

IN THE SUPREME COURT OF OHIO
Appeal From the Ohio Board of Tax Appeals

EPISCOPAL SCHOOL OF CINCINNATI,	:	
	:	
Appellee,	:	
	:	Case No. 07-0126
v.	:	
	:	Appeal From BTA
WILLIAM W. WILKINS [RICHARD A.	:	No. 2004-R-230
LEVIN], TAX COMMISSIONER OF OHIO,	:	
	:	
	:	
Appellant.	:	

BRIEF OF APPELLANT

JOSEPH J. DEHNER (0011321)
(Counsel of Record)
SAMUEL M SCOGGINS (0003352)
Frost Brown Todd LLC
201 East Fifth Street, Suite 2200
Cincinnati, Ohio 45202
Telephone: (513) 651-6800
Facsimile (513) 651-6981
sscoggins@fbtlaw.com

ATTORNEYS FOR APPELLEE

MARC DANN (0039425)
Attorney General of Ohio
JANYCE C. KATZ (0042425)
Assistant Attorney General
(Counsel of Record)
30 East Broad Street, 16th Floor
Columbus, Ohio 43215-3428
Telephone: (614) 466-5967
Facsimile: (614) 466-8226
jkatz@ag.state.oh.us

ATTORNEYS FOR APPELLANT

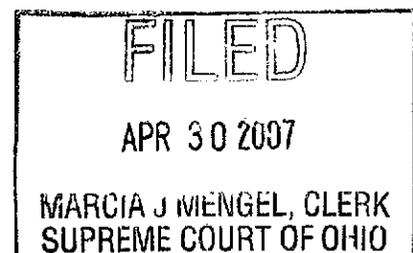


TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
INTRODUCTION.....	1
STATEMENT OF FACTS AND THE CASE	4
A. Procedural Background	4
B. ESC had dream of using the former Natural History Building as a school. However, realizing this dream was far more expensive than anticipated. By the time ESC filed the Application for Exemption, ESC had abandoned the dream of a school in the building for which it was seeking an exemption.....	4
C. Both the Tax Commissioner and the BTA recognized that ESC filed its Application for Exemption after ESC had effectively abandoned the use of the building as a school. However, while the Tax Commissioner correctly applied this Court’s test for prospective use, the BTA ignored it. The BTA granted the exemption even though the BTA acknowledged the building was never used for an exempt purpose.....	14
LAW AND ARGUMENT	
PROPOSITION OF LAW:	
The Tax Commissioner cannot grant an exemption for property to be used for educational or charitable purposes when it is clear that the applicant for the exemption of the property had abandoned the exempt use at the time the application for exemption was filed	20
A. When the BTA decision is neither reasonable nor lawful, it must be reversed.....	20
B. Exemptions from taxation must be strictly construed and the burden of establishing that real property should be exempt is always on the taxpayer and is a heavy burden.....	21
C. A tax exemption should not be a reward for a taxpayer who has raised some funding and has taken steps toward an exempt use of property but who has effectively abandoned intent to use the property for exempt purposes at the time of filing the application for exemption.....	22

1. R.C. 5709.07, R.C. 5709.12 and R.C. 5709.121 allow for property used for specifically designated purposes to receive an exemption from taxation. ESC only took steps toward using the former Natural History Museum building for exempt purposes, but never used the building for an exempt purposes22
2. The Supreme Court’s prospective use test is available when the applicant demonstrates that there is active work toward the exempt purpose at the time the application for exemption is filed and the applicant either is using the property for the exempt purpose at that time or will effectuate that use within a reasonable time24

