IN THE SUPREME COURT OF OHIO

Appeal from the Ohio Board of Tax Appeals

250 SHOUP MILL, LLC, Appellant, vs. JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO Appellee.	)))))))))	Case No. 2015-0340

BRIEF OF APPELLANT

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Statement of Facts

1. Procedural Background

Appellant Shoup Mill, LLC ("Shoup Mill") filed its **Application for Real Property Tax Exemption and Remission** ("Application") in 2010, relating to approximately 3.8 acres of land and improvements it owned located in the Dayton City School District, Montgomery County, Ohio. The Application was filed in 2010 and requests exemption for tax year 2010.

In his Final Determination, the Tax Commissioner denied exemption for tax year 2010 under R.C. 5709.07, 5709.12 and 5709.121, which denial Shoup Mill challenged in its appeal to the Board of Tax Appeals (the "BTA").

On January 27, 2015, the BTA ruled that Shoup Mill was not entitled to tax exemption under either R.C. 5709.07(A)(1) or 5709.121. As to 5709.07(A)(1), the BTA determined that "the lease of the property is 'with a view to profit,'" disqualifying Shoup Mill from exemption. The BTA likewise determined that Shoup Mill was not entitled to exemption under 5709.121, because Shoup Mill's use of the property is not charitable and Shoup Mill is neither a charitable nor educational institution.

For all the reasons outlined herein, the BTA's determination was unreasonable and erroneous. This Court should rule that Shoup Mill is entitled to tax exemption.

2. The property's charter school tenant

The property at issue in this tax exemption appeal is occupied by its leasehold tenant, a charter school known as Horizon Science Academy Dayton High School ("Horizon Dayton H.S.") (Shoup Mill Hearing Transcript ("Shoup Mill Tr.") at 8; Shoup Mill Application, Shoup Mill Hearing Exhibit ("Shoup Mill Ex.") 1 at 2) During the tax year in question, this school served approximately 240 students in the seventh through twelfth grades. (Shoup Mill Tr. at 8-9) The property was converted from a former pet store into a school facility, containing classrooms,

a gymnasium, a cafeteria, administrative offices, and labs. (Id. at 8, 10)

Horizon Dayton H.S. is an Ohio nonprofit corporation (Attachment G-6 to Shoup Mill Application, Shoup Mill Ex. 13; Shoup Mill Tr. at 31) which was formed on March 12, 2009 exclusively "for public charitable, educational, and scientific purposes, exclusively for the benefit and support of, to perform some of the functions of, and to carry out some of the purposes of, charter schools (community schools) which are Ohio public benefit corporations" described in sections 501(c)(3) and 501(a)(1) of the United States Internal Revenue Code, 26 U.S.C. 1, et seq. ("IRC"). (Art. Third, Shoup Mill Ex. 13) Horizon Dayton H.S.'s Articles of Incorporation also state it is organized otherwise than for pecuniary gain or profit, shall be operated exclusively for educational purposes, and that no part of its net earnings can inure to the benefit of, or be distributable to, its members, directors, officers or any other private individual, other than as reasonable compensation for services rendered or in furtherance of the corporation's exempt purposes. (Art. Eighth, Shoup Mill Ex. 13)

Horizon Dayton H.S. was determined by the Internal Revenue Service to be exempt from federal income tax under section 501(c)(3) IRC. (Shoup Mill Ex. 15; Shoup Mill Tr. at 10)

The tax exemption granted in this case will inure to and benefit Horizon Dayton H.S. because it is obligated by the express provisions of the lease, namely Section 9, to reimburse Shoup Mill for real estate taxes due and payable with respect to the property. (Shoup Mill Ex. 3, at 3; Shoup Mill Tr. at 18-19)

3. The property's lessor / owner

Appellant Shoup Mill is the lessor and owner of the property in question. On May 8, 2009, Articles of Organization were filed with the Ohio Secretary of State forming 250 Shoup Mill LLC as a nonprofit limited liability company (the "Articles"). (Attachment G-1 to the

Shoup Mill Application, Shoup Mill Ex. 6) The Articles state that Shoup Mill was organized to "acquire, renovate, rehabilitate and construct a charter school facility at 250 Shoup Mill Road, Dayton *** and to own, hold, lease, mortgage, and pledge [that project] at the direction of, and for the benefit of, New Plan Learning, Inc." ("NPL").

Shoup Mill's Operating Declaration (Attachment G-2 to the Shoup Mill Application, Shoup Mill Ex. 7) provides that (a) NPL is Shoup Mill's sole member (Preamble), (b) Shoup Mill's "profits and losses" shall be allocated to NPL (Sec. 4.4); (c) distributions are to be made to NPL, provided that NPL at that time is an Ohio nonprofit corporation (Sec. 4.5); (d) management of Shoup Mill is reserved to NPL (Sec. 5.1); and Shoup Mill can acquire no property or assets other than those related to the charter school facility (Sec. 9.1(a)). It should be noted that Mr. Arabaci, NPL's President (Shoup Mill Tr. at 17), testified at the BTA hearing that at all relevant times Shoup Mill operated strictly in accordance with the foregoing requirements and restrictions (id. at 12), and that Shoup Mill is owned 100% by NPL. (Id. at 11, 30-31)

Mr. Arabaci also testified that NPL used separate title holding entities to insulate its other supported schools from a default or potential liability from lawsuits affecting only one school (2350 Morse, LLC Hearing Transcript ("Morse Tr.") at 50-51)[1] and, being a single-member LLC, Shoup Mill was a disregarded entity for tax purposes and did not need to obtain, separately from NPL, status as a federal tax-exempt entity under § 501(c)(3) of the IRC. (Shoup Mill Tr. at 12-13; Morse Tr. at 50; Breeze Tr. at 31-32)

[1] For the sake of efficiency in the presentation of common facts, the BTA hearing in this case was conducted at the same session as the hearings in related cases involving 2350 Morse, LLC (BTA Consolidated Case Nos. 2012-1934 and 2012-2214, Ohio Supreme Court case no. 2015-0342) and Breeze Inc. (BTA Case No. 2012-2216, Ohio Supreme Court case no. 2015-0341). Counsel for the Tax Commissioner was present at all three hearings and received the offered exhibits in all three cases. Accordingly, citation to the transcripts and the exhibits in the other cases are made for facts relevant to this case.

4. New Plan Learning, Inc.

Because Shoup Mill was for all relevant times wholly-owned and controlled by NPL, Shoup Mill respectfully submits that this Court must understand the nature of NPL and its purposes in order to consider fully Shoup Mill's position.

NPL was formed on November 10, 2005 as an Ohio nonprofit corporation by the filing of its Initial Articles of Incorporation (the "Initial Articles") with the Ohio Secretary of State. (Shoup Mill Ex. 8) The Initial Articles stated that: (a) NPL was to be operated for public charitable, educational and scientific purposes exclusively for the benefit and support of and to perform some of the purposes of any charter or community school that is an Ohio public benefit corporation described in Sections 501(c)(3) and 509(a)(1) of the IRC; (b) NPL was at all times to be operated, supervised or controlled by such supported charter or community schools; and (c) in carrying out its charitable purposes, NPL was authorized to make payments to supported schools and to provide facilities and services for supported schools, among other activities. (Art. Third, Shoup Mill Ex. 8 at 2, 5) NPL was expressly limited to such activities as were in consonance with such purposes, and no part of NPL's net earnings could inure to the benefit of any person participating in the operation of NPL nor any other private individual, other than as reasonable compensation for services rendered. (Id. at 6)

NPL filed amended Articles of Incorporation (the "Amended Articles") on July 14, 2009. (Attachment G-3 to the Shoup Mill Application, Shoup Mill Ex. 9, Rec. 106). The "purposes" clause of the Amended Articles deleted specific reference to any particular charter school and affirmed that NPL is organized and shall be operated for the benefit and support of organizations both that (a) are publicly-supported 501(c)(3) organizations, and (b) operate charter schools, to which NPL may lease real property either directly or through one or more wholly-owned

corporations or limited liability companies. (Id. at 3) In other relevant respects, the Amended Articles contain virtually the same restrictions and prohibitions relating to NPL's nonprofit purposes and activities as its Initial Articles.

