ORIGINAL

IN THE SUPREME COURT OF OHIO

NBC-USA Housing, Inc. - Five,	:	
Appellant,	:	Case No. 2009-0919
v.	:	
Richard A. Levin, Tax Commissioner of Ohio, et al.,	:	Appeal from the Ohio Board of Tax Appeals
	:	Case No. 2006-N-1492
Appellees.		

MERIT BRIEF OF APPELLEE BOARD OF EDUCATION OF THE COLUMBUS CITY SCHOOL DISTRICT

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Introduction

Appellant seeks real property tax exemption for a twenty-five unit HUD 202 apartment complex. In support of its claim that its property should be exempt from taxation, Appellant relies on the fact that the property is "federally subsidized housing" which was established to benefit the "general welfare." Thus, Appellant claims, "the use of the property is inherently charitable" (Merit Brief, p. 16). As far as this appeal is concerned, what best promotes the "general welfare" was determined by the United States Congress when it provided that all HUD 202 projects would be subject to real property taxation by the states and local subdivisions thereof. Congress provided for the real property taxation of all HUD 202 projects by stating in Section 1701q(c)(2), Title 12, U.S. Code that the Secretary of HUD will make monthly "project rental assistance payments" to the property owner to cover "to cover any part of the costs attributed to [the] units" and to cover "reasonable project costs," and Section 891.105(5) (Definitions), Title 24, C.F.R. provides that these costs are "expenses related to the provision of housing and include[]: *** (5) Taxes."

The only "nexus" between the twenty-five apartment units in question and Appellant's claimed "charitable purpose" is established by the HUD 202 program under which the Federal Government can finance the construction of the property ("capital advances") under 12 USC 1701q(c)(1) and can subsidize the rent of every tenant in the property ("project rental assistance payments") 12 USC 1701q(c)(2). That nexus is not sufficient to cause the exemption of the property because Congress has determined that it is in the best interest of the general public to have HUD 202 projects pay their fair share of real estates in exchange, no doubt, for the public services that are provided to the property and to the tenants thereof. If the HUD 202 "capital

advances" and "rental assistance" payments are not taken into account, then Appellant's property is subject to the well-established principle that "[r]esidence in a dwelling with a family must necessarily be a private use of the premises" and "[w]here the exercise of such private rights constitutes the primary use of property," then the property cannot be exempt from taxation. *W. Res. Academy v. Bd. of Tax Appeals* (1950), 153 Ohio St. 133, 136, 41 O.O. 192, 91 N.E.2d 497; and *First Baptist Church of Milford v. Wilkins*, 110 Ohio St.3d 496, 2006 Ohio 4966, 854 N.E.2d 494, P 21. The same principle was set forth in *Goldman v. Friars Club, Inc.* (1952), 158 Ohio St. 185, 196, 48 Ohio Op. 147, 107 N.E.2d 518, 513, where the following was said:

"This court has held on numerous occasions that the use of lands for private homes for individuals and the use of land for low-rent housing for persons of limited income do not entitle the owner of the property to exemption from the payment of real estate taxes."

Proposition of Law No. 1:

> In Order To Vest The Ohio Board Of Tax Appeals With Jurisdiction To Determine Whether Real Property Is Entitled To Tax Exemption Under R.C. 5709.121, The Notice Of Appeal To The BTA Must Make Reference To R.C. 5709.121 Or At Least Make Reference To The Threshold Requirements Of This Section.

Appellant claims that the BTA erred in failing to consider whether its property was entitled to an exemption under R.C. 5709.121. However, Appellant failed to refer to R.C. 5709.121 or to any of the essential requirements of this section in its application for real property tax exemption filed with the Tax Commissioner and, again, in its notice of appeal to the BTA. The Board of Tax Appeals was correct in concluding that it had no jurisdiction to determine whether Appellant's property was entitled to real property exemption under R.C. 5709.121 because Appellant neither referred to R.C. 5709.121 in its notice of appeal nor specified any of the threshold requirements for an exemption under that section (for instance, that Appellant was

a "charitable institution" or that the property was used "in furtherance of or incidental to" its charitable purposes). Both the Tax Commissioner and the BTA have a right to know what sections of the Revised Code they are required to consider, or at least what principles of exemption law they are required to apply, when a property owner files an application for a real property tax exemption and contests the Commissioner's denial of such an exemption. A property owner seeking exemption under R.C. 5709.121 is required to point the BTA in the right direction by at least making some reference to R.C. 5709.121 or to the threshold requirements of that section.