CONCLUSION34

APPENDIX

Notice of Appeal to Ohio Supreme CourtAppx. 1-21

Final Determination dated February 10, 2004.....Appx. 22-25

Ohio Department of Taxation Recommendation dated May 19, 2003.....Appx. 26-28

Application for Real Property Tax Exemption and RemissionAppx. 29-32

R.C. 323.11 Appx. 33

R.C. 5701.13 Appx. 34

R.C. 5709.01 Appx. 35

R.C. 5709.07 Appx. 36

R.C. 5709.12Appx. 38-38

R.C. 5709.121 Appx. 39

R.C. 5713.081 Appx. 40

TABLE OF AUTHORITIES

CASES

<i>Ace Steel Baling, Inc. v. Porterfield</i> (1969), 19 Ohio St. 2d 137.....	21
<i>American Society for Metals v. Limbach</i> (1991), 59 Ohio St. 3d 38.....	21
<i>Carney v. Cleveland Public Library</i> , 169 Ohio St. at 67.....	24, 25, 32
<i>Christian Benevolent Assn. of Greater Cincinnati</i> (1994), 69 Ohio St. 3d 296.....	28
<i>City of Cleveland v. Limbach</i> (1988), 40 Ohio St. 3d 295.....	27
<i>Cleveland Memorial Medical Foundation v. Perk</i> (1967), 10 Ohio St. 2d 72.....	29
<i>Columbus City School Dist. Bd. of Edn. v. Zaino</i> (2001), 90 Ohio St. 3d 496.....	20
<i>Community Temple v. Voinovich</i> (1976), No. 35395; 1976 Ohio App. LEXIS 8333.....	30
<i>Faith Fellowship Ministries, Inc. v. Limbach</i> (1987), 32 Ohio St.3d 432.....	22
<i>Gahanna-Jefferson Local School Dist. Bd. of Edn. v. Zaino</i> (2001), 93 Ohio St. 3d 231, 2001-Ohio-1335.....	20
<i>H.R. Options, Inc. v. Wilkins</i> , 102 Ohio St. 3d 1214.....	22
<i>Holy Trinity Church v. Bowers</i> , 172 Ohio St. at 103.....	1, 25, 26, 28
<i>Hubbard Press v. Tracy</i> (1993), 67 Ohio St. 3d 564.....	22
<i>In re Exemption</i> (1951), 156 Ohio St. 183.....	24

<i>Lake Cty. Bd. of Commrs. v. Supanick</i> (1972), 32 Ohio St.2d 45.....	26
<i>Joint Hospital Services v. Lindley</i> (1977), 52 Ohio St. 2d 153.....	21
<i>OCLC Online Computer Library Center, Inc. v. Kinney</i> (1984), 11 Ohio St.3d 198.....	21
<i>Ohio Operating Engrs. Apprenticeship Fund v. Kinney</i> (1980), 61 Ohio St. 2d 359.....	25
<i>Pfeiffer v. Jenkins</i> (1943), 141 Ohio St. 66.....	32
<i>Philada Home Fund v. Board of Tax Appeals</i> (1966), 5 Ohio St. 2d 135.....	21
<i>SFZ Transp., Inc. v. Limbach</i> (1993), 66 Ohio St. 3d 602.....	21
<i>Seven Hills Schools v. Kinney</i> (1986), 28 Ohio St. 3d 186.....	21, 23

STATUTES

R.C. 323.11	2, 27
R.C. 5701.13.....	28
R.C. 5709.01	21
R.C. 5709.07.....	passim
R.C. 5709.07(A)(1).....	15
R.C. 5709.12	passim
R.C. 5709.12(B).....	28
R.C. 5709.121	passim
R.C. 5713.081.....	32
R.C. 5713.081(A).....	32

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INTRODUCTION

The Episcopal School of Cincinnati (“ESC” or “Appellee”) knew it would never use the former Natural History Museum (“building”) for an exempt purpose at the time it filed the Application for Exemption (“the Application”). The Board of Tax Appeals (BTA) recognized this fact plus the fact that the building had been sold to a for-profit and razed before the BTA heard the case. (Decision and Order at 10-12).

Despite this, the BTA granted the exemption, reversing the Tax Commissioner’s lawful findings in the process. (Decision and Order at 10-12). In so doing, the BTA misread the Supreme Court’s decision in *Holy Trinity Church v. Bowers*, 172 Ohio St. at 103. In *Holy Trinity* this Court granted an exemption for prospective use of the property on a showing “that plans have been prepared and funds were available, or were to be

available, to effectuate actual construction of such house of worship within a reasonable time from the filing of the exemption.” The test for prospective use as developed by this Court is whether the applicant is actively working toward the exempt purpose at the time of the Application and either is using the property for the exempt purpose or will effectuate that use within a reasonable time.

