IN THE SUPREME COURT OF OHIO

Southside Community Development Corporation Appellant,	:	Case No. 2007-1722
v.	:	On Appeal from the Ohio Board of Tax Appeals
William W. Wilkins, Tax Commissioner of Ohio	:	Case No. 2006-T-635 (DTE Case No. KE4096)
and	:	
Youngstown City School District Board of Education	:	
Appellees.	:	

MERIT BRIEF OF APPELLANT MAHONING COUNTY

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STATEMENT OF FACTS

Appellant appeals from the Order of the Board of Tax Appeals ("BTA"), of August 24, 2007, which denied Appellant's Motion to Intervene in an appeal from a final determination of the Tax Commissioner.

On December 28, 2004, Southside Community Development Corporation ("SCDC") filed an Application for Exemption and Remission of Real Property Tax ("Application"). (Supp. 17.) Through its Application, SCDC sought exemption from taxation for the 2004 tax year and remission of taxes, penalties and interest for tax years 2001 through 2003. Id. The subject real property of the Application of SCDC is described as Parcel Nos.: 53-062-0-225.00-0, 53-062-0-226.00-0, 53-062-0-227.00-0, 53-062-0-228.00-0, 53-062-0-229.00-0, 53-062-0-230.00-0, 53-062-0-231.00-0, and 53-062-0-232.00-0 (the "Real Property"). Id.

On May 3, 2006 SCDC filed a Voluntary Petition for Chapter 7 Bankruptcy ("Bankruptcy Petition"). (Supp. 13.) As a result of the Bankruptcy Petition, the Real Property became an asset of the Bankruptcy Estate. (See Supp. 13.) Attorney Andrew W. Suhar was appointed Chapter 7 Trustee in the United States Bankruptcy Court for the Northern District of Ohio, Case No. 06-40587 ("Bankruptcy Case") concerning SCDC. (Supp. 12-13.)

In the meantime, the Tax Commissioner issued his final determination on April 7, 2006 ("Final Determination"). (Supp. 17.) In response to the Final Determination, Attorney Suhar filed an appeal from the Final Determination on behalf of SCDC on June 1, 2006. (See Supp. 12.) Pending that Appeal, the Bankruptcy Case progressed, and, on July 27, 2006, Appellant herein, Mahoning County, purchased the Real Property from Attorney Suhar, as Chapter 7 Trustee in the Bankruptcy Case. (Supp. 7.) Judge Kay Woods, presiding over the Bankruptcy Case, approved said sale of the Real Property to Appellant, after a hearing. Mahoning County's

purchase of the Real Property was made subject to all encumbrances, including any taxes not subject to exemption or remission. The deed granting title of the Real Property was delivered to and duly recorded by Mahoning County. Mahoning County has appeared as taxpayer for the Real Property on the records of the Mahoning County Auditor as of July 28, 2006.

On June 21, 2007, Mahoning County filed its Motion to Intervene with the BTA in Case No. 2006-T-635 ("BTA Case"). (See Supp. 7.) On or about July 5, 2007, the Tax Commissioner opposed Mahoning County's Motion to Intervene based on the fact that, at the time the Application was filed, Mahoning County was not the owner of the Real Property. (See Supp. 7-11.) To support his propositions, the Tax Commissioner relied on R.C. 5715.27, *Performing Arts School of Metropolitan Toledo, Inc. v. Wilkins*; *Board of Education of the Columbus City School District v. Wilkins*, and *Total Health Care Plan v. Zaino*. Id.; see also *Performing Arts School of Metropolitan Toledo, Inc. v. Wilkins*, 104 Ohio St.3d 284, 2004-Ohio-6389; *Board of Education of the Columbus City School District v. Wilkins*, 106 Ohio St.3d 200, 2005-Ohio-4556; *Total Health Care Plan v. Zaino* (December 17, 2004), B.T.A. Case No. 2003-A-57, unreported.

Though Mahoning County filed a reply to the Tax Commissioner's Memorandum contra to Motion to Intervene, on August 24, 2007, the BTA denied Mahoning County's Motion to Intervene also citing R.C. 5715.27, *Board of Education of the Columbus City School District v. Wilkins, Performing Arts School of Metropolitan Toledo, Inc.*, and *Total Health Care Plan, Inc. v. Zaino*. (See Supp. 7-11.) Additionally, the BTA cited R.C. 5717.02 and this Court's decision in *Avon Lake City School District v. Limbach*, to support its finding that Mahoning County was neither a statutory nor necessary party to the BTA case. Id.

When the Ohio General Assembly created the statutory right to appeal tax determinations it, in no way, indicated an intention to preclude owner-taxpayers vested with a real interest at stake in the appeal proceedings. On the contrary, the Ohio General Assembly, at the very least, recognized that both the property owner and/or the taxpayer were parties to be included in tax appeals. Such an intention is evidenced in R.C. 5717.02 and R.C. 5717.04. See R.C. §§5717.02, 5717.04. Now, the Tax Commissioner and the BTA would exclude Mahoning County from appeal proceedings solely concerning real property owned exclusively by Mahoning County, thus undermining the unambiguous statutory language and the progressive intentions of the Ohio General Assembly without any legal basis.

ARGUMENT

Proposition of Law No. I:

Mahoning County is a statutory party under R.C. 5717.02 and has standing pursuant to R.C. 5715.27.

The determination of the Board of Tax Appeal that Mahoning County is not a statutory party under R.C. 5717.02 and lacks standing under R.C. 5715.27 is unreasonable and unlawful. R.C. 5717.02, providing that a taxpayer may appeal a final determination by the tax commissioner to the BTA, does not preclude Mahoning County as a statutory party in the BTA Case because Mahoning County "stands in the shoes" of SCDC. R.C. 5717.02. It is clear that there is no inherent right to appeal a tax determination. *Avon Lake City School District v. Limbach* (1998), 35 Ohio St.3d 118, 119, 518 N.E.2d 1990. Instead, a litigant's power to appeal tax determinations is created by statute. Id. Just as clear is the tenet that when one is in privity with another by means of a transfer of real property he or she maintains the identical rights and position as his predecessor in interest. *City of Columbus v. Union Cemetery Association* (1976),

45 Ohio St.2d 47, 341 N.E.2d 298; *Berardi v. Ohio Turnpike Commission* (1965), Ohio App.2d 365, 371, 205 N.E.2d 23.

Significantly, R.C. 5717.02 allows the *taxpayer* to appeal final determinations of the tax commissioner irrespective of whether the party to the appeal and the party to the application for exemption from taxation are one in the same. See R.C. 5717.02. The plain language of R.C. 5717.02 promotes harmony between the statutory nature of tax appeals with the well settled law concerning real estate taxation and privity.

After SCDC, through Attorney Suhar, filed the appeal that instituted the BTA Case, Mahoning County purchased the Real Property. At that point, all the rights and interests of SCDC, including standing in the BTA Case, transferred to Mahoning County. See *Union Cemetery Association*, 45 Ohio St.2d at 51; *Berardi*, Ohio App.2d at 371. It is this privity, or successive relationship, that brings Mahoning County within the purview of R.C. 5717.02.

Similarly, as SCDC properly filed its Application (and Mahoning County is in privity with SCDC) there is no lack of standing for the purposes of R.C. 5715.27. That Section provides that "the owner of any property may file an application with the tax commissioner... requesting that such property be exempted from taxation and that taxes and penalties by remitted..." R.C. 5715.27(A).

The December 2004 filing of the Application by SCDC is the genesis of this matter. Undoubtedly, SCDC was the owner of the Real Property and had standing to so file in 2004. These facts do not destroy Mahoning County's standing to intervene in the BTA Case. On the contrary, the above facts reinforce the merit of Mahoning County's arguments.

Privity between SCDC and Mahoning County establishes Mahoning County's statutory rights as a party in the BTA Case. Therefore, the denial of the BTA to allow Mahoning County to join as a party to the BTA Case was unreasonable and unlawful.

Proposition of Law No. II:

The owner-taxpayer of real property has a right to intervene in and/or continue an appeal concerning the tax-exempt status of the real property.