R.C. 5717.02 states that the notice of appeal to the BTA "shall also specify the errors therein complained of." This requirement is jurisdictional. In *Cleveland Elec. Illum. Co. v. Lindley* (1982), 69 Ohio St.2d 71, 75, 23 O.O.3d 118, 430 N.E.2d 939, 943, this Court held the following [with citations omitted]:

"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. 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."

In a case that is similar to the appeal at hand in terms of whether Appellant's notice of appeal to the BTA raised the threshold requirements for purposes of R.C. 5709.121, this Court stated the following stated in *Community Health Professionals, Inc. v. Levin*, 113 Ohio St.3d 432, 2007-Ohio-2336 [P20]:

" *** [T]he Tax Commissioner failed to challenge the charitable nature of [the owner] in the notice of appeal to this court, as required by R.C. 5717.04. Therefore, the only question before

us concerns whether the property has been used in furtherance of or incidently to [the owner's] purpose and not with the view to profit."

The appeal in *Community Health Professionals*, supra, arose under R.C. 5717.04, which contains the same requirement as does R.C. 5717.02 that a notice of appeal must set forth "the errors therein complained of."

Appellant did not make reference to R.C. 5709.121 in its application for real property tax exemption filed with the Tax Commissioner under R.C. 5715.27. In answer to Question 13 on the application form, which asks "Under what section(s) of the Ohio Revised Code is exemption sought?", Appellant stated: "Elderly and Handicapped Housing O.R.C. 5709.12. As per Ohio House Bill 95." Appellant's notice of appeal to the BTA raised six issues, which were the following:

1) The claim that its property is entitled to an exemption "under Ohio Revised Code §5709.12 since the subject property is used exclusively for charitable purposes";

2) The claim that the property meets "the requirement of being used exclusively for charitable purposes under Ohio Revised Code §5709.12";

3) The Commissioner's erroneous reliance on *Philada Home Fund v. Bd. of Tax Appeals* (1966), 5 Ohio St. 2d 135, 34 O.O. 2d 262, 214 N.E. 2d 431, and *Cogswell Hall, Inc. v. Kinney* (1987), 30 Ohio St. 3d 43; 506 N.E.2d 209; 30 Ohio B. Rep. 85 (which make no reference to R.C. 5709.121);

4) "The Tax Commissioner failed to consider *** that the property is owned by a religious non-profit organization whose purpose is to provide housing to the aged, low-income residents";

5) The Tax Commissioner "misinterpreted R.C. §5709.12(B), §5709.12(C) and §5709.12(E)"; and

6) The decision of the Tax Commissioner "is against the manifest weight of the evidence."

Appellant relies on this Court's prior statements that R.C. 5709.121 is a "definition" of the "charitable" use exemption in R.C. 5709.12, which must mean, according to Appellant, that R.C. 5709.121 does not have to be identified in any manner in a notice of appeal that merely makes reference to R.C. 5709.12. According to Appellant, R.C. 5709.121 "is not an independent exemption" by itself (Appellant's Merit Brief, p. 6), and does not have to be mentioned in a notice of appeal that merely refers to R.C. 5709.12.