The BTA based its decision on what it thought were adequate steps in place on tax lien date – January 1, 2001. However, for purposes of the prospective use test, “tax lien date” or January 1 as established in R.C. 323.11, has only been relied upon as a means of determining that the institution seeking the exemption owned the property owned as of a particular date.

The BTA listed as fact that at the time ESC applied for an exemption for the building ESC had decided to forgo taking further steps toward an exempt use of the building. (Decision and Order at 10-12). Yet, the BTA ignored the “effectuation” requirement of the “prospective use” test for exemption when it granted an exemption based on lien date rather than “reasonable time from the filing of the exemption application.” The reasonableness of the effectuation test at the time of filing is quite evident in this case because not only did ESC abandon the exempt use of the building at the time of filing the application for exemption, the property was sold to a for-profit and leveled before the Tax Commissioner issued his Final Determination. In essence, the BTA has instructed the Commissioner to ignore the evidence at the time of the filing of the application indicating that a property will never be used for an exempt purpose and grant an exemption if an applicant has taken some steps toward realizing its dream.

Because the BTA ignored an important part of the *Holy Trinity* test for granting an exemption for prospective use of property, the Tax Commissioner respectfully requests that this Court reverse the BTA. The Court should restore the Tax Commissioner's reasonable, lawful finding that the property was never used for educational or charitable purposes. This Court should also find that the prospective use test is not applicable for this case. Should this Court decide not to reverse the BTA's finding of an exemption, such a ruling would encourage less honest and less worthy institutions to attempt to receive an exemption for "prospective use" of property the institution never intends to use for exempt purposes.

STATEMENT OF FACTS AND THE CASE

A. Procedural background.

ESC purchased the former Natural History Museum building and surrounding property (or, as ESC says, donated money in exchange for the building) on November 21, 2000 from the Cincinnati Museum Center. (Supp. 81, 168-170). On December 21, 2001, ESC filed an Application for Real Property Tax Exemption and Remission (“the Application”) under R.C. 5709.07, R.C. 5709.12 and R.C. 5709.121. (Appx. 29-32). On May 19, 2003, the Tax Commissioner issued a recommendation. (Appx at 26-28). On February 10, 2004 the Tax Commissioner issued a Final Determination denying the exemption. The Tax Commissioner found that the exempt use had never materialized and all use of the building had been abandoned. (Appx. at 2-5).

ESC filed an appeal to the Board of Tax Appeals on March 3, 2004. A BTA hearing examiner heard the case on July 7, 2004. On January 22, 2007, the BTA issued a Decision and Order reversing the Tax Commissioner and granting an exemption to ESC for 2001. (Appx. 5-17).

B. ESC had dream of using the former Natural History Building as a school. However, realizing this dream was far more expensive than anticipated. By the time ESC filed the Application for Exemption, ESC had abandoned the dream of a school in the building for which it was seeking an exemption.

The Rt. Rev. Herbert Thompson, Jr., the Bishop of Southern Ohio had a vision of creating an Episcopal School in Cincinnati. (Supp. 7, 15, 98). In 1997, people affiliated with the Episcopal Diocese of Cincinnati began meeting about the possibility of starting an Episcopal school to bridge the racial divide and to provide good education for students. (Supp. 15, Tr. 55). ESC’s witness, James Hanisian, Arch Deacon of the

Diocese of Southern Ohio told the BTA that “the vision was to create a school in the City of Cincinnati which would bring together affluent white kids from the suburbs and inner city poor kids and a curriculum that was a curriculum of excellence and also had a faith-based portion, so it was unique in the sense that it was not only about excellence and racial reconciliation, but it was to be unabashedly Christian and Episcopal.” (Supp. 7, Tr. 22-23). The National Episcopal School Association was commissioned to do a feasibility study, costing \$75,000. (Supp.15, Tr. 55-56). The study was completed prior to the creation of ESC or to the commitment to purchase the property in question. (Supp. 15, Tr. 55-56).