In its Order denying Motion to Intervene, the Board of Tax Appeals unreasonably and unlawfully denied Mahoning County leave to intervene in an appeal from a final determination of the Tax Commissioner concerning real estate owned by Mahoning County and for which Mahoning County is the sole taxpayer. This case appears to be unique in the realm of tax appeals but is easily summarized into a single issue. The issue at bar is whether it is unreasonable and unlawful to deny a *current* property owner the right to continue an *appeal* of a final determination of the tax commissioner before the BTA when its predecessor in title properly filed an application for exemption from taxation under Chapter 5715 of the Ohio Revised Code. Since such unprecedented denial would deprive Mahoning County of a substantial right contrary to both statutory and common law, including principles of fundamental fairness, the BTA's Order is unreasonable and unlawful.

In Ohio, obligations for real property tax "run with the land" and attach to realty, not a person or entity. See *Southern Ohio Savings Bank & Trust Co. v. Bolce* (1956), 165 Ohio St. 201, 209, 135 N.E.2d 382. Thus, taxes are a direct and specific lien on real property, which encumber the current owner's interest therein. Id. Consequently, it is clear why this Court established that determinations concerning whether property is taxable affect a substantial right. *Pittsburgh Steel Company v. Bowers* (1961), 172 Ohio St. 14, 173 N.E.2d 361. The BTA's refusal to add Mahoning County as a party in the BTA Case, which effectively denies it any

meaningful opportunity to be heard regarding its property, is utterly unsupported, flouts the doctrine of due process, and cannot withstand the "reasonable and lawful standard." Indeed, cases cited by the BTA and the Tax Commissioner "supporting" such a denial bear no relationship to the present matter.

Neither *Performing Arts* nor *Total Health Care Plan, Inc.* involve the issues pertinent here. In *Performing Arts*, a tenant, who leased property for non-profit purposes, filed for an exemption from taxation. *Performing Arts School of Metropolitan Toledo, Inc.*, 104 Ohio St.3d at 284. There, this Court held that the property's "legal title holder," alone, possessed standing to file such an application. Id. at 287. Similarly, in *Total Health Care Plan, Inc.*, the BTA, relying on *Performing Arts*, found that a former title holder lacked standing to apply for an exemption from taxation. *Total Health Care Plan, Inc. v. Zaino* (Dec. 17, 2004), BTA No. 2003-A-57, unreported.

In this case, Mahoning County is the current, fee simple owner of the Real Property and such interest is duly recorded. Unlike the facts in *Performing Arts* Mahoning County does not have an inferior interest in the Real Property. Cf. *Performing Arts School of Metropolitan Toledo, Inc.*, 104 Ohio St.3d at 284. Further, this case is distinct from *Total Health Care Plan, Inc.*, as Mahoning County presently owns the Real Property and has conveyed none of its interest in the Real Property. *Total Health Care Plan, Inc. v. Zaino* (Dec. 17, 2004), BTA No. 2003-A-57, unreported.

Thus, as there existed no standing defect when SCDC applied for a Revised Code Section 5715.27 exemption, there is no standing defect now. Under the reasoning of the BTA, itself, Mahoning County does not lack standing but possesses a superior interest. See *Total Health*

Care Plan, Inc., BTA No. 2003-A-57 at 6 (stating "a former titleholder ***does not stand in the same position as a fee simple title holder*** . . .") (emphasis added).

Any tax burden concerning the Real Property will rest solely with Mahoning County. Thus, Mahoning County is peculiarly situated and inextricably involved in the BTA Case. Furthermore, Mahoning County is a necessary party to the BTA Case as no other party therein shares its interests. The ability of Mahoning County to protect its interest can only be served through intervention and/or addition as a party to the BTA case. Chapters 5715 and 5717 of the Ohio Revised Code, the doctrine of privity, and fundamental fairness requires as much. Therefore, Mahoning County respectfully requests that this Court overrule the Order of the BTA denying its Motion to Intervene.

CONCLUSION

If Mahoning County is not added to the BTA Case it will suffer irreparable harm. Mahoning County is both a statutory party and a real party in interest to the BTA Case. Its exclusion from the BTA Case is unsupported by law and is fundamentally unfair. Therefore, the failure of the BTA to add Mahoning County in the BTA Case was unreasonable and unlawful.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that a true and accurate copy of this Merit Brief of Appellant Mahoning County was served via ordinary mail to counsel for Appellee William W. Wilkins, Tax Commissioner of Ohio, **Marc Dann**, Attorney General of Ohio, and **Janyce C. Katz,** Assistant Attorney General, State Office Tower, 25th Floor, 30 E. Broad Street, Columbus, Ohio 43215-3428; counsel for Appellee Youngstown City School District Board of Education, **Martin Hughes & Associates, LPA, Jackie Lynn Hager**, 150 E. Wilson Bridge Road, Suite 300, Worthington, Ohio 43085-2326; and, counsel for Appellant, Southside Community Development Corporation, **Suhar & Macejko, LLC, Andrew W. Suhar**, 1101 Metropolitan Tower, P.O. Box 1497, Youngstown, OH 44501, this 6th day of November, 2007.

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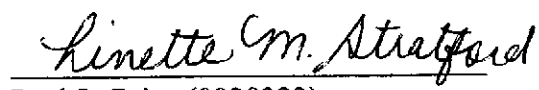

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IN THE SUPREME COURT OF OHIO

07-1722

Southside Community Development Corporation	:	
Appellant,	:	Appeal from the Ohio Board of Tax Appeals
v.	:	
William W. Wilkins, Tax Commissioner of Ohio	:	Board of Tax Appeals Case No. 2006-T-635
and	:	
Youngstown City School District Board of Education	:	
Appellees.	:	

NOTICE OF APPEAL OF INTERVENOR MAHONING COUNTY

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Notice of Appeal of Intervenor Mahoning County

Mahoning County hereby gives notice of its appeal as of right, pursuant to R.C. 5717.04, to the Supreme Court of Ohio, from a Decision and Order of the Board of Tax Appeals, journalized in Case No. 2006-T-635 on August 24, 2007. A true copy of the Decision and Order of the board being appealed is attached hereto and incorporated herein by reference.

Mahoning County complains of the following errors in the Decision and Order of the Board of Tax Appeals:

1. The Ohio Board of Tax Appeals erred in its final appealable order denying Mahoning County's Motion to Intervene in Case No. 2006-T-635, styled as *Southside Community Development Corporation v. William W. Wilkins, Tax Commissioner of Ohio, et al.* finding that Mahoning County is not a real party in interest as taxpayer and property owner of the real property at issue in the above-captioned matter.

2. The Ohio Board of Tax Appeals erred in its determination that Mahoning County could not intervene or join as of right pursuant to R.C. §5717.07 in the above-mentioned case.

3. The Ohio Board of Tax Appeals erred in its final appealable order finding that Mahoning County lacks standing to intervene or join in the above-captioned appeal because Mahoning County did not own the subject property at the time Southside Community Development Corporation, Mahoning County's predecessor in interest, filed an application for exemption from taxation.

4. The Ohio Board of Tax Appeals erred in finding that Mahoning County is "neither statutory nor a necessary party" to the above-captioned appeal.

5. The Decision of the Ohio Board of Tax Appeals denying Mahoning County's Motion to Intervene violates the due process clauses of the Ohio Constitution and the United States Constitution (Ohio Const. Art. I, §1; U.S.Const. Amend. XIV, §1).

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Certificate of Service

I hereby certify that a copy of this Notice of Appeal was sent by certified mail to the **Ohio Board of Tax Appeals**, James A. Rhodes State Office Tower, 24th Floor, 30 East Broad Street, Columbus, Ohio 43215-3414, and counsel for Appellee William W. Wilkins, Tax Commissioner of Ohio, **Marc Dann**, Attorney General of Ohio, and **Janyce C. Katz**, Assistant Attorney General, State Office Tower, 25th Floor, 30 E. Broad Street, Columbus, Ohio 43215-3428; counsel for Appellee Youngstown City School District Board of Education, **Martin Hughes & Associates, LPA, Jackie Lynn Hager**, 150 E. Wilson Bridge Road, Suite 300, Worthington, Ohio 43085-2326; and, counsel for Appellant, Southside Community Development Corporation, **Suhar & Macejko, LLC, Andrew W. Suhar**, 1101 Metropolitan Tower, P.O. Box 1497, Youngstown, OH 44501.

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OHIO BOARD OF TAX APPEALS

Southside Community Development Corporation, Appellant, vs. William W. Wilkins, Tax Commissioner of Ohio, and Youngstown City School District Board of Education, Appellees.	CASE NO. 2006-T-635 (REAL PROPERTY TAX EXEMPTION) ORDER (Denying Motion to Intervene)

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Entered AUG 24 2007

Ms. Margulies, Mr. Eberhart, and Mr. Dunlap concur.