While this Court has referred to R.C. 5709.121 as a definition of the charitable use language in R.C. 5709.12, R.C. 5709.121 does not actually "define" anything, and it is an "independent" section. R.C. 5709.121(A) provides an independent set of rules which (as relevant here) determine when "[r]eal property *** belonging to a charitable *** institution *** shall be considered as used exclusively for charitable *** purposes." This language simply provides that property satisfying the separate and independent requirements of R.C. 5709.121 is entitled to an exemption under the charitable use provisions of R.C. 5709.12. This Court previously recognized that R.C. 5709.121 is independent of R.C. 5709.12 when it stated that R.C. 5709.121 "is not all-encompassing." For instance in *Episcopal Parish of Christ Church, Glendale v. Kinney* (1979), 58 Ohio St.2d 199, 200-201, 12 O.O.3d 197, 389 N.E.2d 847, citing with approval Justice Stern's concurring opinion in *White Cross Hosp. Assn. v. Bd. of Tax Appeals*, 38 Ohio St.2d at 203, 67 O.O.2d 224, 311 N.E.2d 862, this Court stated as follows:

"Initially, it is important to observe that, although R.C. 5709.121 purports to define the words used exclusively for 'charitable' or 'public' purposes, as those words are used in R.C. 5709.12, the definition is not all-encompassing." [P18]

Indeed, much of the property that is entitled to exemption under R.C. 5709.121 cannot be exempted from taxation under R.C. 5709.12, and that, of course, was why R.C. 5709.121 was enacted. For this reason, it is essential for a property owner to inform the BTA that it is requesting an exemption under the provisions of R.C. 5709.121, notwithstanding any claim that one section "defines" the other. The fundamental distinction between these two sections is based on the well-settled interpretation of R.C. 5709.12 that the "ownership [of the property] and use for charitable purposes must coincide"; that is, in order to be exempt from taxation under R.C. 5709.12, the owner of the property had to be the actual user of the property. After setting forth the history of the relevant statutes and constitutional provisions, Justice Day, concurring in *Zangerle v. State* (1929), 120 Ohio St. 139, 145; 165 N.E. 709, 711, noted that "[t]he writer is of opinion that, by the provisions of the foregoing statute and of the Constitution, ownership and use for charitable purposes must coincide." This interpretation was affirmed by this Court in *Lincoln Memorial Hospital, Inc. v. Warren* (1968), 13 Ohio St. 2d 109, 100, 42 Ohio Op. 2d 327, 235 N.E.2d 129. More recently, in *First Baptist Church of Milford, Inc. v. Wilkins*, 110 Ohio St. 3d 496, 2006 Ohio 4966, 854 N.E.2d 494, this Court stated that "the ownership and use must coincide for exemption under R.C. 5709.12" [P13]. This Court has "approved" Justice Stern's concurring opinion in *White Cross Hosp. Assn.*, supra, in numerous cases: see *Community Health Professionals, Inc. v. Levin*, 113 Ohio St. 3d 432, 2007 Ohio 2336, P17, 18, 866 N.E.2d 478; *Episcopal Parish of Christ Church, Glendale v. Kinney* (1979), 58 Ohio St.2d 199, 200-201, 12

O.O.3d 197, 389 N.E.2d 847, and *Bethesda Healthcare, Inc. v. Wilkins*, 101 Ohio St.3d 420, 2004 Ohio 1749, 806 N.E.2d 142, P 26-27.

R.C. 5709.121 then sets forth the rules that apply when the "ownership and use for charitable purposes" do not "coincide." Division (A) applies to property "belonging to a charitable *** institution" when it is "used *** by one or more other such institutions *** under a lease, sublease, or other contractual arrangement." Division (B) applies to property that "is made available under the direction or control of such institution, *** for use in furtherance of or incidental to its charitable *** purposes ***." The only overlapping provisions of the two sections are the provisions that deal with the actual use of the property by the owner institution itself under Division (A), where the property is "used by such [the owner] institution" for "other charitable, educational, or public purposes." By enacting R.C. 5709.121, the General Assembly must be deemed to have codified the prior interpretation of R.C. 5709.12 that the "ownership and use for charitable purposes must coincide."

The point of referring to the history of these two sections and to the doctrine that the "ownership and use for charitable purposes must coincide" under R.C. 5709.12 is to show that R.C. 5709.121 is an independent section that applies, in substantial part, to property that would not otherwise be exempt under R.C. 5709.12. Consequently, a mere reference in a notice of appeal to R.C. 5709.12 and to the claim that the property is "used exclusively for charitable purposes" does not raise the issue of whether the property owner is a "charitable institution" as required by R.C. 5709.121 (which is not a necessary requirement under R.C. 5709.12) or raise the different specific use requirements that are set forth in R.C. 5709.121(A) and (B) (and not found in R.C. 5709.12). In this sense, R.C. 5709.121 is not a mere "definition" of the charitable use language in R.C. 5709.12.