In the year 2000, those interested in starting a school began to take steps toward actualizing their dream. The Bishop had hired The Reverend Dr. Robert Hansel to head the project and to lead a group of volunteers interested in the project and also appointed by the Bishop. (Supp. 7, Tr. 23). The Episcopal Diocese set up a separate 501(c)(3) organization, ESC, prior to the purchase of a site for the school. (Supp.7, Tr. 21-22, 57).

By the time the ESC Board met on February 29, 2000, those comprising the new organization had decided to use the former Natural History Museum as the school building. (Supp. 56-58). Those attending the meeting seemed to agree that the former Natural History Museum was a perfect building for the new school, that is, if arrangements could be made to find a suitable alternative building into which to move the remaining museum items, such as the woolly mammoths. (Supp. 57).

Located on a hill in Mount Adams, the former Natural History Museum building had been part of the Cincinnati skyline for many years. The building was elegant, big and rambling with thick, asbestos-filled walls. (Supp. 13, Tr. 46; Supp. 169). However, as

recognized even before ESC had acquired the building, one of the major problems with the vision of the Episcopal Diocese was the nature of the building chosen to use for a school.

Just purchasing the building from the Cincinnati Museum Center was expensive. James Hanisian, Arch Deacon of the Diocese testified that he had gotten an initial request for an amount in excess of \$20 million down to \$6 million. (Supp. 20, Tr. 75). Plus, to get this particular building, ESC had to commit to many actions prior to even beginning to renovate the building for use as a school including the purchase of a second building.

The family that gave the Mount Adams hill-top property to Cincinnati for use as the Natural History Museum gave it with a covenant that the property could only be used as a museum. (Supp.8, Tr. 27). Before the building could be transformed into a school, the covenant restricting the use of the property to a museum had to be removed or altered. While Cincinnati owned the property, the City received no revenue from the property either in tax or in its lease to the Natural History Museum because of the restrictions in the covenant. (Supp. 46).

ESC had to lobby Cincinnati City Council to alter the covenant so that the restriction could be changed to allow the use of the property as a school. Once the covenant was altered, the former Natural History Museum Building could be transferred to ESC in exchange for a donation to the Museum Center of Cincinnati of cash and of a building into which the remaining exhibits and offices and library could be moved. (Supp. 7, Tr. 24; Supp. 59- 65).

As the ESC Board tried to move toward realizing its dream, it found out that the price tag to get the school started included purchasing the property, renovating two

buildings and a startup cost – all of which kept growing. Changing the building into a modern facility was a very expensive proposition, more than the ESC Board anticipated at that first meeting. (Supp. 13, Tr. 46-47; Supp. 159, 168-170).

By the March 21, 2000 meeting, Board members tossed around a possible cost of \$4 million as a rough estimate of the cost of acquiring the building and starting the school in September of 2001. (Supp. 61). The Board estimated the cost of purchasing the building at \$2 million and the rest would be for the operating expenses. The cost of acquiring the property also included the cost of purchasing and refurbishing a second building. (Supp. 46-50). The Board decided to purchase a building on Gest Street, near the location of the current Museum of Natural History for the swap.

Board member John Pepper called the amount of fundraising necessary to purchase two buildings, reconstruct both buildings and open the school by September 2001 “Herculean [sic].” (Supp. 61). Pepper stated that his rationale for believing the task was so large and difficult was because the fundraising had to be completed in a short time or the school could not open as planned.

At the Board meeting held Wednesday, May 24, 2001, Bob Hansel announced that firm figures had been brought to the Museum Board regarding the cost of the addition to house the Museum’s collection. (Supp. 68) The cost had become \$6 million with the Museum being willing to underwrite \$1.5 million of that amount. (Supp. 68). ESC would have to cover the \$4.5 million balance. This amount alone exceeded ESC’s initial estimates of the total cost and did not cover any renovation or startup costs. Bob Hansel told the Board that the plan required ESC “raise \$4.5 million and then borrow

another \$5 million” to provide sufficient funding for the two “turnkey” facilities – the two buildings ESC had to purchase before beginning the school.