Mahoning County moves this board for an order permitting it to intervene in this appeal because the county has an interest in the real property in issue. For the reasons given below, the BTA denies the motion to intervene.

The subject appeal concerns eight parcels of real property located in the Youngstown Schools Taxing District of Mahoning County.[1] On December 28, 2004, Southside Community Development Corporation, then owner of the subject property, filed an application for exemption. Southside sought exemption of the subject property from taxation for tax year 2004 and further sought remission of taxes, penalties, and interest for tax years 2001, 2002, and 2003. See R.C. 5715.27(H) and 5713.081. The commissioner issued a final determination on April 7, 2006. Therein, the commissioner denied the application for exemption but did remit all penalties charged for tax years 2001 through 2005. Southside appealed the commissioner's final determination to this board on June 1, 2006.

On May 3, 2006, Southside filed for Chapter 7 bankruptcy protection. Subsequently, on July 27, 2006, Mahoning County purchased the subject property from the bankruptcy trustee. Mahoning County now argues that, as it purchased the property subject to all encumbrances, including real property tax, it has an interest in the outcome of this appeal as the current owner. As such, Mahoning County represents that it is a necessary party to this appeal and seeks to intervene.

The commissioner objects to the motion on the grounds that Mahoning County was not the owner of the subject property at the time the application for

[1] The subject is identified as parcel numbers 53-062-0-225.00-0, 53-062-0-226.00-0, 53-062-0-227.00-0, 53-062-0-228.00-0, 53-062-0-229.00-0, 53-062-0-230.00-0, 53-062-0-231.00-0, and 53-062-0-232.00-0.

exemption was filed in December 2004. The commissioner also objects because Mahoning County did not own the subject during the time for which exemption was sought, i.e., tax year 2004, or for the time for which Southside sought remission of taxes, i.e., 2001, 2002, or 2003. The commissioner further notes that Mahoning County did not acquire title to the subject property until more than three months after the commissioner's April 7, 2006 final determination on the application was issued. In short, the commissioner argues that Mahoning County lacks standing to participate in this appeal.

The commissioner's objection is based upon the Ohio Supreme Court's interpretation of R.C. 5715.27, which governs the filing of an application for exemption. The commissioner asserts that R.C. 5715.27 specifies who has standing to file either an application for exemption or a complaint against exemption. According to the commissioner, because Mahoning County was not an owner of the subject at the time the application was filed, the county lacks standing to participate in these proceedings. R.C. 5715.27(A) specifies:

> "Except as provided in section 3735.67 of the Revised Code, the *owner* of any property may file an application with the tax commissioner, on forms prescribed by the commissioner, requesting that such property be exempted from taxation and that taxes and penalties be remitted as provided in division (B) of section 5713.08 of the Revised Code." (Emphasis added.)

"A threshold question when considering an application for exemption filed under R.C. 5715.27 is whether the applicant has standing." *Bd. of Edn. of the Columbus City School Dist. v. Wilkins*, 106 Ohio St.3d 200, 2005-Ohio-4556, at ¶9.

The court has held that the term "owner," as used in R.C. 5715.27, refers only to the legal title owner of the real property for which the exemption is sought. *Performing Arts School of Metro Toledo, Inc. v. Wilkins*, 104 Ohio St.3d 284, 2004-Ohio-6389, at ¶13.

Moreover, the question of who is the owner is dependent upon who owns legal title to the property at the time the application is filed. *Society Natl. Bank v. Tracy* (Jan. 20, 1995), BTA No. 1993-G-549, unreported; *Total Health Care Plan, Inc. v. Zaino* (Dec. 17, 2004), BTA No. 2003-A-57, unreported. In *Total Health Care*, this board considered a situation in which an entity filed an application for exemption although the entity did not own the property at the time of the filing. The entity argued that it had standing to file because it had owned the property during the time period for which exemption was sought. This board disagreed, finding that "a former titleholder does not stand in the same position as the fee simple titleholder, and appellant's contention that THCP was the owner of the subject property during the time period for which exemption is requested has no effect on whether it had standing to file the application after it conveyed title to the subject." Id. at 6.

Similarly, Mahoning County was not the legal title holder of the subject property at the time Southside filed the application for exemption. Mahoning County held no interest in the subject at the time of application, throughout the commissioner's review of the application, or at the close of the period during which an appeal from the commissioner's determination could be filed with this board. See R.C. 5717.02. Even if Mahoning County were to demonstrate that it has some contractual

obligation to remit prior taxes due on the subject, such an interest would be insufficient to grant Mahoning County standing to participate in the application process. *Total Health Care*, supra, at 7.

The commissioner argues that, as Mahoning County lacked standing to participate in the application for exemption process, the county is likewise without standing to participate in this appeal. The board agrees. This board has previously denied a motion to intervene where the entity seeking to participate in the appeal as a party has no statutory right to do so. In *Sidman v. Tracy* (Interim Order, Mar. 10, 1995), BTA No. 1994-P-790, unreported, this board acknowledged the Supreme Court's pronouncement in *Avon Lake City School Dist. v. Limbach* (1988), 35 Ohio St.3d 118, at 119, that "[a] litigant has no inherent right to appeal a tax determination, only a statutory right." The board then reviewed R.C. 5717.02,[2] which authorizes appeals from final orders of the Tax Commissioner, and determined that, because the movant did not fall within that category of persons authorized to appeal the

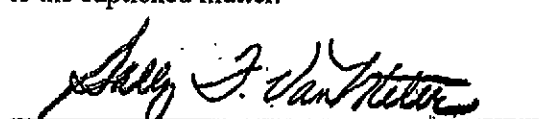
[2] R.C. 5717.02 provides: "Except as otherwise provided by law, appeals from final determinations by the tax commissioner of any preliminary, amended, or final tax assessments, reassessments, valuations, determinations, findings, computations, or orders made by the commissioner may be taken to the board of tax appeals by the taxpayer, by the person to whom notice of the tax assessment, reassessment, valuation, determination, finding, computation, or order by the commissioner is required by law to be given, by the director of budget and management if the revenues affected by such decision would accrue primarily to the state treasury, or by the county auditors of the counties to the undivided general tax funds of which the revenues affected by such decision would primarily accrue. Appeals from the redetermination by the director of development under division (B) of section 5709.64 or division (A) of section 5709.66 of the Revised Code may be taken to the board of tax appeals by the enterprise to which notice of the redetermination is required by law to be given. Appeals from a decision of the tax commissioner concerning an application for a property tax exemption may be taken to the board of tax appeals by a school district that filed a statement concerning such application under division (C) of section 5715.27 of the Revised Code. Appeals from a redetermination by the director of job and family services under section 5733.42 of the Revised Code may be taken by the person to which the notice of the redetermination is required by law to be given under that section."

commissioner's final order, it was precluded from participating in the appeal as an intervenor.

As Mahoning County lacked standing to file the application for exemption now on appeal and did not have an interest in the subject either at the time the commissioner issued the final determination or at the time the determination could be appealed to this board, the BTA concludes that Mahoning County is neither a statutory nor necessary party. Mahoning County's motion to intervene is therefore denied.

Nevertheless, the BTA is always receptive to the citation of additional authority that may be germane to the issues raised in an appeal. For this reason, following the conclusion of the evidentiary hearing in this matter, Mahoning County will be accorded the opportunity to file an amicus curiae brief at the same time as the party whose position it seeks to support. See *Bd. of Edn., Princeton City School Dist. v. Tracy* (Interim Order, May 15, 1998), BTA No. 1997-K-825, unreported. However, it will remain the responsibility of Mahoning County to ascertain the date when such a filing is due.

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.



Sally F. Van Meter, Board Secretary

Ohio Department of
TAXATION
Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: APR 07 2006

Southside Community Development Corporation
c/o Executive Director
345 Oak Hill Avenue
Youngstown, OH 44502

Re:	DTE No.:	KE 4096
	Auditor's No.:	04-12-126
	County:	Mahoning
	School District:	Youngstown SD
	Parcel Numbers:	53-062-0-225.00-0
		53-062-0-226.00-0
		53-062-0-227.00-0
		53-062-0-228.00-0
		53-062-0-229.00-0
		53-062-0-230.00-0
		53-062-0-231.00-0
		53-062-0-232.00-0

This is the final determination of the Tax Commissioner on an application for exemption of real property from taxation filed on December 28, 2004. The applicant seeks exemption of real property from taxation for the tax year 2004, and remission of taxes, penalties and interest for tax years 2003, 2002 and 2001. R.C. 5715.27(H); R.C. 5713.081.