The BTA was correct in refusing to consider Appellant's request for a real property tax exemption under R.C. 5709.121 because Appellant failed to raise that issue in its exemption application and in its notice of appeal to the BTA.

Proposition of Law No. 2:

> Private Residential Apartment Units In A HUD 202 Apartment Project Are Not Entitled To Real Property Tax Exemption Under R.C. 5709.12 Or Under R.C. 509.121(B).

In its second proposition of law, Appellant claims that its property is entitled to exemption under R.C. 5709.121(B) because it belongs to a "charitable institution" and "is made available under the direction or control of such institution for use in furtherance of or incidental to its charitable purposes" under R.C. 5709.121(B) (Merit Brief, p. 11).

However, Appellant's twenty-five apartment units cannot be exempt under Division (B) of R.C. 5709.121 for numerous reasons. First, the general provisions of R.C. 5709.121(B) are not applicable to Appellant's apartment units because the apartment units are being used "under a lease, sublease, or other contractual arrangement" and the actual tenants are private individuals and not "a charitable or educational institution or to the state or a political subdivision" as required by Division (A) of R.C. 5709.121. Second, the general provisions of R.C. 5709.121(B) are not applicable to Appellant's apartment units because the apartment units meet the definition of "independent living facilities" set forth in R.C. 5709.12(A), but do not satisfy the requirements for exemption of such property under R.C. 5709.12(C)(2). Third, there is no evidence to prove that the twenty-five apartments units are used by the tenants "under the direction or control of" Appellant. The use of a private apartment unit by a tenant is not "under the direction or control of" the landlord. Finally, private apartment units are simply not used "in

furtherance of or incidental to [any] charitable *** purposes" even when the apartments are subsidized in one form or another by the Federal Government.

R.C. 5709.121 provides, in relevant, part as follows:

"Real property *** belonging to a charitable *** institution *** shall be considered as used exclusively for charitable *** purposes by such institution *** if it meets one of the following requirements:

(A) It is used by such institution*** or by one or more other such institutions *** under a lease, sublease, or other contractual arrangement: *** (2) For other charitable *** purposes;

(B) It is made available under the direction or control of such institution *** for use in furtherance of or incidental to its charitable *** purposes ***."

Appellant describes itself as a "non-profit religious organization" and it relies, in part, on its religious activities and religious services that it provides to the apartment tenants to support its claim for tax exemption (Merit Brief, p. 11). As a "religious organization," however, Appellant would not qualify as a "charitable institution" under R.C. 5709.121. See *Summit United Methodist Church v. Kinney* (1982), 2 Ohio St. 3d 72, 73; 442 N.E.2d 1298, 1299; 2 Ohio B. Rep. 628 ("we find sufficient evidence in the record to support the [BTA's] finding that appellant was primarily a religious institution, and therefore not entitled to tax exemption under R.C. 5709.12 and 5709.121"); *Operation Evangelize-Youth Mission, Inc. v. Kinney* (1982), 69 Ohio St. 2d 346; 432 N.E.2d 200; 23 Ohio Op. 3d 315, February 24, 1982 (affirmed BTA decision holding that a "non-profit Ohio corporation organized for the purposes of conducting and carrying on a Christian Evangelistic service" was not a "charitable institution"); and *Episcopal Parish of Christ Church v. Kinney* (1979), 58 Ohio St. 2d 199, 201; 389 N.E.2d 847;

12 Ohio Op. 3d 197 ("It is evident from the foregoing that appellant, as a religious institution, does not necessarily fall within that category defined as charitable institutions.")

1. Property That is Used Under A Lease, Sublease, Or Other Contractual Arrangement Cannot Be Exempt Under R.C. 5709.121(B).