While \$6 million was high, Arch Deacon James Hanisian told the BTA at the hearing that he had negotiated down the cost of acquiring the former Natural History Museum building during this time period from the Museum Board’s original request of in excess of \$20 million to \$6 million. (Supp. 20, Tr. 75). At that time, the Arch Deacon had not yet become staff at the Diocese but was still at the Church of Redeemer and acting as President of ESC’s Trustees.

The Board passed a resolution on June 28, 2000 in which they resolved to pay the costs on an interim basis to acquire, renovate and equip the former Natural History Museum of Cincinnati. (Supp. 74). The June minutes of the Board indicate the Board discussed a financing plan based upon a \$10 million bond issue via the Capital Markets Department of PNC, repayable over a twenty year period as the Episcopal School of Cincinnati carried out a capital gifts campaign. (Supp. 72). Since the bond issue would take many months to transact, the ESC Board decided that PNC needed to arrange “bridge financing” to get the money needed to purchase two buildings. (Supp. 72). The goal was to immediately raise sufficient money to purchase the two buildings and start renovation.

Bishop Thomson also sent a letter announcing a \$500,000 gift from the Diocese and that was announced at the meeting. ESC would receive the \$500,000 grant over a three year period. (Supp. 135). This grant, while generous, left ESC far short of its own cost estimates, which later events show were still too low at this point.

In August of 2000, ESC had a contract to obtain the former Natural History Museum building. (Supp. 16, Tr. 58). Cincinnati City Council agreed to change the covenant restricting the use of the property to museum use in order to permit ESC to operate a school on the property.

News articles published during the summer of 2000 indicated that the estimated cost for renovation was \$11 million. (Supp. 49). According to the minutes of the October 12, 2000 Board meeting, Bob Hansel reported the original estimate of the cost of renovating the building turned out to be a million dollars under what the construction company told them to expect. (Supp. 86). By October of 2000, before the purchase of the building, the cost just for its renovation had already risen to \$11.5 million. (Supp. 86).

On November 21, 2000, the ESC Board purchased the building or, after ESC made a donation to the Cincinnati Museum Center, the Museum Center gave ESC the building. (Supp. 81). The Episcopal Diocese guaranteed a \$6.5 million dollar loan from PNC Bank to the Episcopal School for purchase of the building. (Supp. 25, Tr. 91). While ESC had obtained a loan for \$6.5 million, by November of 2000, with the "swing loan" line of credit in place, there was a budgetary shortfall of about \$60,000. (Supp. 96).

After ESC purchased the former Natural History Museum building, the cost for renovation had, by then, grown to be approximately \$18 million, not including asbestos removal or wiring the building for modern computers. (Supp. 13, Tr. 47-49; Supp. 169-170). This cost was more than four times the initial \$4 million estimate to purchase and start up the school.

The November 20, 2000 Board minutes noted Board's concern about being able to meet the start-up operating costs of the School. (Supp. 98). There was also a

discussion about how many grades it would be possible to open in September, 2001 and the Board raised the idea of scaling back “so that we and the Staff can give more time and attention to structure and fund-raising.” (Supp. 98).

During the December 12, 2000 Board meeting, the Board talked about the major gaps between the money raised and the money needed to renovate the building and open the school. (ST. 219, 224-228). The financial projections were shaky. (Supp. 102-104).

Board member Jim Ewell discussed the efforts to reduce the cost of renovating the building and the cost of opening the school to an affordable cost. (Supp. 102-104). The Board focused on opening the school with only the kindergarten and first grade classes as a means of lowering the cost. There was also mention of finding an alternative site for the school.

After January 1, 2001, ESC’s Board focused more and more on the problems of raising financing for all the schools costs. Even though the Board’s members had major questions about the ability to raise sufficient funding to complete the project at the December Board meeting, ESC signed a contract with a construction company on January 2, 2001. (Decision and Order 9-10).