The property in question was the subject of a previous application for the same time period, which application was dismissed on November 17, 2004. See, DTE Case No. HE 2557, Auditor's No. 02-03-023. By letter received January 17, 2005 the applicant requests that the current application proceed from the point at which the prior application was dismissed. Therefore the application will be reviewed utilizing the information submitted with both the prior and current applications. The applicant submitted additional information to the record on March 11, 2005 and again on March 24, 2005. While the applicant stated that it may send further information by June 6, 2005, no further information has been submitted. Based upon the available record, the property does not meet the requirements for exemption.

Property Description and Leases

Parcel 53-062-0-225.00-0 is 6.05 acres with 500,000 sq. ft. gross building area and about 275,000 sq. ft. of net "leaseable" area, with about 37% occupancy in 2001. Parcel 53-062-0-226.00-0 is 4.780 acres with a 120,000 sq. ft. paved parking, a 36,252 sq. ft. garage and an 11,870 sq. ft. building. Parcel 53-062-0-227.00-0 is 0.043 acres of vacant and unused land. Parcel 53-062-0-228.00-0 is 0.044 acres of vacant and unused land. Parcel 53-062-0-229.00-0 is

96 sq. ft. of vacant and unused land. Parcel 53-062-0-230.00-0 is 0.237 acres of paved lot. Parcel 53-062-0-231.00-0 is 0.010 acres of vacant and unused land. Parcel 53-062-0-232.00-0 is 0.242 acres of paved lot.

The applicant acquired the property between February 25, 2000, and July 5, 2000, for the stated purpose of converting the approximately 500,000 sq. ft. facility with 10 acres of grounds into a community hub for business uses and charitable or educational uses. This facility contains several office wings, a tower building, an auditorium and kitchen area, as well as several outbuildings and adjacent parking areas. As stated above the subject property is comprised of several parcels. Two parcels, 53-062-0-225.00-0 and 53-062-0-226.00-0, contain a building or buildings, while the remaining parcels are vacant lots or parking lots leased to or used by the tenants.

The applicant is a development corporation. R.C. 1726.02 provides that a development corporation may be formed to promote, aid, develop and advance the industrial and business prosperity of the state or any subdivision. The applicant's mission is to provide a multi-purpose business and service center in the area known as Oakhill Renaissance Place. The applicant is formed to assist and facilitate the revitalization of the City of Youngstown; to facilitate the provision of adequate housing in the area and to spur economic development; to offer programs for job training and job development, and to provide recreational or educational programs in the community. The property is either vacant or is leased to third party tenants for those tenants' use.

The applicable record, together with letters from the applicant's director, indicate that of the total square footage of the building on parcel 53-062-0-225.00-0 ("225-Building"), between approximately 225,000 sq. ft. and 80,000 sq. ft. is non-leaseable. A notation on one of the letters indicates that at least 179,356 sq. ft. of the 225-Building should remain taxable as leased to or used by for profit entities or unused. As well, portions are leased to non-profit entities generating yearly rental revenue. About 2,880 sq. ft. of the 225-Building is used by the applicant as a free community computer lab facility, open to the public at large. The 11,870 sq. ft. of parcel 53-062-0-226.00-0 ("226-Building") is also leased, and the parking areas are used by the for-profit and non-profit entities. The applicant does not seek exemption for the property leased to or used by the for-profit entities.

A total of 102,884 sq. ft. out of the total net leaseable space of between 275,000 and 273,219 sq. ft. is leased at a current annual rent total of $764,954.00. The record shows that the rent charged increases with each year, and is projected to reach between approximately $1,040,906.00 per year and $2,483,525.00 per year (based on lease of the entire building areas). The record reflects that current tenants include:

- Specialty Hospitals (aka Mahoning Valley Hospital), a non-profit entity that leases 28,629 sq. ft of space since June 22, 2004, at an annual rent of $148,500.00 increasing to $495,000.00 per year, for use as a long term acute residential facility;
- Youngstown Area Community Action Council (YACAC) Headstart, a non-profit entity that leases 23,489 sq. ft of space since August 1, 2000, at an annual rent of $252,507.00;
- the County Coroner's office, a governmental entity that leases 3,342 sq. ft of space since August 31, 2000, at an annual rent of $40,104;

- the Youngstown Health Department, a governmental entity that leases 17,676 sq. ft of space since September 1, 1999, at an annual rent of $119,111.00;
- MTAPCA-Pollution Control, a governmental entity that leases 600 sq. ft of space since December 1, 2002, at an annual rent of $3,000.00;
- Comprehensive Care Center, a non-profit entity that leases 3,500 sq. ft of space since January 1, 2003, at an annual rent of $21,000.00, for use as an AIDS clinic;
- C&I Healthcare Inc., a for-profit entity that leases 1,723 sq. ft of space since July 1, 2004, at an annual rent of $9,000.00, for use as a nursing resource center;
- Mahoning Columbiana Training Association, a non-profit entity that leases 4,180 sq. ft of space since January 1, 2004, at an annual rent of $82,692.00, for use as a workforce training investment facility;
- Oakhill Pharmacy (aka Independent Pharmacy Group), a for-profit entity that leases 585 sq. ft of space since September 1, 1999, at an annual rent of $7,020.00, for use as a retail pharmacy;
- Youngstown Hearing and Speech, a for-profit entity that leases 360 sq. ft of space since April 1, 1999, at an annual rent of $1,440.00, for use as a storage area;
- Youngstown State University, a non-profit entity that leases 1,590 sq. ft of space since November 1, 2002, at an annual rent of $14,994.00, for use as a physics research facility;
- Forum County Morgue, a non-profit hospital entity that leases 732 sq. ft of space since January 1, 1999, at no charge for use as a county morgue;
- Forum DACAS Nursing, a non-profit entity that leases 1,000 sq. ft of space since January 1, 1999, at an annual rent of $34,020.00, for use as offices for a visiting nurse home care facility;
- Forum Storage, a non-profit entity that leases 10,489 sq. ft of space since January 1, 1999, at an annual rent of $19,159.00, for use as records storage;
- LinMar Strategies Inc., a for-profit entity that leases 250 sq. ft of space since January 17, 2005, at an annual rent of $3,000.00, for use as a media programming facility;
- Blossom We Care 24hrs Inc., a for-profit entity that leases 250 sq. ft of space since July 26, 2004, at an annual rent of $1,200.00, for use as a home assistance facility;
- Protestant Family Service, a non-profit entity that leases 1,344 sq. ft of space since September 1, 2003, at an annual rent of $7,008.00, for use as a housing assistance facility;
- Lamarr Benton, an individual or for-profit entity that leases 265 sq. ft. of space since February 1, 2005, at an annual rent of $1,200.00, for use as a storage area; and
- the applicant's affiliate Community Computer lab, a separate non-profit entity that leases 2,880 sq. ft of space since October 1, 2003, at no charge for use as a free community computer lab.

It is noted that the general rule is that a subsidiary or affiliate corporation is a separate entity from its parent company, even if wholly owned. *State ex rel Lewis v. Industrial Commission* (1986), 23 Ohio St.3d 195, citing, *North v. Higbee Co.* (1936), 131 Ohio St. 507 wherein the Court held that a parent corporation and its subsidiary are separate corporate entities. The record further shows that prior lessees included:

- Oakhill Pharmacy, a for-profit entity which leased between 500 sq. ft. and 9,180 sq. ft. between 1995 and 2004 at an annual rent of between $7,020.00 to $10,000.00;