NPL's Amended and Restated Code of Regulations (the "Amended Code"), which was adopted after NPL filed its Amended Articles in 2009 (Shoup Mill Ex. 10; Morse Tr. at 37-38), provides that NPL has no members *per se* but that its directors act in the place of members, as expressly permitted by R.C. 1702.14. The Amended Code also provides that the directors of NPL are to be elected by members of the governing bodies of the charter or community schools supported by NPL. (Art. II, Sec. 2, Shoup Mill Ex. 10; Shoup Mill Tr. at 29-30; Morse Tr. at 30-31, 76-77) NPL was determined to be exempt from federal income taxes under 501(c)(3) of the IRC, effective July 14, 2009. (Shoup Mill Ex. 11; Morse Ex. 14)

Thus, NPL exists solely to support Ohio charter schools. A primary way that NPL accomplishes this purpose is by helping new charter schools secure a suitable school building quickly in the specific geographic area selected for opening the new school, and by operating that school once it is open. (Shoup Mill Ex. 21 at 1; Shoup Mill Ex. 22 at 1; Shoup Mill Ex A at 1; Shoup Mill Tr. at 8, 28; Breeze Tr. at 30; Morse Tr. at 31-32, 39-47, 66) In so doing, NPL fills an essential need because the typical new charter school lacks the financial history, the operational history, the capital, the expertise and the backing of a traditional school district needed in order to secure a school facility. (Shoup Mill Tr. at 39-40; Breeze Tr. at 30; Morse Tr. at 38-39, 43-44)

One of NPL's primary functions is to provide school facilities and facility management services to charter schools (Shoup Mill Ex. 21 at 1; Shoup Mill Ex. 22 at 1; Shoup Mill Ex A at 1) and, in order to achieve that purpose, NPL performs a number of necessary tasks to facilitate

the securing of a school building. Specifically, NPL surveys local facilities in the neighborhood to locate buildings suitable for school purposes (Morse Tr. at 18, 26-27, 39-40, 67), negotiates for purchase of the property (id. at 40), arranges financing for the purchase price and remodeling costs (id. at 18-19, 27-28, 40-42), consults regarding the specific design elements required for the school (id. at 42-43), oversees the construction work to convert the building and grounds to school purposes (id. at 19, 43), performs cash-flow budgeting and negotiates the lease with the charter school operating entity (id. at 28, 43-44), and sometimes even assists in procuring and paying for furniture and equipment (id. at 47). NPL also provides accounting and tax reporting services for its title-holding entities. (Morse Tr. at 47; Morse Exs. 6, 15, 16, 24, 25)

The services that NPL performs require significant time and expertise, which would interfere with the charter school's primary function of educating children if left to the charter school. (Shoup Mill Tr. at 39-40; Morse Tr. 43-44) By leveraging its experience and the collective financial resources of its supported charter schools, NPL is in a position to aid new charter schools with critical start-up needs. Unlike their district-owned counterparts, charter schools lack the ability to issue bonds to provide initial acquisition and construction funding for their school buildings. (Morse Tr. at 39; Breeze Tr. at 30) In a sense, NPL operates as the charter-school equivalent of a traditional school district in terms of providing facility services and providing start-up funding for suitable charter school facilities. (Morse Tr. at 31-32, 39, 77) Mr. Arabaci testified (perhaps obviously) that charter schools cannot function without a school building. (Id. at 92)

5. The property is in no way leased with a view to profit, and any monies collected by Shoup Mill and NPL can go only to support charter schools.

The lone, unrefuted evidence as to the issue of how the lease amount is established is that of Mr. Arabaci, who testified the amount of rent charged under the lease was established at the

minimum amount necessary to amortize a loan for the actual costs of obtaining and converting the property to school use, including a down payment and the lender's *required* debt service coverage ratio, plus amounts for operating expenses. (Breeze Tr. at 21; Morse Tr. at 28, 40-41, 61-64; Shoup Mill Tr. at 15-16, 18, 20, 25) Mr. Arabaci concluded by testifying that the rental rate was established to minimize the rent for the school. (Shoup Mill Tr. at 20; Morse Tr. at 64, 69)

NPL obtains the funds it needs to support its charter schools solely from the rentals paid by the charter schools to NPL's title-holding entities such as Shoup Mill. (Morse Tr. at 53) In turn, as shown above, Shoup Mill was restricted from distributing any of its net revenue to any person or entity other than NPL. (Shoup Mill Tr. at 27) At the BTA hearing, Mr. Arabaci testified that at all times Shoup Mill adhered to those restrictions. (Id. at 20, 27) NPL, in turn, had no owners to which any distribution of net positive revenue might have been made (Shoup Mill Tr. at 29), and NPL was strictly prohibited by its organizational documents and by the law of nonprofit and tax exempt entities from distributing any of its net revenues to any person or entity other than its supported charter schools.

The testimony at the BTA hearing detailed how NPL used the net revenue received from its property-holding entities, after payment of the direct acquisition and operation costs for its school facilities, either to meet the cash needs of performing NPL's services, such as providing the "down payment" portion of acquisition and construction costs for school facilities not funded by mortgage loans (Morse Tr. at 41) and paying NPL's employee salaries and operating costs (Shoup Mill Ex. 4 at 3, 6-7; Shoup Mill Ex. 5 at 3, 7-8; Morse Tr. at 41-42, 53-58, 64-65), or to provide direct financial assistance to its charter school tenants that were experiencing cash flow challenges through direct grants or the reduction, forgiveness, or deferral of rent due under

leases. (Shoup Mill Tr. at 20-21; Morse Tr. at 44-45, 57; Breeze Tr. at 34-35)

The deferral and forgiveness of rent, characterized as "contributions" for accounting purposes, were mechanisms used by Shoup Mill and NPL to assist their supported charter schools, particularly during the critical first years of a school's operation. Charter school cash needs are the greatest during the first months of operation, due in part to the fact that government funding is paid to the school on a per-student basis and thus is fixed, notwithstanding higher first year costs and lower enrollment. (Note 1 to Financial Statements, Shoup Mill Ex. 4 at 5; Shoup Mill Ex. 5 at 5; Morse Ex. 16 at 5) Sometimes funding is delayed or other start-up costs are not met from per-student funding due to low enrollments. (Morse Tr. at 45)

During the years in question, Shoup Mill's and NPL's financial assistance to their supported schools was both varied and substantial. For example, as Mr. Arabaci testified at the BTA hearing, NPL contributed $100,000 in the fiscal year ending June 30, 2010 to Shoup Mill LLC and $30,000 to Horizon Middle School. (Shoup Mill Tr. at 19-20; Morse Tr. at 51-54; Shoup Mill Ex. 4 at 3, Rec 80) Similarly, during that same fiscal year, NPL deferred rent for Horizon Dayton H.S. in the amount of $149,031, as well as for the other schools listed in its financial statements. (Morse Tr. at 44, 58; Shoup Mill Ex. 4 at 6) During the fiscal year ending June 30, 2011, NPL had deferred rent for Horizon Dayton H.S. in the amount of $91,865, as well as for the other schools listed in its financial statements. (Morse Tr. at 58; Shoup Mill Ex. 5 at 7, Note 3) In a later year, if a school was unable to pay the deferred rent, it was sometimes just "written off". (Morse Tr. at 44-46)

Consistent with this model of assisting its supported schools via deferred and excused rent, NPL never sent a late payment notice to any of its supported charter schools, never imposed a late rent payment charge and never evicted a charter school tenant because of the school's

inability to pay the stated rent. (Morse Tr. at 45-46)

Law and Argument

1. Standard of Review

a. Shoup Mill has the burden to demonstrate that the BTA's *Decision and Order* was unreasonable or unlawful.

This Court's revisory jurisdiction in matters such as the one now before it is statutorily delineated in R.C. 5717.04: "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 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."

b. Tax exemption statutes should be fairly and reasonably applied.

Shoup Mill acknowledges the general rule of construction that statutes granting exemptions from taxation are to be strictly construed in favor of the state and against the person claiming the exemption. *See* R.C. 5715.271; *Athens Cty. Auditor v. Wilkins*, 106 Ohio St. 3d 293, 2005-Ohio-4986, 834 N.E.2d 804. However, this Court has recognized for more than a century that the rule of construction of statutes containing exemptions from taxation should be relaxed in relation to exemptions of charitable and educational institutions, given their meritorious nature and the fact that they relieve the government of burdens which it would otherwise have to bear. *Watterson v. Halliday*, 77 Ohio St. 150, 82 N.E. 962 (1907).

As this Court noted, "Although constitutional provisions for exemption from taxation should be given a strict construction, that construction should be reasonable and one which will not defeat the intention which the people expressed by the words which they used." *Carney v. Cleveland City School Dist. Public Library*, 169 Ohio St. 65, 66, 157 N.E.2d 311 (1959).

