for strictly charitable

purposes."), *overruled in part on other grounds by AM/FM Int'l*, 940 P.2d at 346 n.16.

CONCLUSION

For the foregoing reasons, the BAA's orders under the religious and charitable exemptions should be reversed, and the PTA's determinations upheld.

Oral argument is requested.

Respectfully submitted this 27th day of January, 2012.

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