- Eye Care Associates, a for–profit entity which leased 600 sq. ft. until June 2004, at an approximate yearly rental of $3,000.00 (based upon the applicant's typical $5.00 per sq. ft. per month charge);
- Joy and Praise Ministries, listed as for profit entity which leased between 134 sq. ft. and 1,144 sq. ft. from September 1, 2003 to July 31, 2004, at an approximate annual rent of between $8,040.00 and $68,640.00 (based upon the applicant's typical $5.00 per sq. ft. per month charge);
- White Hat Realty, a for-profit entity that leased 6,550 sq. ft. between 1999 and 2004, at an annual rent of between $52,400.00 and $72,050.00;
- Grace Place, a non-profit entity which leased 5,840 sq. ft. of space from April 1, 1999, to December 1, 2004, for an annual rent of $70,080.00, for use as a free clinic;
- Life Skills, a non-profit entity which leased 6,550 sq. ft. of space between November 1, 1999, and October 31, 2004, for an annual rent of approximately $393,000.00 (based upon the applicant's typical $5.00 per sq. ft. per month charge), for use as a charter school;
- St. Augustine's Learning Tree, a non-profit entity which leased 1,723 sq. ft. of space from January 31, 2002, to March 21, 2004, for an annual rent of approximately $103,380.00 (based upon the applicant's typical $5.00 per sq. ft. per month charge), for use as an after school program facility; and
- Summit Academy, a non-profit entity which leased 9,180 sq. ft. of space from July 1, 2001, to July 31, 2003, at an annual rent of $95,400.00, for use as a charter school;

The applicant seeks exemption pursuant to R.C. 5709.12. In *Episcopal Parish v. Kinney* (1979), 58 Ohio St. 2d 199, the Supreme Court defined the charitable use provisions of R.C. 5709.12 and R.C. 5709.121 as follows:

> R.C. 5709.12 states "*** real and tangible personal property belonging to an institution that is used exclusively for charitable purposes shall be exempt from taxation." *** The legislative definition of exclusive charitable use found in R.C. 5709.121, however, applies only to property "belonging to, 'i.e. owned by' a charitable or educational institution, or the state or a political subdivision."

R.C. 5709.12(B) applies to property owned by an institution and used exclusively for a charitable purpose and R.C. 5709.121, "while not itself granting an exemption", states that property owned by a charitable, educational or public entity, and used exclusively for a purpose as defined by that section is to be considered as property used for a charitable purpose. The Court stated that one cannot apply the definition of exclusive charitable use found in R.C. 5709.121, to property owned by non-charitable entities. *Id.*; *Bethesda Healthcare v. Zaino* (Sep. 20, 2002), BTA No. 00-J-1591. Affirmed *Bethesda Healthcare, Inc. v. Wilkins* (2004), 101 Ohio St.3d 420.

R.C. 5709.12(B), then, applies to property owned by an institution and used exclusively for a charitable purpose. Therefore, in order to be entitled to exemption under R.C. 5709.12(B), two requirements must be met: (1) the property must belong to an institution, and (2) the property must be used exclusively for charitable purposes. *Highland Park Owners, Inc. v. Tracy* (1994), 71 Ohio St.3d 405. Additionally, R.C. 5709.121 provides that there are two general requirements in order for property to be considered as used exclusively for charitable or

educational purposes: (1) the property owner must be a charitable, public, or educational institution, and (2) the property must be used by or made available to a charitable, public, or educational institution for an educational, charitable or public purpose.

Development Corporation

The Supreme Court has defined "charity" as "the attempt in good faith, spiritually, physically, intellectually, socially and economically to advance and benefit mankind in general, or those in need of advancement and benefit in particular, without regard for their ability to supply that need from other sources, and without hope or expectation, if not with positive abnegation, of gain or profit by the donor or by the instrumentality of the charity." *Planned Parenthood Association v. Tax Commissioner* (1966), 5 Ohio St. 2d 117. The Court also held that a "private, profit-making venture does not use property exclusively for charitable purposes". *Highland Park* at 406-407.

Here, the applicant is organized to revitalize and promote business within the Youngstown area, and is therefore not a charitable or educational entity. The property is owned by a development corporation which uses the property for business development, commercial leasing and revenue generating purposes. Property used by a non-profit entity for the purpose of economic development is not an exempt use of that property. *Columbus City School District Board of Education v. Zaino* (2001), 90 Ohio St 3d 496; *Miami Valley Research Foundation v. Tracy* (Jun. 17, 1994), BTA No. 91-J-161. The Board also held that real property acquired by a non-profit corporation the purpose of which was to revitalize the central business district of an urban area or used for the aid of business development did not constitute a charitable purpose. Property used for the aid of business development is not a charitable use of the property, and such property is not entitled to exemption. *Youngstown Revitalization Foundation v. Limbach* (Jan. 11, 1991), BTA No. 87-D-1127.

Property leased to individuals, business groups or for-profit tenants or sub-tenants is not a charitable, educational or public use of the property, and such property is not exempt from taxation under R.C. 5709.12 and R.C. 5709.121. See *Case Western Reserve Univ. v. Tracy* (1999), 84 Ohio St.3d 316. See, also, *The Lutheran Book Shop v. Bowers* (1955), 164 Ohio St. 359, wherein the Court affirmed denial of a business owned by a corporation that operated "in competition with commercial concerns in the same line *** even though such corporation be one formed not for profit".

Because of the individual and business uses of the property the requirements for exemption are not met. See, R.C. 5709.121; *Reuben Anaya v. Lawrence* (Jun. 30, 2000), BTA No. 99-S-1308; *Highland Park*, supra.

Revenue

As well, the property is used by the applicant to generate rental revenue of between $740,000.00 and $2,000,000.00 per year. Property used to generate revenue or to produce income is not a charitable use of such property. *National Headquarters, D.A.V. v. Bowers* (1960), 171 Ohio St. 312; *Columbus Youth League v. Board of Revision* (1961), 172 Ohio St. 156. In *Hubbard Press v. Tracy* (1993), 67 Ohio St.3d 564, the Supreme Court restated the tenet that "[i]t is only the use of property in charitable pursuits that qualifies for tax exemption." The Court held that property used for the purpose of generating revenue is not exempt from taxation, even though the revenue

may be employed for purposes that are themselves charitable. *Zindorf v. The Otterbein Press* (1941), 138 Ohio St. 287. The subject property is used by the applicant to earn rental income for itself, while several of the lessees operate for-profit, revenue generating businesses from the property. See, *City of Parma Hts. v. Wilkins* (2005), 105 Ohio St. 3d 463, wherein the Court held that a rent of $60,000.00 per year is not de minimus.

In *Thomaston Woods Limited Partnership v. Lawrence* (Jun. 15, 2001), BTA No. 99-L-551, the Board of Tax Appeals ("Board") held that commercially leased property or property used by a non-charitable organization does not meet the requirements for exemption under R.C. 5709.12 or R.C. 5709.121. Therefore, not only must both the lessor and lessee of property be either a charitable, educational or public entity, but the property cannot be commercially leased, even if no profit is made from such lease. *Id.* See, also, *Bethesda Healthcare,* supra. Similarly, in *White Cross Hospital Ass'n v. Board of Tax Appeals* (1974), 38 Ohio St. 2d 199, the Supreme Court held that an office building owned by a charitable entity that leased the office space to others was not used "in furtherance of or incidental to its charitable, educational, or public purposes, even in the absence of a profit." Here, the property is not owned by a charitable or educational entity and the property is commercially leased. Therefore the requirements for exemption are not met under R.C. 5709.12 and R.C. 5709.121.

No Evidence of Charitable Use

Finally, even if the applicant could be considered a charitable or educational institution, the property leased to the for-profit businesses or individuals would not meet the requirements for exemption. See, *Reuben Anaya*, supra. Further, there is no evidence in the record that the non-profit entities are themselves charitable or educational institutions, or that they provide charitable health care or other services. A charitable health facility should have as its primary purpose the provision of health services to those in need without regard to ability to pay, and such facility must provide its services to indigent patients and to the public generally. *Vick v. Cleveland Memorial Medical Foundation* (1965), 2 Ohio St.2d 30. The Supreme Court found that a health care entity must render "sufficient services to persons who are unable to afford them to be considered as making charitable use of property" in order to be considered charitable. *Bethesda Healthcare*, supra. In *Cleveland Osteopathic Hospital v. Zangerle* (1950), 153 Ohio St. 222, the Court restated the tenet that where a health care organization "extends its facilities and services very largely to those who are able to and do pay the established rates for their accommodation *** it places itself in the classification of a business enterprise amenable to taxation, notwithstanding that some unfortunate persons without means are cared for free of charge". *Id.* at 227.

Here, the record is unclear as to whether the lessee non-profit service or health care providers offer care or services without regard to ability to pay, or on a sliding scale basis. *Bethesda Healthcare*, supra. Specialty Hospitals uses the property as a long term acute care residential facility. However, there is no evidence that the facility meets the requirements for such residential facility under R.C. 5709.12(B) and R.C. 5701.13. The general rule in Ohio is that independent living or residential property is not exempt from real property taxation. *Philada Home Fund v. Bd. of Tax Appeals* (1966), 5 Ohio St.2d 135. The *Philada* Court held:

> 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.