A statute, or part thereof, that sets for a specific requirement that must be met in order for real property to be exempt from taxation cannot be evaded by resort to a more general statute, or part thereof, because "the general language could no longer be construed as applying to property for which specific criteria had been established." See *Rickenbacker Port Authority v. Limbach, Tax Commr.* (1992), 64 Ohio St. 3d 628, 631; 597 N.E.2d 494, 496; *Toledo Business & Professional Women's Retirement Living, Inc. v. Bd. of Tax Appeals* (1971), 27 Ohio St.2d 255, 56 O.O.2d 153, 272 N.E.2d 359; and *Summit United Methodist Church v. Kinney* (1982), 2 Ohio St.3d 72, 2 OBR 628, 442 N.E.2d 1298.

It seems obvious that the General Assembly did not contemplate that property being used by a tenant "under a lease, sublease, or other contractual arrangement" under R.C. 5709.121(A) could also "be made available under the direction or control of [the owner] institution" as required by Division (B). Otherwise, of course, Division (B) of R.C. 5709.121, with its fairly vague use requirement ("in furtherance of or incidental to [the] charitable *** purposes" of the owner institution) would subsume and repeal all other parts of R.C. 5709.121. Real property that is being used by someone or some entity "under a lease, sublease, or other contractual arrangement" must obtain exemption under Division (A) of R.C. 5709.121, and the actual user of the property in this case must be a "charitable institution" or other qualified tenant. See *Northeast Ohio Psychiatric Inst. v. Levin*, 121 Ohio St. 3d 292, 2009 Ohio 583, 903 N.E.2d 1188. Real property being used "under a lease, sublease, or other contractual arrangement" cannot obtain exemption under Division (B).

The statutory distinction between use that is "under a lease, sublease, or other contractual arrangement" and use that is "under the direction or control of" the owner charitable institution is critical. The vague use requirements of R.C. 5709.121(B) ("in furtherance of or incidental to") may make some sense when the actual use of the property, and the actual user of the property, are directly under the control of the owner charitable institution, which can then dictate and guarantee that the actual use of the property has direct relationship to its own charitable purposes. However, the use requirements of R.C. 5709.121(B) make no sense whatsoever when the user of the property is an independent tenant who has acquired the right to use the property "under a lease, sublease, or other contractual arrangement." Any entity that acquires the right to use the property "under a lease, sublease, or other contractual arrangement" must be a "charitable institution" in order for the property to be entitled to an exemption under R.C. 5709.121.

All of the private tenants of Appellant's twenty-five apartment units acquired the right to use the apartments for their own strictly private purposes "under a lease, sublease, or other contractual arrangement." However, none of these tenants are "charitable institutions" are required by R.C. 5709.121(A). Consequently, none of the apartment units are entitled to real property tax exemption under the "specific criteria" that has "been established" for leased real property by R.C. 5709.121(A). None of the apartment units can be exempted from taxation under Division (B) of R.C. 5709.121 under the "general" claim that the apartments units as "made available under the direction or control of" the Appellant.

2. Appellant's Apartment Complex Is An "Independent Living Facility" Under R.C. 5709.12(A), But It Does Not Meet The Requirements For Exemption Of Such Property Under R.C. 5709.12(C)(2).

Appellant's property is an "independent living facilit[y]" under R.C. 5709.12(A), but it does not satisfy the requirements for tax exemption of R.C. 5709.12(C)(2). Division (A) of this section defines "independent living facilities" as follows:

"(A) As used in this section, 'independent living facilities' means any residential housing facilities and related property that are not a nursing home, residential care facility, or adult care facility as defined in division (A) of section 5701.13 of the Revised Code."

Division (C)(2) of R.C. 5709.12 provides that an independent living facility can be exempt from taxation only if residential housing is provided to certain individuals "without charge" and in connection with a licensed "nursing home, residential care facility, or adult care facility." This provision reads as follows:

"(2) Independent living facilities are exempt from taxation if they are operated in conjunction with or at the same site as a home for the aged described in division (B)(2) of section 5701.13 of the Revised Code; operated by a corporation, association, or trust described in division (B)(1)(b) of that section; operated exclusively for the benefit of members of the corporation, association, or trust who are retired, aged, or infirm; and provided to those members without charge in consideration of their service, without compensation, to a charitable, religious, fraternal, or educational institution."