2. Summary of the Argument

The property in this matter was never leased with a "view to profit," and the BTA's **Decision and Order** is therefore incorrect. At best, the property was leased with a "view to break even," ***and in fact Horizon Dayton H.S. as the tenant under the lease was repeatedly provided with contributions and deferred rent because it required assistance to meet its rental obligations in the early years of its operations***. Further, if there were to occur any unexpected profits from the lease, any and all such profits could only be distributed solely to benefit charter schools. This cannot be reasonably categorized as leasing with a view to profit – all of the potential charter school beneficiaries are nonprofit, public schools.

The BTA did determine, correctly, that no excess rental income is distributed by New Plan to any private for-profit entities or individuals, and in fact any profits subsidize the operations of other tenant charter schools. Somehow, it appears the BTA was of the opinion that, if the unintended profits of a single charter school, such as Horizon Dayton H.S, were retained for the benefit of or returned to Horizon Dayton H.S. and not to any other charter school, that would be allowable. The BTA wrote, "It does not appear that any excess revenues from a single charter school are held for the future benefit of that certain school; instead, it appears that excess revenues are distributed among all of New Plan's tenant schools. We therefore find that the lease of the property is 'with a view to profit'…" The BTA proceeded to deny exemption under R.C. 5709.07(A)(1). That conclusion is not supported by law or reason.

The BTA also erred in ruling that exemption would also be disallowed under R.C. 5709.121 because Shoup Mill 1) "does not ***use*** the property for charitable purposes. Appellant's sole use of the property is to hold the property and lease it to Horizon. Such use is not charitable," and 2) the property does not ***belong*** to a charitable or educational institution.

*** [I]t is clear that appellant exists merely to hold title to the property and provide a vehicle for New Plan to assist Horizon in meeting its facility needs." (Emphasis added) The BTA unreasonably erred for this reason as well, as will be shown below. Shoup Mill and New Plan are nothing but charitable, as their sole reason for existence as nonprofit entities is to assist charter schools, which are public schools and likewise nonprofit entities.

3. Shoup Mill and NPL should be viewed as a single organization for purposes of this appeal.

For purposes of the tax exemption at issue here, Shoup Mill and NPL should be considered to be a single organization. The evidence establishes that: (a) Shoup Mill existed for the sole purposes of holding title to real property for NPL, collecting rent, and remitting the net proceeds from the property to NPL (Shoup Mill Tr. at 26-27, 31); and (b) at all relevant times, NPL was the sole member and sole owner of Shoup Mill and therefore totally controlled Shoup Mill. Because Shoup Mill was controlled by NPL alone and could not (and did not) distribute any net revenues to any person or entity other than NPL, Shoup Mill thus was a mere instrumentality of NPL and should be considered one and the same as NPL for purposes of the Application. Mr. Arabaci confirmed at the BTA hearing that the supported charter schools and NPL operate as if they are one entity (Morse Tr. at 77), and that NPL's title-holding limited liability companies are disregarded entities for tax purposes (id. at 50, 75).

A number of provisions of the Ohio Revised Code expressly recognize that the relationship and transactions between a nonprofit entity and its nonprofit subsidiary do not imperil the nonprofit nature of the entities when viewed together. For example, the use of a wholly-owned nonprofit entity for tax exempt purposes has received express sanction by the Ohio General Assembly, which in 2008 enacted R.C. 5701.14, **Limited liability companies operating with nonprofit purpose**, providing as follows:

> For purposes of Title LVII of the Revised Code:
>
> (A) In order to determine a limited liability company's nonprofit status, an entity is operating with a nonprofit purpose under section 1705.02 of the Revised Code if that entity is organized other than for the pecuniary gain or profit of, and its net earnings or any part of its net earnings are not distributable to, its members, its directors, its officers, or other private persons, except that the payment of reasonable compensation for services rendered, payments and distributions in furtherance of its nonprofit purpose, and the distribution of assets on dissolution permitted by section 1702.49 of the Revised Code are not pecuniary gain or profit or distribution of net earnings. In no event shall payments and distributions in furtherance of an entity's nonprofit purpose deprive the entity of its nonprofit status as long as all of the members of that entity are operating with a nonprofit purpose.
>
> (B) A single member limited liability company that operates with a nonprofit purpose, as described in division (A) of this section, ***shall be treated as part of the same legal entity as its nonprofit member, and all assets and liabilities of that single member limited liability company shall be considered to be that of the nonprofit member***. Filings or applications for exemptions or other tax purposes may be made either by the single member limited liability company or its nonprofit member. (Emphasis added.)

Consistent with this "one entity" concept, another provision of Ohio's tax code, R.C. 5713.08(A), expressly recognizes that the conveyance of exempt real property between a single-member nonprofit limited liability company and its nonprofit member will not result in the loss of tax exemption for the property involved. Similarly, the definition of "nonprofit corporation" in R.C. 1702.01(C) acknowledges that related nonprofit corporations are permitted to transfer funds between themselves without destroying their tax-exempt status, by providing:

> In a corporation all of whose members are nonprofit corporations, distribution to members does not deprive it of the status of a nonprofit corporation.

Such arrangements, in which the fee owner of real property has used a wholly-owned subsidiary to hold and operate the property, have been approved by the courts of Ohio in tax

exemption cases. For example, in *Bryan Chamber of Commerce v. Bd. of Tax Appeals*, 5 Ohio App.2d 195, 214 N.E.2d 812 (6th Dist. 1966), a chamber of commerce purchased a 79-acre farm for the purpose of developing the property into a public park, and later turned over the property gratuitously to a nonprofit recreation council for the promotion, development and maintenance of the park. In affirming the granting of tax exemption, the Court of Appeals quoted from paragraph 6 of the syllabus in *Gerke v. Purcell*, 25 Ohio St. 229 (1874):

> The constitution, in directing the levying of taxes and in authorizing exemptions from taxation, has reference to property, and the uses to which it is applied; and where property is appropriated to the support of a charity which is purely public, the legislature may exempt it from taxation, without reference to the manner in which the title is held, and without regard to the form or character of the organization adopted to administer the charity.

Bryan Chamber of Commerce, supra, 5 Ohio App.2d at 204, 214 N.E.2d 812.

Therefore, for all of the foregoing reasons, Shoup Mill and NPL should be considered to be a single organization for purposes of the tax exemption at issue here.

4. The BTA unreasonably erred when it held that Shoup Mill was not entitled to exemption under R.C. 5709.07.

The version of R.C. 5709.07(A)(1) that was in effect through tax year 2010 and applies to this matter provided that:

> (A) The following property shall be exempt from taxation:
>
> (1) Public schoolhouses and the ground attached to them necessary for the proper occupancy, use, and enjoyment of the schoolhouses, and not leased or otherwise used ***with a view to profit***. (Emphasis added)

The initial, critical aspect of this case to be emphasized to this Court is there is not, and has never been, any "view to" profit by anyone in this case. None. Instead, as demonstrated by the testimony of Mr. Arabaci provided above, the property

owner strove instead to ***eliminate*** any profit and instead only cover its expenses. At best, the property was leased with a "view to break even," which is not a ground for denying tax exemption.

To reiterate, the lone, unrefuted evidence as to the issue of how the lease amount is established is that of Mr. Arabaci, who testified the amount of rent charged under the lease was established at the minimum amount necessary to amortize a loan for the actual costs of obtaining and converting the property to school use, including a down payment and the lender's *required* debt service coverage ratio, plus amounts for operating expenses. (Breeze Tr. at 21; Morse Tr. at 28, 40-41, 61-64; Shoup Mill Tr. at 15-16, 18, 20, 25) Mr. Arabaci concluded by testifying that the rental rate was established to minimize the rent for the school. (Shoup Mill Tr. at 20; Morse Tr. at 64, 69)

As stated over 150 years ago by the Ohio Supreme Court, to use property with a view to profit is to use the property for the purpose of "accumulating" money or "produc[ing] an increase". *Cincinnati College v. State*, 19 Ohio 110, 113-114 (1850). In Ohio, a "view to profit" requires an actual conscious goal or intent to profit from a transaction or property. For example, the phrase "with a view to profit" has been equated by the Ohio Attorney General to an arrangement which "contemplates" profit or gain. 1974 Ohio Op. Atty. Gen. No. 74-058.