The Supreme Court followed that rule in *Cogswell Hall v. Kinney* (1987), 30 Ohio St.3d 43. The appellant in that case was a nonprofit corporation which furnished low cost housing to 25 elderly women. The Court held that, while the result may be charitable, the use of the property was not exclusively for charitable purposes and not entitled to exemption under section 5709.12. The evidence on record shows that the property is used as residential rental apartments and is not exempt from taxation under R.C. 5709.12. See, also, *Ohio Presbyterian Homes v. Kinney* (1984), 9 Ohio St.3d 90; *S.E.M. Villa II v. Kinney* (1981), 66 Ohio St. 2d 67.

Applying the statutes and case law cited above, the property owned by a non-charitable entity and leased to or used by the separate third party entities does not meet the requirements for exemption as leased and used to generate revenue through commercial leases. Analysis of the evidence submitted by the applicant establishes that the subject property does not meet the requirements for exemption from taxation.

The Tax Commissioner finds that the property described in the application is not entitled to be exempt from taxation and the application is therefore denied for reasons set forth above.

The Tax Commissioner further orders that all penalties charged for the 2001, 2002, 2003, 2004 and 2005 tax years be remitted.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. NOTICE WILL BE SENT PURSUANT TO R.C. 5715.27 TO THE COUNTY AUDITOR. UPON EXPIRATION OF THE SIXTY-DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED, AND THE FILE APPROPRIATELY CLOSED.

I CERTIFY THAT THIS IS A TRUE AND ACCURATE COPY OF THE FINAL DETERMINATION RECORDED IN THE TAX COMMISSIONER'S JOURNAL

William W. Wilkins
TAX COMMISSIONER

/s/ William W. Wilkins

William W. Wilkins
Tax Commissioner

cc:

Carmen V. Paniss, Esq.
26 Market Street, Suite 1200
Youngstown, OH 44503-1769

00007

OHIO BOARD OF TAX APPEALS

Total Health Care Plan, Inc.,	)	
	)	
Appellant,	)	CASE NO. 2003-A-57
	)	
vs.	)	(REAL PROPERTY TAX EXEMPTION)
	)	
Thomas M. Zaino, Tax Commissioner of Ohio and Cleveland Municipal School District Board of Education,	)	DECISION AND ORDER
	)	
Appellees.	)	

APPEARANCES:

For the Appellant - Nicola, Gudbranson & Cooper, LLC
Matthew T. Fitzsimmons
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For the Appellee Tax Commissioner - Jim Petro
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Entered December 17, 2004

Ms. Jackson, Ms. Margulies, and Mr. Eberhart concur.

This cause and matter came on to be considered by the Board of Tax Appeals upon a notice of appeal filed by the appellant from a final determination of the

Tax Commissioner. The Tax Commissioner dismissed the appellant's application for the exemption of certain real property from taxation for tax year 2001, finding that the appellant was not the owner of the subject property at the time application was made and therefore did not have standing to seek its exemption.

The matter was submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript certified to the board by the Tax Commissioner, the record of the hearing before this board, and the briefs of counsel.

In reviewing appellant's appeal, we first recognize the presumption that the findings of the Tax Commissioner are valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. It is therefore incumbent upon a taxpayer challenging a finding of the Tax Commissioner to rebut that presumption and establish a right to the relief requested. *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St.2d 135; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138. Moreover, the taxpayer is assigned the burden of showing in what manner and to what extent the Tax Commissioner's determination is in error. *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213.

Total Health Care Plan, Inc., ("THCP"), was a licensed health maintenance organization (HMO) in Ohio that insured indigent patients from approximately 1987 to 1999. H.R. at 13. Due to questions of solvency, among others, THCP was taken over by the Ohio Department of Insurance in 1999, first for supervision/oversight purposes and then for rehabilitative purposes. H.R. at 17, 65.

While in the rehabilitation phase, the Department of Insurance handled all of the affairs of THCP, including its legal affairs. H.R. at 22, 28, 33.

In March 2001, title to the subject property was conveyed from THCP to Hicks, Thomas & Turner Properties, Inc. The exemption application for the subject was filed in September 2001, by Ohio Department of Insurance employees, on behalf of THCP. H.R. at 19.

The subject property, consisting of less than one acre (approximately 12,000 square feet), was used by THCP for an office, records and equipment storage, print shop and vehicle parking from November 1998 through March 2001. We note that at the time of its sale, the purchase agreement for the subject provided that:

> "Seller believes that the 55th Street Property [the subject] should have been exempt from real estate taxes during the period of Seller's ownership. Seller desires to seek to have the applicable governmental agencies recognize such tax exemption, and to obtain remittance of real estate taxes paid by the Seller; Buyer is willing to accommodate Seller in this regard. Therefore, notwithstanding the sale of the 55th Street Property, Seller may pursue such tax exemption and remittance of taxes paid by Seller during its ownership of said property. Any taxes remitted by any government agencies based upon a change of tax status shall belong to and be paid to the Seller."

In its notice of appeal, THCP specified the following errors:

> "1. The Tax Commissioner has jurisdiction to consider THCP's Application for Real Property Tax Exemption because THCP was the owner of the property during the time period for which it seeks the tax exemption, and, therefore, THCP has standing under R.C. 5715.27(A) to file the Application.
>
> "2. The Tax Commissioner has jurisdiction to consider THCP's Application for Real Property Tax Exemption

because THCP has an equitable/legal interest in the property – thus making it the real party in interest – and, therefore, THCP has standing under R.C. 5715.27(A) to file the Application.

"3. The Tax Commissioner has jurisdiction to consider THCP's Application for Real Property Tax Exemption because, pursuant to the Purchase Agreement whereby THCP sold the property, THCP retained the ownership right to seek the tax exemption for the time period that it owned the property, and, therefore, THCP has standing under R.C. 5715.27(A) to file the Application.

"4. Agents of the Ohio Department of Insurance have already determined that THCP is entitled to a Real Property Tax Exemption for the property, and, therefore, the Tax Commissioner is estopped from denying THCP the Exemption."

As we review THCP's application for exemption of the property in question, we are mindful of the provisions of R.C. 5715.27(A), which at the time application was made, stated:

"(A) The *owner* of any property may file an application with the tax commissioner, on forms prescribed by the commissioner, requesting that such property be exempted from taxation and that unpaid taxes and penalties be remitted as provided in division (B) of section 5713.08 of the Revised Code." (Emphasis added.)

The Tax Commissioner argues, based upon the foregoing statutory language, that only the "owner" of the real property is the appropriate applicant for its exemption and that THCP is without standing to make an application for exemption since its title to the subject was conveyed to another entity in March 2001 and its application for exemption was not filed until September 2001.

THCP contends that it had standing to file the exemption application under consideration because "(1) THCP was the owner of the Property during the time period for which it seeks the tax exemption; (2) THCP has an equitable/legal interest in the Property – thus making it the real party in interest; (3) pursuant to the Purchase Agreement whereby THCP sold the Property, THCP retained the ownership right to seek the tax exemption for the time period that it owned the Property; and (4) attorney-agents of ODI have already determined that THCP is entitled to a Real Property Tax Exemption for the Property and, therefore, the Ohio Department of Taxation should not deny THCP the exemption." Appellant Brief at 6-7.

First, we consider appellant's argument that it had standing to file the exemption application under consideration because it was the owner of the subject property during the time period for which exemption is sought. Recently, in *Performing Arts School of Metro. Toledo, Inc. v. Wilkins*, ___ Ohio St.3d ____, 2004-Ohio-6389, the Supreme Court specifically held that "'owner' as used in R.C. 5715.27 refers only to a legal title holder of the real property for which a tax exemption is sought." Citing to its previous holding in *Victoria Plaza Ltd. Liab. Co. v. Cuyahoga Cty. Bd. of Revision* (1999), 86 Ohio St.3d 181, the court reiterated that "'[T]o be the *owner* of real property, the person must hold legal title to the property, not simply an equitable interest in the property.' (Emphasis added.) *** '[T]he owner of an equitable interest in real property does not have standing to file a complaint.' Id."