An apartment complex that otherwise falls with the definition of an "independent living facilit[y]" must meet the specific requirements of R.C. 5709.12(C)(2) in order to be exempt and cannot obtain exemption under another more general provision of the exemption statutes. See

Toledo Business & Professional Women's Retirement Living, Inc. v. Bd. of Tax Appeals (1971), 27 Ohio St. 2d 255, 258-259, 56 Ohio Op. 2d 153, 272 N.E.2d 359, 362, wherein it was said that: "The taxpayer urges that R. C. 5709.121, 3 effective October 24, 1969, vitiates the dissenting opinion in *Philada Fund Home v. Board of Tax Appeals*, supra (5 Ohio St. 2d 135). But its general language cannot be construed to affect the special requirements of R. C. 5709.12 and 5701.13, as amended and adopted respectively a year and one-half earlier."

3. Private Apartment Units Are Not Used For "Charitable Purposes" Or "In Furtherance Of Or Incidental To" A "Charitable Purpose."

It is well settled that private residential apartment units are not used for "charitable purposes" (the issue raised in Appellant's Proposition of Law No. IV). In *Cogswell Hall, Inc. v. Kinney, Commr.* (1987), 30 Ohio St. 3d 43; 506 N.E.2d 209; 30 Ohio B. Rep. 85, this Court affirmed the "long-standing" rule set forth in *Philada Home Fund v. Bd. of Tax Appeals* (1966), 5 Ohio St. 2d 135, 34 O.O. 2d 262, 214 N.E. 2d 43, "* * * that the furnishing of low-cost housing at or below market prices, where residents pay a part or all of their rental costs, is not, in and of itself, an exclusive use of the property for charitable purposes." See also *Columbus Colony Housing, Inc. v. Limbach* (1989), 45 Ohio St. 3d 253, 544 N.E.2d 235; and *National Church Residences v.. Lindley* (1985), 18 Ohio St. 3d 53, 18 OBR 87, 479 N.E. 2d 870.

This "long-standing" rule also applies to "independent living facilities" and other non-licensed residential housing. See *Toledo Bus. & Prof. Women's Retirement Living Inc. v. Bd. of Tax Appeals* (1971), 27 Ohio St. 2d 255, 56 O.O. 2d 153, 272 N.E. 2d 359; *S.E.M. Villa II, Inc. v. Kinney* (1981), 66 Ohio St. 2d 67, 20 O.O. 3d 60, 419 N.E. 2d 879; and *Ohio Presbyterian Homes, Inc. v. Kinney* (1984), 9 Ohio St. 3d 90, 9 OBR 319, 459 N.E. 2d 500.

Appellant attempts to distinguish these cases by relying on the "services" it provides to its "tenants" and on its "religious mission" (Merit Brief, p. 18). The "services" Appellant

provides to its tenants are not sufficient to justify an exemption to the private apartment units and are not sufficient to satisfy the required "nexus" between the strictly private use of the apartments and Appellant's "charitable purposes."

These principles also apply to publicly-owned low income housing. See *Youngstown Metropolitan Housing Authority v. Evatt, Tax Commr.* (1944), 143 Ohio St. 268; 55 N.E.2d 122; 28 Ohio Op. 163; *Dayton Metropolitan Housing Authority v. Evatt, Tax Commr.* (1944), 143 Ohio St. 10; 53 N.E.2d 896; 27 Ohio Op. 557; 152 A.L.R. 223, and *Columbus Metropolitan Housing Authority v. Thatcher, Aud.* (1942), 140 Ohio St. 38, 48; 42 N.E.2d 437, 442; 23 Ohio Op. 252, where it was said that:

"It seems to us clear that dwellings are leased to family units for the purposes of private homes, the use of such dwellings is private and not public. Under Anglo-Saxon law and tradition, there is nothing more private than one's home. ***. That every man's house is his castle has not yet been erased from our laws.