Such a situation does not exist in this case. By comparison, consider *Am. Soc. of Metals v. Limbach*, 59 Ohio St.3d 38, 40, 569 N.E. 2d 1065 (1991), wherein the Tax Commissioner elicited testimony from the applicant's chief operating officer that the applicant made a "net profit" from the sale of publications and that it operated every year with "a view to having *** operating revenues exceed * * * operating expenses." In that case, this admitted "view to profit"

was fatal, and appropriately so, to the applicant's requests for exemption under R.C. 5709.07, 5709.12, and 5709.121.

However, if profits do unexpectedly or fortuitously occur, the BTA is correct in its determination as to where those monies go – back into the tax-exempt charter schools. As noted in its **Decision and Order**, the BTA concluded, "[A]ny excess of rental income over expenses is not distributed to any private for-profit entities or individuals ***. [New Plan] appears to use the profits to subsidize the operations of other tenant charter schools ***." (Dec. & Order at *3)

A community school created under R.C. Chapter 3314 is a public school, and is part of the state's program of education. Thus, but for the fact that the community school here exists "independent of any school district" (R.C. 3314.01(B)), exemption would be expressly authorized by R.C. 5709.07(B) because NPL contributes all excess revenues back to its supported charter schools. Certainly, there is no public policy reason that organizations that support charter schools should not enjoy the same exemption that has received express legislative approval when it comes to other forms of public schools under R.C. 5709.07(B).

The BTA's concern seems to be that "excess revenues from a single charter school [such as Horizon Dayton H.S.] are [not] held for benefit of that certain school; instead, it appears that excess revenues are distributed among all of New Plan's tenant schools. We therefore find that the lease of the property is 'with a view to profit' ***." Based upon this "view to a profit" determination, the BTA improperly and unreasonably proceeded to deny exemption under R.C. 5709.07(A)(1).

Again, as shown previously, there is no intention for profits to occur. If profits do occur, they are all put back into tax-exempt, public charter schools.[2] Why should this arrangement not be tax exempt?

5. ***Anderson/Maltbie is not controlling in this matter, as that case dealt with an admitted for-profit lease.***

In the recent case of *Anderson/Maltbie Partnership v. Levin*, 127 Ohio St.3d 178, 2010-Ohio-4904, 937 N.E.2d 547, the tenant, like Horizon Dayton H.S., was a non-profit community school and had entered into a lease with the landlord. But that is where the similarities end because the landlord there, Anderson/Maltbie Partnership, stipulated that it was a for-profit partnership. Id. at ¶12. Thus, in *Anderson/Maltbie*, the "view to profit" element was conclusively established by stipulation of the parties.

To the contrary, in this case the evidence conclusively establishes that the owner/landlord, Shoup Mill, was organized and at all relevant times operated strictly for

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[2] Other Ohio tax exemption statutes expressly recognize that a non-profit entity even may receive an excess of revenue over expenses without destroying its right to receive tax exemption for its properties, as long as protections such as exist here are present. For example, R.C. 5709.12(D) provides:

> The fact that an organization described in this division [a private or a nonprofit corporation formed to encourage the advancement of science, scientific knowledge and research] operates in a manner that results in an excess of revenues over expenses shall not be used to deny the exemption granted by this section, provided such excess is used, or is held for use, for exempt purposes or to establish a reserve against future contingencies; and, provided further, that such excess may not be distributed to individual persons or to entities that would not be entitled to the tax exemptions provided by this chapter.

The result was the same in the case of *Akron Golf Charities, Inc. v. Limbach*, 34 Ohio St.3d 11, 516 N.E. 2d 222 (1987), in which the Ohio Supreme Court rejected the Tax Commissioner's contention that a charity's retention of a contingency fund negated a tax exemption and, in fact, said that it would be folly not to.

nonprofit purposes. By their very natures, neither Shoup Mill nor its sole non-profit member and owner, NPL, are "for profit" entities. During the years in question, neither entity could legally distribute its net revenues to any private person or for-profit entity. In other words, there could have been no "private inurement" of the monies paid to Shoup Mill or NPL under the lease. Indeed, these are more than theoretical restrictions -- there are serious ramifications for members of a nonprofit limited liability company that approve improper payments, including personal liability. R.C. 1705.23.

The pivotal facts in *Anderson/Maltbie* are wholly distinguishable from the facts at issue in Shoup Mill's application. However, Shoup Mill does note that the Supreme Court in *Anderson/Maltbie* clarified that a "community school that leases its building may still receive the benefit of tax exemption as a public schoolhouse," and then proceeded to hold:

> [U]nder the public-schoolhouse exemption, the restriction that the property not be used with a view to profit requires examination of the total use of the property by both lessor and lessee. If the lease is intended to generate profit for the lessor, the property does not qualify for exemption; similarly, the property does not qualify if the lessee's use is intended to generate profit.

Anderson/Maltbie, 127 Ohio St.3d 178, 2010-Ohio-4904, 937 N.E.2d 547, ¶33.

The lease in this case meets this test: there is no evidence that the lease to the charter school was intended to (or, under the restrictions applicable to Shoup Mill/NPL in their organizational documents, was even *permitted* to) generate profit for Shoup Mill or NPL; and there is no evidence that the charter school tenant, which itself is a nonprofit corporation, intended to use the property to generate profit.

For all the foregoing reasons, this Court should hold that the BTA erred in finding, "[T]he lease of the property is 'with a view to profit' and, accordingly, the properties are not

entitled to exemption under R.C. 5709.07(A)(1) for tax year 2010." This Court should grant tax exemption for tax year 2010.

6. The BTA erred by finding that the properties in question would not be entitled to exemption under R.C. 5709.12 and 5709.121.

Although Shoup Mill listed only R.C. 5709.121 in response to Question 13 of its Application ("Under what section(s) of the Ohio Revised Code is exemption sought?"), by so doing it necessarily triggered a determination of whether it qualifies for exemption under R.C. 5709.12. This is so because R.C. 5709.121 itself does not independently grant a tax exemption but was enacted as an aid to construing the phrase "used exclusively for charitable or public purposes by such institution," as that language is used in R.C. 5709.12 and other sections of R.C. Chapter 5709. *Dialysis Clinic, Inc. v. Wilkins*, 127 Ohio St.3d 215, 2010-Ohio-5071, 938 N.E.2d 329; *Galvin v. Masonic Toledo Trust*, 34 Ohio St.2d 157, 296 N.E.2d 542 (1973); *State Teachers Retirement Bd. v. Kinney*, 68 Ohio St.2d 195, 198, 429 N.E.2d 1069 (1981).

> [P]ursuant to R.C. 5709.12(B), any institution, charitable or noncharitable, may qualify for a tax exemption if it is making exclusive charitable use of its property. But if the property belongs to a charitable or educational institution, R.C. 5709.121 defines what constitutes exclusive use of the property in order to be exempt from taxation.

Cincinnati Community Kollel v. Testa, 135 Ohio St.3d 219, 2013-Ohio-396, 985 N.E.2d 1236, ¶23.

Therefore, this Court should consider whether Shoup Mill qualifies for exemption under R.C. 5709.12, and it should take into account the guidance provided by R.C. 5709.121 in doing so.

a. R.C. 5709.12

R.C. 5709.12, entitled **Exemption of property used for charitable or public purposes,** provides in relevant part in section (B) that "[r]eal and tangible personal property belonging to institutions that is used exclusively for charitable purposes shall be exempt from taxation … ."

When determining charitable use of property under R.C. 5709.12, the test set forth in *Planned Parenthood Assn. v. Tax Commr.*, 5 Ohio St.2d 117, 214 N.E.2d 222 (1966), paragraph one of the syllabus, is applied:

> '***[C]harity,' in the legal sense, is 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 to 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.

Here, the property is used exclusively as a public school. The students of the school receive instruction daily in a group setting to advance themselves intellectually and socially. Also, because testimony at the hearing established that this school building contains a gymnasium, the students also receive the benefits of physical activities and education. Being a part of Ohio's public school system, the charter school that occupies the property charges no tuition, and students are admitted without regard to whether they might be able to afford a private school. And, finally, as shown above, the property is made available "without hope or expectation, if not with positive abnegation, of gain or profit". Therefore, the property reasonably meets all of the requirements for exemption under R.C. 5709.12. One can hardly argue that operation of a public school is not charitable.