A January 8, 2001 report presented to the Board indicated ESC had \$89,922 in the bank, \$155,849 cash in escrow, and \$55,405 cash in the brokerage account. (Supp. 117). The report also indicated \$86,204 in gifts received and \$103,110 in open pledges. (Supp. 119).

According to the minutes of the January 30, 2001 Board meeting, Joan Peck “brought up the need to recognize and discuss our serious financial situation of not

having the resources to guarantee the \$850,000 difference in the construction cost and the Bank's approval line on the loan for the Bond Issue." (Supp. 122). Peck also addressed the lack of funds for the day-to-day running of the school project.

The Executive Committee Agenda dated February 7, 2001 emphasized the funding problem by drawing several question marks by the word "Funding." (Supp. 124). By the end of February, the Board was discussing its financial problem and was thinking about other options for the former Natural History Museum building as well as other places in which to put the school. (Supp. 130-132).

The witness for the Episcopal Diocese James Hanisian, Arch Deacon of the Diocese of Southern Ohio told the BTA that it turned out that Father Hansel had been building a house of cards. (Supp. 20, Tr. 75-76). Also, Father Hansel had suddenly decided to move out of Cincinnati to Atlanta in February, 2001. (Supp. 122).

The Arch Deacon told the BTA at the hearing, that by the time Father Hansel left, the ESC Board clearly saw major financial problems preventing their movement toward their dream. "We were leaking money because we were paying interest on this bridge loan. And in an attempt to stop that leak, we went to a number of people that Father Hansel had identified as being potential donors to see whether or not there was enough to help us get over the hump that we were seeming [sic] to have in order to float the bond. He apparently told these people that the diocese was going to build it. We just needed them to help with scholarships. He told us that the corporate world was buying it and that we just needed the money to get the bridge thing done, so once we got up and going it would be fine." (Supp. 20, Tr. 75-76).

ESC had failed to complete critical steps as of March 21, 2001. (Supp.52). But, perhaps the biggest blow to the dream was Appellant's inability to receive a \$12.2 million bond issue which was to be "the money to renovate the museum into the school." (Supp. 9, Tr. 29). Appellant's witness testified that "[t]he people who had given us green lights all along with the underwriters and other people came about one month after we guaranteed the \$6.5 million because it was supposed to be taken care of by the bond issue, and said we are not going to do the bond issue, and that was the crisis point." (Supp. 9, Tr. 29-30). At that point, the school defaulted on the loan because the school had no money and the trustees of the Episcopalian Diocese were then obligated to pay back the bridge loan. (Supp. 9, Tr. 30).

By April of 2001, the Board saw that they could not open the school in the building in September of 2001. (Supp. 10-11, Tr. 35-36; Supp. 20, Tr. 75-78). At some point after April, there was a settlement with the architectural firm. (Supp.12, Tr. 43). Then, the school staff left. Caroline Blackburn, hired as a principal for the school "parachuted out" in June of 2001, having been paid extra money in settlement. (Supp. 17, Tr. 64). The cost of just renovating the building had jumped to \$20 million because of a need to remove asbestos as well as to rewire the building for the 21st Century. (Supp. 168-170).

ESC made only the bare minimum payments by September 21, 2001 - payments for legal fees on the bond levy, the utilities of the building and a severance payment to one of the employees. (Supp. 27, Tr. 97). After September of 2001, the only payments ESC made were to prevent the deterioration of the property. ESC had halted payments on projects to make the former Natural History Museum building into a school. (Supp.

27, Tr. 99-100). In November, ESC made payments for utilities and for other costs of maintaining the property. (Supp. 27, Tr. 98).

ESC's Board had emphasized the purchase of the building, its renovation and innovative furniture to use inside it. The school's other potential costs were also high, anticipated to be \$40 million dollars. (Supp. 22, Tr. 80). The costs included starting up the school, operating the facility and providing scholarships for the targeted inner city school children. (Supp. 22, Tr. 80, 83). The money for all of this never was in place, in part because the Episcopal Diocese didn't get "accurate information from the person about the charges" and in part because they had people who liked the concept but wouldn't give money until the school was operating. (Supp. 19, Tr. 69). But, the school couldn't operate until and unless there was money in place, "kind of a Catch 22." (Supp. 19, Tr. 69).