Further, in *Society National Bank v. Tracy* (Jan. 20, 1995), BTA No. 1993-G-549, unreported, this board stated that "the statute [R.C. 5715.27(A)] in

question is unambiguous. It clearly contains the requirement that the applicant for a tax exemption be the owner of the subject property. Where no ambiguity exists to require statutory interpretation, this Board will not enlarge the statute by construction beyond the clear language." Id. at 5-6. Here, just as we found in *Society National Bank*, we find that once a property owner has conveyed all of its interests to a purchaser in a sale of the subject property, the owner "rendered itself an improper party for purposes of R.C. 5715.27(A)." Id. at 8. Thus, a former titleholder does not stand in the same position as the fee simple titleholder, and appellant's contention that THCP was the owner of the subject property during the time period for which exemption is requested has no effect on whether it had standing to file the application after it conveyed title to the subject.

Appellant also argues, pursuant to the Supreme Court's holding in *Cleveland State University v. Perk* (1971), 26 Ohio St.2d 1, 5 that "[w]here, as here, the party submitting the application has an equitable or legal interest in the property – thus making it the real party in interest – that party has standing to submit an application seeking tax exempt status." However, considering the recent Supreme Court pronouncement in *Performing Arts*, supra, and, having determined that appellant is not the legal title holder of the property, we find that the court's earlier holding in *Cleveland State University* has no application to the instant matter. Even if it did, THCP does not stand in the same position as Cleveland State University did in the foregoing case. The university, as owner of the land in question and lessee of the buildings located thereon, had a present and ongoing interest in the property for which

exemption was sought. Appellant cannot assert any interest in the subject property as of the time the application was filed, other than a contractual interest in remittance of prior taxes paid on the subject.

Next, appellant contends that since employees of the Ohio Department of Insurance have already determined that THCP is entitled to the exemption in question, the Tax Commissioner should be estopped from dismissing the application and/or denying the exemption. However, only the Tax Commissioner has the authority, pursuant to R.C. 5715.27, to determine whether certain real property is "subject to taxation or exempt therefrom." Therefore, while the Ohio Department of Insurance personnel may have come to their own conclusion that the subject property should be exempt from taxation, there is no significance to be attributed to such pronouncements, as the Department of Insurance has not been imbued with the statutory authority to make such a determination.

Finally, THCP argues that "since any alleged error in the filing or timeliness of the application for exemption was an error of the state of Ohio and ODI [Ohio Department of Insurance] --and not THCP – fundamental fairness and equity compel the tax commissioner to decide the application for exemption on the merits." In that vein, THCP also contends that it has been denied equal protection under the Ohio and U.S. Constitutions.

Considering the latter argument first, we question whether such constitutionality arguments were properly raised in the notice of appeal to this board. In *Moraine Hts. Baptist Church v. Kinney* (1984), 12 Ohio St.3d 134, the Supreme

Court reviewed its prior decisions regarding the specificity requirement imposed by R.C. 5717.02:

> "This court has consistently held that 'under R.C. 5717.02, a notice of appeal does not confer jurisdiction upon the Board of Tax Appeals to resolve an issue, unless that issue is clearly specified in the notice of appeal.' *Cleveland Elec. Illum. Co. v. Lindley* (1982), 69 Ohio St.2d 71, 75; *** *Lenart v. Lindley* (1980), 61 Ohio St.2d 110 ***; *Abex Corp. v. Kosydar* (1973), 35 Ohio St.2d 13 ***. Moreover, in *Gochneaur v. Kosydar* (1976), 46 Ohio St.2d 59, 66 ***, it was stated that '*** this court will not reverse a decision of the board where the notice of appeal to the board does not enumerate in definite and specific terms the precise errors claimed.' See, also, *Queen City Valves, Inc. v. Peck* (1954), 161 Ohio St. 579." Id. at 138. (Parallel citations omitted.)

Further, more specifically, in *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St.3d 229, the Supreme Court held in paragraph three of its syllabus:

> "The question of whether a tax statute is unconstitutional when applied to a particular state of facts must be raised in the notice of appeal to the Board of Tax Appeals, and the Board of Tax Appeals must receive evidence concerning this question if presented, even though the Board of Tax Appeals may not declare the statute unconstitutional. (*Bd. of Edn. of South-Western City Schools v. Kinney* [1986], 24 Ohio St.3d 184, *** construed.)" (Parallel citations omitted.)

Without being hypertechnical and even with a very broad reading of the specifications of error in the notice of appeal, we find that appellant did not raise the question of constitutionality. See *Queen City Valves*, supra. However, even if we had found that the constitutionality question had been sufficiently raised, this board has no jurisdiction to consider constitutional arguments and only the Supreme Court may

render a determination regarding such concerns. *Cleveland Gear*, supra; *MCI Telecommunciations Corp. v. Limbach* (1994), 68 Ohio St.3d 195.

Next, when considering arguments of fairness and equity, we note that the Tax Commissioner has no discretion, statutory or otherwise, to ignore the jurisdictional requirements for filing an application for exemption; a party cannot waive subject matter jurisdiction. See *Shawnee Twp. V. Allen Cty. Budget Comm.* (1991), 58 Ohio St.3d 14. Further, the Supreme Court has stated that it does not apply "equitable principles to tax matters." *General Motors Corporation v. Limbach* (1993), 67 Ohio St. 3d 90. Accordingly, we are restricted in our consideration of matters such as these to the provisions of the statute as prescribed by the General Assembly. We are not free to apply equity as we might see fit. See *Williams v. Tracy* (Aug. 1, 1997), BTA No. 1996-P-1244, unreported. This board is invested with only the jurisdiction given to it by law, and thus, has no equity jurisdiction. We are a creature of statute and must strictly enforce the law without regard to equity. *Steward v. Evatt* (1944), 143 Ohio St. 547. Thus, appellant's arguments for the application of equity and fairness must fail.

Accordingly, based upon the foregoing, this board finds that appellant has not overcome the presumption of validity of the Tax Commissioner's determination. See *Hatchadorian v. Lindley* (1986), 21 Ohio St.3d 66. The board finds that the Tax Commissioner properly dismissed THCP's application for real property tax exemption. It is the decision and order of the Board of Tax Appeals that the decision of the Tax Commissioner must be and hereby is affirmed.

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R.C. § 5715.27

C
BALDWIN'S OHIO REVISED CODE ANNOTATED
TITLE LVII. TAXATION
CHAPTER 5715. BOARDS OF REVISION; EQUALIZATION OF ASSESSMENTS
TAX COMMISSIONER

→5715.27 Right to complain to tax commissioner; notice to school board

(A) Except as provided in section 3735.67 of the Revised Code, the owner of any property may file an application with the tax commissioner, on forms prescribed by the commissioner, requesting that such property be exempted from taxation and that taxes and penalties be remitted as provided in division (B) of section 5713.08 of the Revised Code.

(B) The board of education of any school district may request the tax commissioner to provide it with notification of applications for exemption from taxation for property located within that district. If so requested, the commissioner shall send to the board for the quarters ending on the last day of March, June, September, and December of each year, reports that contain sufficient information to enable the board to identify each property that is the subject of an exemption application, including, but not limited to, the name of the property owner or applicant, the address of the property, and the auditor's parcel number. The commissioner shall mail the reports on or about the fifteenth day of the month following the end of the quarter.

(C) A board of education that has requested notification under division (B) of this section may, with respect to any application for exemption of property located in the district and included in the commissioner's most recent report provided under that division, file a statement with the commissioner and with the applicant indicating its intent to submit evidence and participate in any hearing on the application. The statements shall be filed prior to the first day of the third month following the end of the quarter in which that application was docketed by the commissioner. A statement filed in compliance with this division entitles the district to submit evidence and to participate in any hearing on the property and makes the district a party for purposes of sections 5717.02 to 5717.04 of the Revised Code in any appeal of the commissioner's decision to the board of tax appeals.

(D) The commissioner shall not hold a hearing on or grant or deny an application for exemption of property in a school district whose board of education has requested notification under division (B) of this section until the end of the period within which the board may submit a statement with respect to that application under division (C) of this section. The commissioner may act upon an application at any time prior to that date upon receipt of a written waiver from each such board of education, or, in the case of exemptions authorized by section 725.02, 1728.10, 5709.41, 5709.62, or 5709.63 of the Revised Code, upon the request of the property owner. Failure of a board of education to receive the report required in division (B) of this section shall not void an action of the commissioner with respect to any application. The commissioner may extend the time for filing a statement under division (C) of this section.