Moreover, the fact that NPL totally controls Shoup Mill, and therefore that NPL's involvement in the use of the property is relevant to the inquiry, should not prevent tax

exemption because NPL itself qualifies as an "institution" and its use of the property would likewise meet the "used exclusively for charitable purposes" test. In *In re Dana W. Morey Found.*, 21 Ohio App.2d 230, 256 N.E.2d 232 (3d Dist. 1970), the Court of Appeals held that, although the elements of ownership of the real property in that case were partly vested in the lessor and partly in the lessee, no one else had any interest of ownership whatever in the property, and because both the lessor and lessee were charitable institutions, there was nothing but ownership of that property by nonprofit institutions of charitable service character, and the property was, to use the words of R.C. 5709.12, "Real * * * property belonging to institutions." *Id*. at 240.

b. R.C. 5709.121

Even if Shoup Mill/NPL were not entitled to exemption under R.C. 5709.12, it would nonetheless be entitled to exemption under R.C. 5709.121. As relevant to this case, R.C. 5709.121, entitled **Exclusive charitable or public use, defined**, provided at the time in question:

> (A) Real property … belonging to a charitable or educational institution … shall be considered as used exclusively for charitable or public purposes by such institution … if it meets ***one of*** the following requirements:
>
> (1) It is used by such institution … or by one or more other such institutions … under a lease … or other contractual arrangement:
>
> ****
>
> (b) For other charitable, educational, or public purposes.
>
> (2) It is made available under the direction or control of such institution … for use in furtherance of or incidental to its charitable, educational, or public purposes and not with the view to profit. (Emphasis added)

(i) Shoup Mill and NPL constitute "educational institutions" for purposes of R.C. 5709.121(A)

As demonstrated above, Shoup Mill and NPL exist to assist Ohio charter schools, which are a component of Ohio's tax-supported public education system, in obtaining and occupying affordable and functional school facilities and in receiving essential financial support. In performing such functions, they operate as the private counterpart of a traditional school district.

The provisions of Shoup Mill's and NPL's organizational documents compel a finding that they are "educational institutions" and that the property is used by one or more such institutions for "educational purposes." For example, the exhibits before this Court prove that NPL is to be operated *exclusively* for the public charitable, educational, and scientific purpose of supporting Ohio charter schools. Shoup Mill, in turn, was formed for the *exclusive* purpose of holding title to property, collecting income from the property, and turning over the income to NPL. Therefore, the sole reasons for Shoup Mill and NPL to exist are to promote public education by facilitating their supported schools in procuring suitable school facilities and providing essential financial support, both critical "educational purposes." Just as one could not seriously argue that a traditional school district was not an "educational institution" in performing such functions, so too must any such argument fail with respect to Shoup Mill and NPL.

This case thus is analogous to the situation that the Ohio Attorney General found to be qualified for tax exemption under R.C. 5709.07 and R.C. 3314.44, notwithstanding that the school property in question generated revenue, because the school district there was empowered to acquire property only for school purposes and not for the purpose of undertaking a business enterprise. 1999 Ohio Op. Atty Gen. No. 7; 1999 Ohio AG LEXIS 7.

Ohio courts have found that numerous organizations providing facilities for a broad range of activities constitute "educational institutions" under R.C. 5709.121, including a nonprofit corporation organized to establish and maintain a center for fine arts education (*Fairmount Ctr. for Creative & Performing Arts, Inc. v. Kinney*, 11th Dist. No. 1251, 1986 Ohio App. LEXIS 7401 (June 27, 1986)), and a center for Jewish Torah scholars (*Cincinnati Community Kollel v. Levin*, 113 Ohio St.3d 138, 2007-Ohio-1249, 863 N.E.2d 147).

Accordingly, the Ohio Supreme Court's description of "educational institutions" in the *Cincinnati Community Kollel* case should not be viewed as establishing the only test under R.C. 5709.121. This is so because the Supreme Court in *Cincinnati Community Kollel* simply was not presented with the precise issue in this case: whether a nonprofit organization which is controlled by state-sanctioned charter schools and which exists and operates solely to assist such schools in obtaining suitable school facilities and to provide direct financial support to such schools would qualify as an "educational institution" under R.C. 5709.121.

Nonetheless, in that case, the Supreme Court noted that the Kollel's mission included a focus on the physical places in which its educational activities were conducted, quoting portions of the Kollel's written constitution that provided that it existed to "provide an *environment* of Torah study combining the advanced studies of the Kollel staff scholars with a *venue* for community learning." (Emphasis added.) *Cincinnati Community Kollel*, 113 Ohio St.3d at 142, 2007-Ohio-1249, 863 N.E.2d 147. And just as is stated in the organizational documents of Shoup Mill and NPL, the Kollel's written constitution provides that it "is organized and is to be operated exclusively for charitable and educational purposes." Even the federal tax statute cited by the Supreme Court to buttress its finding that the Kollel was an "educational institution",

26 U.S.C. 170(b)(1)(A)(ii), makes reference to "pupils or students in attendance at the *place* where its educational activities are regularly carried on." (Emphasis added.)

While it does not appear that the Ohio Supreme Court has yet ruled on the precise issue presented in this case, the courts in other states have recognized that an applicant that exists to provide a suitable physical place in which another entity actually provides classroom education is no less an "educational institution" than its supported school. For example, in *Rudolf Steiner Edn. & Farming Assn. v Brennan*, 65 A.2d 868, 410 N.Y.S. 2d 404 (N.Y. App. Div. 3d Dept. 1978), the appeals court held that a nonprofit corporation that used its farm land as an integral part of various educational activities was entitled to tax exemption as a corporation organized "exclusively for educational purposes" where it had direct affiliations with licensed and accredited schools. *See also Univ. Auxiliary Services, Inc. v. Smith*, 78 A.2d 959, 433 N.Y.S.2d 270 (N.Y. App. Div. 3d Dept. 1980) (a "campus" owned by a nonprofit corporation organized primarily for educational purposes and comprised of a number of parcels--some of which were improved by structures used for faculty conferences and to house student and nonstudent employees, and some of which were vacant areas, used for hiking, skiing and botany study by a university biology department--was entitled to exemption).

(ii) Shoup Mill and NPL constitute "charitable institutions" for purposes of R.C. 5709.121(A).

Even if Shoup Mill/NPL are not found to be "educational institutions" for purposes of R.C. 5709.121, they nonetheless qualify as "charitable institutions" under that statute. It has long been recognized in Ohio tax exemption cases that "[s]chools established by private donations, and which are carried on for the benefit of the public, and not with a view to profit, are 'institutions of purely public charity' within the meaning of the provision of the Constitution, which authorizes such institutions to be exempt from taxation." *Gerke*, 25 Ohio St. 229,

paragraph five of the syllabus; *In re Estate of Lambert*, 69 Ohio App. 522, 44 N.E.2d 325 (2d Dist. 1940).

(iii) The property is used by another educational/charitable institution for educational or public purposes (R.C. 5709.121(A)(1)).

Shoup Mill/NPL is entitled to exemption under R.C. 5709.121(A)(1). The uncontested facts here show that the subject property is used by Horizon Dayton H.S., unquestionably an educational institution, under a lease for the operation of a public charter school, a use that has been characterized in various prior cases as a use for "charitable," "educational," or "public" purposes. The lease prohibits Horizon Dayton H.S. from unilaterally changing such use by providing that Horizon Dayton H.S. will use the property solely for charter school purposes in strict accordance with the lease and its charter contract. (Shoup Mill Ex. 3, ¶5, at 2) Thus, the property qualifies for exemption under R.C. 5709.121(A)(1).

(iv) The property is made available under the direction or control of Shoup Mill/NPL for use in furtherance of or incidental to its charitable, educational or public purposes and not with the view to profit (R.C. 5709.121(A)(2)).

Similarly, Shoup Mill/NPL is entitled to exemption under the independent provision of R.C. 5709.121(A)(2). The uncontested facts here show that (a) the property belongs to Shoup Mill, (b) Shoup Mill exists solely as a property-holding entity for, and is totally controlled by, NPL, (c) the property is made available under the direction and control of Shoup Mill/NPL in furtherance of its charitable and educational purposes, (d) the property is used by Horizon Dayton H.S., an educational institution, under a lease for its charitable, educational and public purposes, and (e) as shown above, the property is made available by Shoup Mill/NPL without a view to profit.

Although the generation of revenue through leasing of property does not necessarily defeat tax exemption, it is not enough that the funds are generated simply in order to provide funds to support the activities of a qualifying charitable organization. Instead, the courts consistently require a nexus between the income-producing use of the property and the owner's mission. Stated another way, the income-producing use of the property must be "essential and integral" to the primary tax-exempt purpose or function of the owner. *Bowers v. Akron City Hosp.*, 16 Ohio St.2d 94, 243 N.E.2d 95 (1968); *Am. Chem. Soc. v. Kinney*, 69 Ohio St.2d 167, 431 N.E.2d 1007 (1982); *Girl Scouts--Great Trail Council v. Levin*, 113 Ohio St.3d 24, 2007-Ohio-972, 862 N.E.2d 493; *Old West End Assn., Inc. v. Wilkins*, 6th Dist. No. L-06-1374, 2008-Ohio-366.