By the time Appellant had filed an application for exemption in December of 2001, the idea of using the former Natural History Museum building for a school site was dead. The vision of starting a school somewhere else in another building continued.

As to the building itself, there were some negotiations with the Art Museum, which was considering purchasing it, but the price offered was not acceptable to Appellant. (Supp. 11, Tr. 38). In September, 2002, it was common knowledge that WCPO-TV was negotiating to purchase the building so that the City could expand its convention center into the then WCPO-TV property. On November 1 2002, the Cincinnati City Council voted to release the covenant. (Supp. 11; Tr. 40). After the vote, the property, once under a covenant for museum use only, was sold on November 15,

2002 to a for-profit broadcast news company. (Supp. 168-170). The television station demolished the building, constructing a new studio/office in its stead. (Supp. 168-170).

In a letter written to the Department of Taxation on November 4, 2002, after the covenant had been released but eleven days before the building transferred to WCPO-TV, an attorney for ESC noted that plans for opening the school had been delayed “[b]ecause fund-raising was not possible on the scale intended.” (Supp. 42). Even with the covenant changed and a sale to WCPO pending, the letter went on to say that the property remained tax-exempt and “exclusively devoted to exempt purposes.” Given the common knowledge of the building’s fate at this time, the attorney’s representation was inaccurate.

C. Both the Tax Commissioner and the BTA recognized that ESC filed its Application for Exemption after ESC had effectively abandoned the use of the building as a school. However, while the Tax Commissioner correctly applied this Court’s test for prospective use, the BTA ignored it. The BTA granted the exemption even though the BTA acknowledged the building was never used for an exempt purpose.

ESC filed its Application for Real Property Tax Exemption and Remission under R.C. 5709.07, R.C. 5709.12 and R.C. 5709.121 on December 21, 2001, after all hope of completing the project at the museum had faded. (Appx. 29-32). Despite the collapse of the project, ESC stated in the application that it intended to use the building to operate an educational institution which would develop the intellect of each student enrolled in the program and which would “serve as a non-profit, independent Episcopal school in ministry to and with families of the Greater Cincinnati community.” (Appx. 29-32). In the Application, ESC also wrote that it has been “actively planning and working toward the use of the property for the above purposes since the land was purchased.”

In his February 10, 2004 Final Determination denying the exemption, the Tax Commissioner noted an exemption for “prospective use” of property for an exempt

purpose had been created to help those who needed to develop or build on real property prior to using it for its exempt purpose. (Appx. at 2-5). The “prospective use” exemption was based upon an understanding that “actual use for the exempt purpose cannot always begin immediately.” The Tax Commissioner continued, finding that ESC had shown intent to use the property for an exempt purpose and had made some progress toward the goal. The Tax Commissioner added that he could not grant the exemption to the property under R.C. 5709.07(A)(1) because ESC’s “intent did not materialize into an actual use of the property in question.” The Tax Commissioner also pointed out that ESC had since sold the property to a for-profit entity. (Appx. at 2-5).

As to ESC’s requests to be exempt under R.C. 5709.12 or R.C. 5709.121, the Tax Commissioner found neither statute to be applicable. (Appx. at 2-5). Given that R.C. 5709.07 provided an exemption for a school house and ESC wanted to use the building as a school house, the Tax Commissioner found R.C. 5709.07 the more appropriate statute to use to determine exemption for this particular property. (Appx. at 5). The Tax Commissioner also pointed out that even if the application had been reviewed under R.C. 5709.12 or R.C. 5709.121, the fact that ESC had never actually used the property for an exempt purpose would prevent granting the exemption. The Tax Commissioner found the sale of the building to a for-profit entity without the building ever having been used as a school or used for other exempt purposes a further reason why he could not grant an exemption for prospective use under either of the charitable statutes.

ESC filed an appeal to the Board of Tax Appeals on March 3, 2004. A BTA hearing examiner heard the case on July 7, 2004. On January 22, 2007, the BTA issued a

Decision and Order reversing the Tax Commissioner and granting an exemption to ESC for 2001.