HUD apartments complexes are not entitled to a sales tax exemption under the same principles. See *Quaker Apartments v. Kosydar* (1974), 38 Ohio St. 2d 20, 23, 67 O.O. 2d 36, 38, 309 N.E. 2d 863, 865,and *Columbus Colony Housing Inc. v. Limbach, Tax Commr.* (1989), 45 Ohio St. 3d 253; 544 N.E.2d 235.

It likewise clear that private apartment units are not used "in furtherance of or incidental to" any "charitable purpose." In *Ohio Masonic Home v. Bd. of Tax Appeals* (1977), 52 Ohio St.2d 127, 130, 6 O.O.3d 343, 370 N.E.2d 465, 468, this Court stated that R.C. 5709.121(B) "requires 'use in furtherance of or incidental to' the charitable purpose of the institution" that owns the property. In *Am. Chem. Soc. v. Kinney* (1982), 69 Ohio St.2d 167, 172, 23 O.O.3d 197, 431 N.E.2d 1007, 1010, held that under R.C. 5709.12(B) "the property must be used in

furtherance of or incidental to [the charitable] purpose" of the owner-institution. In *Community Health Professionals, Inc. v. Levin*, supra, at (P21) this Court stated that in determining whether an exemption can be granted under R.C. 5709.121(B), "this court focuses on the relationship between the actual use of the property and the purpose of the institution." In *State Teachers Retirement Bd. v. Kinney* (1981), 68 Ohio St. 2d 195, 198, 22 Ohio Op. 3d 434, 436, 429 N.E.2d 1069, 1071, this Court looked for the "nexus" between the actual use of the property and the exempt purpose of the owner-institution.

In Appellant's case, the twenty-five apartment units are being used for strictly private residential purposes by private individuals. The Ohio General Assembly has provided (for instance, with respect to "independent living facilities") and this Court has consistently held "that the furnishing of low-cost housing at or below market prices, where residents pay a part or all of their rental costs, is not, in and of itself, an exclusive use of the property for charitable purposes." The private use of Appellant's apartment units is the only use of the units so the question of whether the private use is "an exclusive use" for charitable purposes is not the issue. If the apartment units are not being used for "charitable purposes" then they cannot be "used in furtherance of or incidental to [the charitable] purpose" of the owner-institution (*Am. Chem. Soc. v. Kinney*, supra). The words "for use in furtherance of" a charitable purpose mean use "for" a charitable purpose. The words "for use *** incidental to" a charitable purpose refer to a minor or insignificant use of the property and not to the only use of the property which is for private residential purposes. In short, Appellant's apartment units are not "made available under the direction or control of [Appellant] *** for use in furtherance of or incidental to its charitable *** purposes" because "the furnishing of low-cost housing at or below market prices, where residents pay a part or all of their rental costs is not, in and of itself" a charitable use or charitable

purpose, no matter how benevolent the motives of the property owner may be and no matter that the Federal Government may have subsidized the acquisition, construction, and operation of the apartment complex. It has been the consistent policy of this State that Appellant's purpose to provide "safe, comfortable and affordable housing" to needy individuals is not a "charitable purpose" where the "residents pay a part or all of their rental costs."

The one exception to this rule, which does not apply to Appellant's property, is where "the persons who occupy the apartments perform any function for [the owner of the units] that would make it crucial for that person to be housed in these apartments." See *True Christianity Evangelism v. Zaino*, 91 Ohio St.3d 117, 2001-Ohio-295 (P20); *Wellsville v. Kinney* (1981), 66 Ohio St. 2d 136, 20 Ohio Op. 3d 156, 420 N.E.2d 123; and *Cincinnati Nature Ctr. Assn. v. Bd. of Tax Appeals* (1976), 48 Ohio St.2d 122, 125, 2 O.O.3d 275, 357 N.E.2d 381.