In *Bowers, supra,* a nonprofit charitable hospital owned an adjacent parking lot and offset the costs of operating the lot from the parking fees it collected. The Ohio Supreme Court concluded that the generation of "profit" by the charging of a reasonable fee for parking did not remove the property from the statutory category of exempt property because the evidence showed that the parking lot was an essential and integral part of the hospital's function and not property used mainly for income purposes. 16 Ohio St.2d at 96, 243 N.E.2d 95.

In *Girl Scouts--Great Trail Council, supra*, the Court held that the primary use of a store operated by the Girl Scouts was to accommodate the Girl Scouts by making available to them scouting uniforms and clothing, books and merit badges, not simply to generate revenue to be used by the organization. Because the prices charged were intended simply to cover the costs of operation, and the merchandise was not marketed to compete with commercial, for-profit entities, the court held that the store fulfilled the organization's charitable function and met the

statutory requirement that the property be used exclusively for charitable purposes and not with a view to profit.

Similarly, in *Am. Chem. Soc.*, *supra,* the Ohio Supreme Court concluded that the Board of Tax Appeals, in failing to grant a tax exemption, had "ignored the integral connection which has been shown to exist between [the charitable institution's] use of the land in question and [its] purpose for existence." 69 Ohio St.2d at 171, 431 N.E.2d 1007.

And finally, because the property in question here is used for a single purpose, as a public schoolhouse, there is no need for the scrutiny that led the Ohio Supreme Court to recently reject a "primary-use test" to qualify a property for a tax exemption. *Cincinnati Community Kollel v. Testa*, 135 Ohio St.3d at 224-226, 2013-Ohio-396, 985 N.E.2d 1236; *see also Dialysis Clinic, Inc. v. Wilkins*, B.T.A. Case No. 2006-V-2389, 2011 Ohio Tax LEXIS 342 (Feb. 15, 2011).

Therefore, the BTA erred by ignoring the direct relationship between the stated narrow purposes of Shoup Mill and NPL, as detailed in the record and summarized above, and their lease of the property for the operation of a public school. In this respect, this case is similar to *88/96 LP v. Wilkins*, B.T.A. Case No. 2005-A-55, 2007 Ohio Tax LEXIS 1018 (July 20, 2007), in which the BTA cited the relationship between the stated purpose of the applicant to acquire and operate the subject property as low income housing and the applicant's active participation in the delivery of supplemental rehabilitative services as supporting exemption.

And because Shoup Mill/NPL is here using the property in furtherance of its public educational purposes, this is not a situation in which an applicant is seeking "vicarious" exemption, not as a result of its own use of the property but solely due to the charitable nature of its tenant. *See, e.g., Cent. Ohio Med. Textiles v. Levin*, B.T.A Case No. 2009-K-650, 2012 Ohio Tax LEXIS 1610, at ¶ 8-9 (Apr. 10, 2012); *Joint Hosp. Servs. v. Lindley*, 52 Ohio St.2d 153, 370

N.E.2d 474 (1977); *Hubbard Press v. Tracy*, 67 Ohio St.3d 564, 621 N.E.2d 396 (1993); *Dialysis Clinic, supra*; *Old West End Assn.,* 2008-Ohio-366.

The Ohio Supreme Court has stated that the status of an institution as "charitable" under R.C. 5709.121 depends upon the "charitable activities of the taxpayer seeking the exemption," not the "charitable nature of the institutional customers." A clear corollary of that principle is that an entity that leases property to another must establish its charitable status based on the range of its own activities and may not rely upon the activities of a particular lessee. *Northeast Ohio Psych. Inst. v. Levin*, 121 Ohio St.3d 292, 2009-Ohio-583, 903 N.E.2d 1188, ¶14.

Here, Shoup Mill/NPL meet that test because their very reason for being is to benefit and support, to make payments to, and to provide school facilities and related services to their supported public charter schools. In furtherance of said functions, they lease property only to public charter schools. Because Shoup Mill and NPL require a substantial amount of funds to acquire, re-construct, finance, insure, operate and maintain this school facility, which constitute primary functions, and because the proceeds of the lease here are used solely to advance those purposes, with any surplus that might result over a given period used only as financial aid to the supported charter schools, the leasing of this property is an essential and integral part of Shoup Mill/NPL's primary function and bears the required nexus to Shoup Mill/NPL's charitable and educational purposes.

Finally, the exemption sought here has received legislative imprimatur in two respects. First, when the Ohio General Assembly set out in R.C. 5709.121(C) to specifically define when an organization that engaged in the development and revitalization of downtown urban areas would be considered to be a “charitable institution,” it established three requirements:

- the institution must be a nonprofit corporation or association, no part of the net earnings of which inures to the benefit of any private shareholder or individual;

- the institution must be exempt from federal income taxation under section 501(a) of the Internal Revenue Code; and

- the majority of the institution's board of directors are appointed by the entity that is the beneficiary of the institution's services--in this case, the mayor or legislative authority of a municipal corporation or a board of county commissioners.

Thus, when the Ohio legislature sought to impose requirements upon an applicant established to promote urban redevelopment, with its obvious attendant public benefits, to ensure that tax exemption would not result in an improper result, it established precisely the protections that exist with respect to Shoup Mill and NPL here.

Therefore, for all of the foregoing reasons, the BTA's **Decision and Order** was unreasonable and unlawful because it failed to grant tax exemption under R.C. 5709.121.

Conclusion

Respectfully, the BTA was wrong when it denied tax exemption under R.C. 5709.07 on the basis of its erroneous and unreasonable finding that the property in question was leased with a view to profit.

The Ohio General Assembly has indicated its approval of the result that Shoup Mill seeks here by amending R.C. 5709.07 to expressly permit tax exemption for properties used by public charter schools beginning with tax year 2011. This Board should extend this clearly fair and publicly-beneficial result for the prior tax year at issue in this case by reversing the BTA and granting Shoup Mill's application.

Lastly, the BTA also committed reversible error by unreasonably denying tax exemption under R.C. 5709.12 and 5709.121. This Court should grant tax exemption in this matter.

Respectfully submitted,

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Shoup Mill, LLC

Proof of Service

This is to certify that a true and exact copy of the foregoing **Brief of Appellant** has been duly served upon Sophia Hussain and Melissa Baldwin, Assistant Attorneys General of Ohio, Rhodes State Office Tower, 25th Floor, Taxation Section, 30 East Broad Street, Columbus, Ohio 43215, Attorneys for Appellee, Joseph W. Testa, Tax Commissioner of Ohio, by electronic transmission to sophia.hussain@ohioattorneygeneral.gov and melissa.baldwin@ohioattorneygeneral.gov, this 17th day of September, 2015.

/s/ M. Charles Collins
Attorney for Appellant
Shoup Mill, LLC

Appendix

OHIO BOARD OF TAX APPEALS

250 SHOUP MILL, LLC, (et. al.),

Appellant(s),

vs.

JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO, (et. al.),

Appellee(s).

CASE NO(S). 2011-2226

(EXEMPTION)

DECISION AND ORDER

APPEARANCES:

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Represented by:
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COLUMBUS, OH 43215

Entered Tuesday, January 27, 2015

Mr. Williamson, Mr. Johrendt, and Mr. Harbarger concur.

Appellant appeals a final determination of the Tax Commissioner wherein he denied exemption from real property taxation of certain real property, i.e., parcel number E20 01008 0057, located in Montgomery County, Ohio, for tax year 2010. We proceed to consider the matter upon the notice of appeal, the statutory transcript certified by the commissioner, the record of the hearing before this board, and the parties' written legal argument.

In our review of this matter, we are mindful that the findings of the Tax Commissioner are presumptively valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. Consequently, it is incumbent upon a taxpayer challenging a determination of the commissioner to rebut the presumption and to establish a clear right to the requested relief. *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St.2d 135; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138. In this regard, the taxpayer is assigned the burden of showing in what manner and to what extent the commissioner's determination is in error. *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213.