(E) A complaint may also be filed with the commissioner by any person, board, or officer authorized by section 5715.19 of the Revised Code to file complaints with the county board of revision against the continued exemption of any property granted exemption by the commissioner under this section.

(F) An application for exemption and a complaint against exemption shall be filed prior to the thirty-first day of December of the tax year for which exemption is requested or for which the liability of the property to taxation in that year is requested. The commissioner shall consider such application or complaint in accordance with

procedures established by the commissioner, determine whether the property is subject to taxation or exempt therefrom, and certify the commissioner's findings to the auditor, who shall correct the tax list and duplicate accordingly. If a tax certificate has been sold under section 5721.32 or 5721.33 of the Revised Code with respect to property for which an exemption has been requested, the tax commissioner shall also certify the findings to the county treasurer of the county in which the property is located.

(G) Applications and complaints, and documents of any kind related to applications and complaints, filed with the tax commissioner under this section, are public records within the meaning of section 149.43 of the Revised Code.

(H) If the commissioner determines that the use of property or other facts relevant to the taxability of property that is the subject of an application for exemption or a complaint under this section has changed while the application or complaint was pending, the commissioner may make the determination under division (F) of this section separately for each tax year beginning with the year in which the application or complaint was filed or the year for which remission of taxes under division (B) of section 5713.08 of the Revised Code was requested, and including each subsequent tax year during which the application or complaint is pending before the commissioner.

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R.C. § 5717.02

C
BALDWIN'S OHIO REVISED CODE ANNOTATED
TITLE LVII. TAXATION
CHAPTER 5717. APPEALS

→5717.02 Appeals from final determination of the tax commissioner; procedure; hearing

Except as otherwise provided by law, appeals from final determinations by the tax commissioner of any preliminary, amended, or final tax assessments, reassessments, valuations, determinations, findings, computations, or orders made by the commissioner may be taken to the board of tax appeals by the taxpayer, by the person to whom notice of the tax assessment, reassessment, valuation, determination, finding, computation, or order by the commissioner is required by law to be given, by the director of budget and management if the revenues affected by such decision would accrue primarily to the state treasury, or by the county auditors of the counties to the undivided general tax funds of which the revenues affected by such decision would primarily accrue. Appeals from the redetermination by the director of development under division (B) of section 5709.64 or division (A) of section 5709.66 of the Revised Code may be taken to the board of tax appeals by the enterprise to which notice of the redetermination is required by law to be given. Appeals from a decision of the tax commissioner concerning an application for a property tax exemption may be taken to the board of tax appeals by a school district that filed a statement concerning such application under division (C) of section 5715.27 of the Revised Code. Appeals from a redetermination by the director of job and family services under section 5733.42 of the Revised Code may be taken by the person to which the notice of the redetermination is required by law to be given under that section.

Such appeals shall be taken by the filing of a notice of appeal with the board, and with the tax commissioner if the tax commissioner's action is the subject of the appeal, with the director of development if that director's action is the subject of the appeal, or with the director of job and family services if that director's action is the subject of the appeal. The notice of appeal shall be filed within sixty days after service of the notice of the tax assessment, reassessment, valuation, determination, finding, computation, or order by the commissioner or redetermination by the director has been given as provided in section 5703.37, 5709.64, 5709.66, or 5733.42 of the Revised Code. The notice of such appeal may be filed in person or by certified mail, express mail, or authorized delivery service. If the notice of such appeal is filed by certified mail, express mail, or authorized delivery service as provided in section 5703.056 of the Revised Code, the date of the United States postmark placed on the sender's receipt by the postal service or the date of receipt recorded by the authorized delivery service shall be treated as the date of filing. The notice of appeal shall have attached thereto and incorporated therein by reference a true copy of the notice sent by the commissioner or director to the taxpayer, enterprise, or other person of the final determination or redetermination complained of, and shall also specify the errors therein complained of, but failure to attach a copy of such notice and incorporate it by reference in the notice of appeal does not invalidate the appeal.

Upon the filing of a notice of appeal, the tax commissioner or the director, as appropriate, shall certify to the board a transcript of the record of the proceedings before the commissioner or director, together with all evidence considered by the commissioner or director in connection therewith. Such appeals or applications may be heard by the board at its office in Columbus or in the county where the appellant resides, or it may cause its examiners to conduct such hearings and to report to it their findings for affirmation or rejection. The board may order the appeal to be heard upon the record and the evidence certified to it by the commissioner or director, but upon the application of any interested party the board shall order the hearing of additional evidence, and it may make such investigation concerning the appeal as it considers proper.

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R.C. § 5717.02

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R.C. § 5717.04

C
BALDWIN'S OHIO REVISED CODE ANNOTATED
TITLE LVII. TAXATION
CHAPTER 5717. APPEALS

→5717.04 Appeal from decision of board of tax appeals to supreme court

The proceeding to obtain a reversal, vacation, or modification of a decision of the board of tax appeals shall be by appeal to the supreme court or the court of appeals for the county in which the property taxed is situate or in which the taxpayer resides. If the taxpayer is a corporation, then the proceeding to obtain such reversal, vacation, or modification shall be by appeal to the supreme court or to the court of appeals for the county in which the property taxed is situate, or the county of residence of the agent for service of process, tax notices, or demands, or the county in which the corporation has its principal place of business. In all other instances, the proceeding to obtain such reversal, vacation, or modification shall be by appeal to the court of appeals for Franklin county.

Appeals from decisions of the board determining appeals from decisions of county boards of revision may be instituted by any of the persons who were parties to the appeal before the board of tax appeals, by the person in whose name the property involved in the appeal is listed or sought to be listed, if such person was not a party to the appeal before the board of tax appeals, or by the county auditor of the county in which the property involved in the appeal is located.

Appeals from decisions of the board of tax appeals determining appeals from final determinations by the tax commissioner of any preliminary, amended, or final tax assessments, reassessments, valuations, determinations, findings, computations, or orders made by the commissioner may be instituted by any of the persons who were parties to the appeal or application before the board, by the person in whose name the property is listed or sought to be listed, if the decision appealed from determines the valuation or liability of property for taxation and if any such person was not a party to the appeal or application before the board, by the taxpayer or any other person to whom the decision of the board appealed from was by law required to be certified, by the director of budget and management, if the revenue affected by the decision of the board appealed from would accrue primarily to the state treasury, by the county auditor of the county to the undivided general tax funds of which the revenues affected by the decision of the board appealed from would primarily accrue, or by the tax commissioner.

Appeals from decisions of the board upon all other appeals or applications filed with and determined by the board may be instituted by any of the persons who were parties to such appeal or application before the board, by any persons to whom the decision of the board appealed from was by law required to be certified, or by any other person to whom the board certified the decision appealed from, as authorized by section 5717.03 of the Revised Code.

Such appeals shall be taken within thirty days after the date of the entry of the decision of the board on the journal of its proceedings, as provided by such section, by the filing by appellant of a notice of appeal with the court to which the appeal is taken and the board. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within ten days of the date on which the first notice of appeal was filed or within the time otherwise prescribed in this section, whichever is later. A notice of appeal shall set forth the decision of the board appealed from and the errors therein complained of. Proof of the filing of such notice with the board shall be filed with the court to which the appeal is being taken. The court in which notice of appeal is first filed shall have exclusive jurisdiction of the appeal.

R.C. § 5717.04

In all such appeals the tax commissioner or all persons to whom the decision of the board appealed from is required by such section to be certified, other than the appellant, shall be made appellees. Unless waived, notice of the appeal shall be served upon all appellees by certified mail. The prosecuting attorney shall represent the county auditor in any such appeal in which the auditor is a party.

The board, upon written demand filed by an appellant, shall within thirty days after the filing of such demand file with the court to which the appeal is being taken a certified transcript of the record of the proceedings of the board pertaining to the decision complained of and the evidence considered by the board in making such decision.

If upon hearing and consideration of such record and evidence the court decides that the decision of the board appealed from is reasonable and lawful it shall affirm the same, but if the court decides that such decision of the board is unreasonable or unlawful, the court shall reverse and vacate the decision or modify it and enter final judgment in accordance with such modification.

The clerk of the court shall certify the judgment of the court to the board, which shall certify such judgment to such public officials or take such other action in connection therewith as is required to give effect to the decision. The "taxpayer" includes any person required to return any property for taxation.

Any party to the appeal shall have the right to appeal from the judgment of the court of appeals on questions of law, as in other cases.

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