The reversal of the "long-standing" rule set forth in *Cogswell Hall* and *Philada Home Fund*, supra, would deprive the school districts of this State of desperately needed tax revenue, while at the same time provide no benefit to the general public. In *Philda Home Fund*, supra (at 5 Ohio St. 2d, 139), this Court stated that "[t]he reason for exemption is present benefit to the general public sufficient to justify the loss of tax revenue." In *Beerman Foundation,* supra (at 152 Ohio St, 181), this Court stated that "[t]axation is the rule and exemption is the exception. Every property removed from the tax duplicate increases the tax burden on other property." As was stated in *Goldman v. Bentley Post* (1952), 158 Ohio St. 205, 207, 48 Ohio Op. 155, 107 N.E.2d 528, 529, "[t]his must necessarily be the rule in order to preserve equality in the burden of taxation." Many of Ohio's low income individuals, families, and elderly reside in and pay for their own homes and rental housing. A tax exemption on Appellant's property, followed by the exemption of literally hundreds of other properties that would fall within the precedent, and no

matter how meritorious Appellant's actions might be, would unfairly increase the tax burden on all of these other individuals and families.

Proposition of Law No. 3:

> The BTA Is Vested With Wide Discretion In Determining The Weight To Be Given To The Evidence And Credibility Of Witnesses That Come Before The Board.

Appellant claims that the BTA erred in commenting that Appellant had failed to provide certain "corroborating evidence in the form documents" to support certain testimony given by Appellant's witness, Michelle Tarver (Merit Brief, p. 14). Appellant does not show how the requirement of documents to support Ms. Tarver's testimony had an impact on the BTA's decision or that it played any role in the BTA's denial of the tax exemption to Appellant's property. In fact, the claimed error in question was harmless error. The fact that Appellant may have "sponsored predevelopment costs" for the property or that it acquired the land has no relevance to the issue of whether the private apartment units can be exempt from taxation under R.C. 5709.12 or R.C. 5709.121.

This court has consistently held that the BTA is vested with wide discretion in determining the weight to be given to the evidence and credibility of witnesses that come before the board, and that "[a]bsent a showing of an abuse of discretion, this court will not reverse the BTA's determination as to the credibility of witnesses." Furthermore, the BTA's decision will not be reversed on the basis of harmless error. *Higbee Co. v. Cuyahoga County Bd. of Revision*, 101 Ohio St. 3d 1485, 2004 Ohio 1293, 805 N.E.2d 537 (P 30 and 31).

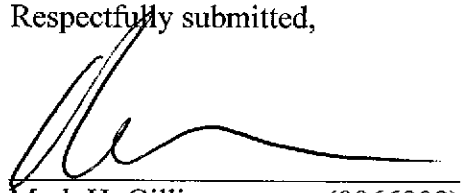
The specific part of Ms. Tarver's testimony that is in issue does not literally say what Appellant claims that it says. Ms. Tarver was speaking generally about how individual churches submit a "memorandum of understanding" to the Church's Housing Commission "which

includes their agreement to – the local church to sponsor the predevelopment costs, and the purchasing of the land to participate in the federally subsidized housing program" (Supp. p. 30: BTA TR, p. 14). Ms. Tarver did not specifically testify that Appellant had done either of these things for the property that is involved in this appeal, and at most her testimony means that Appellant had submitted a "memorandum of understanding" to the Church's Housing Commission "which include[d] [Appellant's] agreement to *** sponsor the predevelopment costs, and the purchasing of the land to participate in the federally subsidized housing program." The fact that Appellant agreed to do these things has no relevance to the issue of whether the private apartment units can be exempt from taxation under R.C. 5709.12 or R.C. 5709.121.

CONCLUSION

For the reasons set forth herein, this Court is respectfully requested to affirm the decision of the Ohio Board of Tax Appeals, which denied a real property tax exemption to Appellant's property.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing brief of Appellee was served upon Karen H. Bauernschmidt, 1370 West 6th Street, Suite 200, Cleveland, Ohio, 44113, Paul Stickel, Assistant County Prosecutor, 373 South High Street, 20th Floor, Columbus, Ohio 45215, and Sophia Hussain, Assistant Attorney General, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215, by regular U.S. mail, postage prepaid, this 14th day of August, 2009.

Mark H. Gillis