The building located on the subject parcel is used as a charter school operating under R.C. Chapter 3314 by Horizon Science Academy-Dayton High School, Inc. As explained at this board's hearing, the building is

leased to Horizon by the appellant, a title-holding entity, which is solely owned by New Plan Learning, Inc. ("New Plan"). Murat Arabaci, president of New Plan, explained that it is a nonprofit, 501(c)(3) organization that assists charter schools in finding and financing suitable facilities, and that its directors are elected and approved by its charter school tenants, including Horizon Science Academy, Inc., and four other charter schools. Mr. Arabaci further explained that the property is leased at a rate expected to cover the mortgage payments, construction costs, soft costs, debt service coverage ratio, and operating expenses.

Appellant applied for exemption under R.C. 5709.121, which generally provides for exemption of property used for charitable purposes. The commissioner addressed exemption under both R.C. 5709.12 and R.C. 5709.121, which are related, see *Cincinnati Community Kollel v. Testa*, 135 Ohio St.3d 219, 2013-Ohio-396, ¶23, as well as R.C. 5709.07(A)(1) in the final determination. On appeal, appellant argues that the property is exempt under all these sections. While appellant also asserts in its notice of appeal that the property is exempt under R.C. 3314.082, such argument was not raised in the proceedings below and therefore this board lacks jurisdiction to consider exemption under that section. See, e.g., *St. Mark Coptic Orthodox Church v. Testa* (Interim Order, June 13, 2013), BTA No. 2011-Q-1330, unreported.

We first address exemption under the "charitable use" sections – R.C. 5709.12 and R.C. 5709.121. "[P]ursuant to R.C. 5709.12(B), any institution, charitable or noncharitable, may qualify for a tax exemption if it is making exclusive charitable use of its property. But if the property belongs to a charitable or educational institution, R.C. 5709.121 defines what constitutes exclusive use of property in order to be exempt from taxation." *Cincinnati Community Kollel v. Testa*, 135 Ohio St.3d 219, 2013-Ohio-396, ¶23. R.C. 5709.121(A) provides that "[r]eal property *** belonging to a charitable or educational institution *** shall be considered as used exclusively for charitable or public purposes by such institution *** if***:

> "(1) It is used by such institution, the state, or political subdivision, or by one or more other such institutions, the state, or political subdivisions under a lease, sublease, or other contractual arrangement;
>
> "***
>
> "(b) For other charitable, educational, or public purposes.
>
> "(2) It is made available under the direction and control of such institution, the state, or political subdivision for use in furtherance of or incidental to its charitable, educational, or public purposes and not with a view to profit."

The Supreme Court has broadly defined "charity" in *Planned Parenthood Assn. v. Tax Commr.* (1966), 5 Ohio St.2d 117, as follows:

> "In the absence of a legislative definition, 'charity,' in the legal sense, is 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 to their ability to supply that need from other sources, and without hope or expectation, if not with positive abnegation, or gain or profit by the donor or by the instrumentality of the charity."

At the outset, we find that the property is not entitled to exemption under R.C. 5709.12, as the owner (appellant) does not use the property for charitable purposes. Appellant's sole use of the property is to hold the property and lease it to Horizon. Such use is not charitable. See *Chagrin Realty, Inc. v. Testa* (Apr. 29, 2014), BTA No. 2011-2523, unreported.

We further find that the property is not entitled to exemption under R.C. 5709.121, as the property does not belong to a charitable or educational institution. While appellant argues that it is an "educational

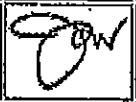
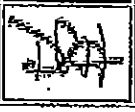
institution," it is clear that appellant exists merely to hold title to the property and provide a vehicle for New Plan to assist Horizon in meeting its facility needs. Moreover, appellant's status as a nonprofit organization is not dispositive in the determination of whether it is a charitable institution under R.C. 5709.121. See *Dialysis Clinic, Inc. v. Levin*, 127 Ohio St.3d 215, 2010-Ohio-5071, at ¶25. Appellant therefore does not meet the requisite requirement of R.C. 5709.121 that the property belong to a charitable or educational institution.

We next turn to exemption under R.C. 5709.07(A)(1), which, prior to it being revised in 2011, provided for exemption of "[p]ublic schoolhouses, ***, and the ground attached to them necessary for the proper occupancy, use, and enjoyment of the schoolhouses, and not leased or otherwise used with a view to profit." The commissioner denied exemption under this section, citing *Anderson/Maltbie Partnership v. Levin*, 127 Ohio St.3d 178, 2010-Ohio-4904, and explaining that "the lessee, a non-profit corporation, is operating a charter school on the subject property, while the appellant, whether non-profit or for-profit, is primarily acting as a landlord collecting substantial market-rate rent. *** Therefore, the applicant clearly has entered into the lease for the subject property as an investment and with a view to profit."

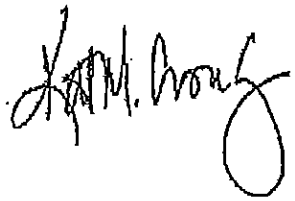
The commissioner cites *Anderson/Maltbie Partnership*, supra, as dispositive in this matter. In that case, the Supreme Court found that a for-profit partnership that leased property to an Ohio community school was not entitled to tax exemption based on the school's use of the property, because the school occupied the property under a commercial, for-profit lease. In doing so, it relied on its previous decision in *Gerke v. Purcell* (1874), 25 Ohio St. 229, where it stated that "the 'exclusion of all idea of private gain or profit' constitutes a basic condition that private property must satisfy to qualify for this exemption." *Anderson/Maltbie*, supra, at ¶20 (citing *Gerke*, supra, at 247). The appellant in this matter argues that *Anderson/Maltbie* is distinguishable, because the lessor in that case was clearly a for-profit entity that entered into the lease solely for profit. Here, appellant argues, because 250 Shoup Mill, LLC and New Plan are both nonprofit entities, it is clear that no profit can be made from leasing the subject properties.

Upon review of the record in this matter, we find that, while any excess of rental income over expenses is not distributed to any private for-profit entities or individuals, New Plan, through distributions from its title-holding entities, does profit from its leases. While it appears to use the profits to subsidize the operations of other tenant charter schools, it is not the use of any profits that determines the exempt status of the subject properties. See, e.g., *Hubbard Press v. Tracy* (1993), 67 Ohio St.3d 564, 566. It does not appear that any excess revenues from a single charter school are held for the future benefit of that certain school; instead, it appears that excess revenues are distributed among all of New Plan's tenant schools. We therefore find that the lease of the property is "with a view to profit" and, accordingly, the properties are not entitled to exemption under R.C. 5709.07(A)(1) for tax year 2010.

Based upon the foregoing, we find that appellant has failed to sufficiently prove that the commissioner's final determination was in error. Therefore, the final determination must be, and hereby is, affirmed.

BOARD OF TAX APPEALS		
RESULT OF VOTE	YES	NO
Mr. Williamson		
Mr. Johrendt		
Mr. Harbarger		

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.



Kathleen M. Crowley, Board Secretary

IN THE SUPREME COURT OF OHIO

250 Shoup Mill, LLC, Appellant, v. Joseph W. Testa, Tax Commissioner of Ohio, Appellee.	15-0340 On Appeal from Ohio Board of Tax Appeals Ohio Board of Tax Appeals Case No. 2011-2226

NOTICE OF APPEAL OF APPELLANT 250 SHOUP MILL, LLC

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COUNSEL FOR APPELLEE, JOSEPH W. TESTA,
TAX COMMISSIONER OF OHIO

Notice of Appeal of Appellant 250 Shoup Mill, LLC

Appellant 250 Shoup Mill, LLC hereby gives notice of appeal to the Supreme Court of Ohio from the Decision and Order of the Ohio Board of Tax Appeals entered in Ohio Board of Tax Appeals case No. 2011-2226 on January 27, 2015. A copy of the decision being appealed is attached hereto.

Appellant sets forth the following claimed errors:

1. The BTA erred in finding that the lease of the property in question is "with a view to profit" and therefore not entitled to exemption under R.C. 5709.07(A)(1).
2. The BTA erred in finding that the property in question is not entitled to exemption under R.C. 5709.12 because appellant does not use the property in question for charitable purposes or R.C. 5709.121 because the property in question does not belong to a charitable or educational institution.

Respectfully submitted,

EASTMAN & SMITH LTD.

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COUNSEL FOR APPELLANT,
250 SHOUP MILL, LLC

Certificate of Service

I certify that a copy of this **Notice of Appeal** was sent by certified mail to counsel for appellee, Melissa W. Baldwin, Assistant Attorney General, Office of Ohio Attorney General, 30 East Broad Street, 25th Floor, Columbus, OH 43215, on February 25, 2015.

M. Charles Collins
COUNSEL FOR APPELLANT,
250 SHOUP MILL, LLC

OHIO BOARD OF TAX APPEALS

250 SHOUP MILL, LLC, (et. al.),

Appellant(s),

vs.

JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO, (et. al.),

Appellee(s).

CASE NO(S). 2011-2226

(EXEMPTION)

DECISION AND ORDER

APPEARANCES:

For the Appellant(s) - 250 SHOUP MILL, LLC
Represented by:
BRUCE L. WATERHOUSE, JR.
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CLEVELAND, OH 44115

For the Appellee(s) - JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO
Represented by:
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ASSISTANT ATTORNEY GENERAL
OFFICE OF OHIO ATTORNEY GENERAL
30 EAST BROAD STREET, 25TH FLOOR
COLUMBUS, OH 43215

Entered Tuesday, January 27, 2015

Mr. Williamson, Mr. Johrendt, and Mr. Harbarger concur.

Appellant appeals a final determination of the Tax Commissioner wherein he denied exemption from real property taxation of certain real property, i.e., parcel number E20 01008 0057, located in Montgomery County, Ohio, for tax year 2010. We proceed to consider the matter upon the notice of appeal, the statutory transcript certified by the commissioner, the record of the hearing before this board, and the parties' written legal argument.

In our review of this matter, we are mindful that the findings of the Tax Commissioner are presumptively valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. Consequently, it is incumbent upon a taxpayer challenging a determination of the commissioner to rebut the presumption and to establish a clear right to the requested relief. *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St.2d 135; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138. In this regard, the taxpayer is assigned the burden of showing in what manner and to what extent the commissioner's determination is in error. *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213.

The building located on the subject parcel is used as a charter school operating under R.C. Chapter 3314 by Horizon Science Academy-Dayton High School, Inc. As explained at this board's hearing, the building is

leased to Horizon by the appellant, a title-holding entity, which is solely owned by New Plan Learning, Inc. ("New Plan"). Murat Arabaci, president of New Plan, explained that it is a nonprofit, 501(c)(3) organization that assists charter schools in finding and financing suitable facilities, and that its directors are elected and approved by its charter school tenants, including Horizon Science Academy, Inc., and four other charter schools. Mr. Arabaci further explained that the property is leased at a rate expected to cover the mortgage payments, construction costs, soft costs, debt service coverage ratio, and operating expenses.

Appellant applied for exemption under R.C. 5709.121, which generally provides for exemption of property used for charitable purposes. The commissioner addressed exemption under both R.C. 5709.12 and R.C. 5709.121, which are related, see *Cincinnati Community Kollel v. Testa*, 135 Ohio St.3d 219, 2013-Ohio-396, ¶23, as well as R.C. 5709.07(A)(1) in the final determination. On appeal, appellant argues that the property is exempt under all these sections. While appellant also asserts in its notice of appeal that the property is exempt under R.C. 3314.082, such argument was not raised in the proceedings below and therefore this board lacks jurisdiction to consider exemption under that section. See, e.g., *St. Mark Coptic Orthodox Church v. Testa* (Interim Order, June 13, 2013), BTA No. 2011-Q-1330, unreported.

We first address exemption under the "charitable use" sections – R.C. 5709.12 and R.C. 5709.121. "[P]ursuant to R.C. 5709.12(B), any institution, charitable or noncharitable, may qualify for a tax exemption if it is making exclusive charitable use of its property. But if the property belongs to a charitable or educational institution, R.C. 5709.121 defines what constitutes exclusive use of property in order to be exempt from taxation." *Cincinnati Community Kollel v. Testa*, 135 Ohio St.3d 219, 2013-Ohio-396, ¶23. R.C. 5709.121(A) provides that "[r]eal property *** belonging to a charitable or educational institution *** shall be considered as used exclusively for charitable or public purposes by such institution *** if***:

> "(1) It is used by such institution, the state, or political subdivision, or by one or more other such institutions, the state, or political subdivisions under a lease, sublease, or other contractual arrangement;
>
> "***
>
> "(b) For other charitable, educational, or public purposes.
>
> "(2) It is made available under the direction and control of such institution, the state, or political subdivision for use in furtherance of or incidental to its charitable, educational, or public purposes and not with a view to profit."

The Supreme Court has broadly defined "charity" in *Planned Parenthood Assn. v. Tax Commr.* (1966), 5 Ohio St.2d 117, as follows:

> "In the absence of a legislative definition, 'charity,' in the legal sense, is 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 to their ability to supply that need from other sources, and without hope or expectation, if not with positive abnegation, or gain or profit by the donor or by the instrumentality of the charity."

At the outset, we find that the property is not entitled to exemption under R.C. 5709.12, as the owner (appellant) does not use the property for charitable purposes. Appellant's sole use of the property is to hold the property and lease it to Horizon. Such use is not charitable. See *Chagrin Realty, Inc. v. Testa* (Apr. 29, 2014), BTA No. 2011-2523, unreported.

We further find that the property is not entitled to exemption under R.C. 5709.121, as the property does not belong to a charitable or educational institution. While appellant argues that it is an "educational

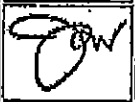
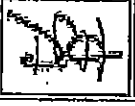
institution," it is clear that appellant exists merely to hold title to the property and provide a vehicle for New Plan to assist Horizon in meeting its facility needs. Moreover, appellant's status as a nonprofit organization is not dispositive in the determination of whether it is a charitable institution under R.C. 5709.121. See *Dialysis Clinic, Inc. v. Levin*, 127 Ohio St.3d 215, 2010-Ohio-5071, at ¶25. Appellant therefore does not meet the requisite requirement of R.C. 5709.121 that the property belong to a charitable or educational institution.

We next turn to exemption under R.C. 5709.07(A)(1), which, prior to it being revised in 2011, provided for exemption of "[p]ublic schoolhouses, ***, and the ground attached to them necessary for the proper occupancy, use, and enjoyment of the schoolhouses, and not leased or otherwise used with a view to profit." The commissioner denied exemption under this section, citing *Anderson/Maltbie Partnership v. Levin*, 127 Ohio St.3d 178, 2010-Ohio-4904, and explaining that "the lessee, a non-profit corporation, is operating a charter school on the subject property, while the appellant, whether non-profit or for-profit, is primarily acting as a landlord collecting substantial market-rate rent. *** Therefore, the applicant clearly has entered into the lease for the subject property as an investment and with a view to profit."

The commissioner cites *Anderson/Maltbie Partnership*, supra, as dispositive in this matter. In that case, the Supreme Court found that a for-profit partnership that leased property to an Ohio community school was not entitled to tax exemption based on the school's use of the property, because the school occupied the property under a commercial, for-profit lease. In doing so, it relied on its previous decision in *Gerke v. Purcell* (1874), 25 Ohio St. 229, where it stated that "the 'exclusion of all idea of private gain or profit' constitutes a basic condition that private property must satisfy to qualify for this exemption." *Anderson/Maltbie*, supra, at ¶20 (citing *Gerke*, supra, at 247). The appellant in this matter argues that *Anderson/Maltbie* is distinguishable, because the lessor in that case was clearly a for-profit entity that entered into the lease solely for profit. Here, appellant argues, because 250 Shoup Mill, LLC and New Plan are both nonprofit entities, it is clear that no profit can be made from leasing the subject properties.

Upon review of the record in this matter, we find that, while any excess of rental income over expenses is not distributed to any private for-profit entities or individuals, New Plan, through distributions from its title-holding entities, does profit from its leases. While it appears to use the profits to subsidize the operations of other tenant charter schools, it is not the use of any profits that determines the exempt status of the subject properties. See, e.g., *Hubbard Press v. Tracy* (1993), 67 Ohio St.3d 564, 566. It does not appear that any excess revenues from a single charter school are held for the future benefit of that certain school; instead, it appears that excess revenues are distributed among all of New Plan's tenant schools. We therefore find that the lease of the property is "with a view to profit" and, accordingly, the properties are not entitled to exemption under R.C. 5709.07(A)(1) for tax year 2010.

Based upon the foregoing, we find that appellant has failed to sufficiently prove that the commissioner's final determination was in error. Therefore, the final determination must be, and hereby is, affirmed.

BOARD OF TAX APPEALS		
RESULT OF VOTE	YES	NO
Mr. Williamson		
Mr. Johrendt		
Mr. Harbarger		

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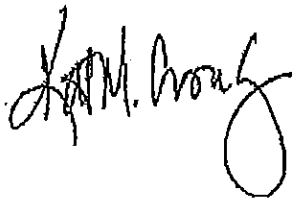

Kathleen M. Crowley, Board Secretary