In deciding the case, the BTA determined that it had to first answer two questions. These questions were as follows: “as of what date are we to determine exempt status, the tax lien date or the date of application for exemption, and was adequate funding in place to make this plan more than a ‘mere dream.’” (Decision and Order at 10).

The BTA, in its Decision and Order, created a time line of what it considered to be significant facts in the case. The BTA pointed out that ESC had taken several steps toward realizing its “dream” of an actual school prior to the January 1, 2001 tax lien date upon which the BTA based its exemption. (Decision and Order at 7-9). The steps ESC took included forming a nonprofit, 501(c)(3) corporation in 2000, hiring a coordinator, Father Hansel, to open the school, setting up committees for curriculum, personnel, and property site development, and purchasing the building for \$4.5 million from the Cincinnati Museum Center. All of these steps toward the realization of the dream took place before January 1, 2001, but these steps were not close to being sufficient. The BTA noted that during the same pre-January 1, 2000 period, ESC had the City of Cincinnati change the restrictive covenant limiting use of the property, hired an architectural firm, and hired four individuals who would be key staff people. (Decision and Order at 7-9). There were still other steps taken, most of them prior to January 1, 2001. The BTA also noted that after January 1, 2001, on January 2, 2001 to be precise, ESC hired a construction company. In addition, the BTA noted that ESC had received some financing consisting of a \$500,000 gift, a \$6.5 million committed line of credit and had obtained a \$10.5 million line of credit for school construction. (Decision and Order at 9).

The BTA stated that by April of 2001, signs of problems were rampant even though ESC had taken steps toward using the former Natural History Museum after January 1, 2001¹. (Decision and Order at 9). “It was then that ESC realized the September 2001 opening date was in jeopardy, and it failed to complete the conversion of the property. Dr. Hansel left Cincinnati.” (Decision and Order at 9). In June of 2001, the principal and the staff left. (Decision and Order at 9).

The BTA indicated that any progress toward developing the former Natural History Museum into a school had completely stopped by September of 2001. (Decision and Order at 9). The BTA noted, by the time ESC filed its application for exemption, ESC had “effectively abandoned” plans for using the former Natural History Museum as a school. (Decision and Order at 10). “By September 2001, ESC was making payments only for legal fees associated with the bond levy, utilities and severance pay. By November 2001, only utilities and maintenance payments were being made to prevent the deterioration of the building. By the time the application for exemption was filed in December 2001, ESC had already begun considering the possibility of starting a school in another building. The subject property was sold to Scripps Howard, a for-profit corporation, in November 2002 after the city of Cincinnati was persuaded to release the use restrictions on the property.” (Decision and Order at 9-10).

¹ The BTA cites April as the critical month. However, the record indicates that by December ESC’s Board was concerned that the cost for the reconstruction and start-up was considerably above the financing in place to begin the school in the former Natural History Museum building. Supp. 99-109). The Board suggested the possibility of an alternative place for the school at that meeting. Further, testimony at the BTA hearing made it clear that the ESC Board knew in February of 2001 that Father Hansel had been building a “house of cards” and financing wasn’t available to move forward with a school in the former Natural History Museum building. (Supp. 20, Tr. 75-76).

Despite the fact that ESC filed its application for exemption after ESC was no longer taking steps to renovate the building so it could be used as a school, the BTA decided the prospective use test required using as a base for exemption, the progress an applicant had made toward the end goal on tax lien date rather than the date of application. (Appx. 5-17, Decision and Order at 10-11). Ironically, that ESC would never use the building for exempt purposes was clear to the BTA because long before the hearing, ESC had sold the building to a for-profit company which had demolished the building. (Decision and Order at 9-10; Supp. 168-170).

As to the adequate funding question, the BTA based its decision on the progress ESC had made toward turning the building into a school as of January 1, 2001. The BTA looked at a variety of facts, including money committed or to be committed to the project, people and companies hired to work on the project and drawings and plans for the project developed. (Decision and Order at 11). Far less than half of the financing needed to have the school up and running in the former Natural History Museum building had been committed by January 1, 2001. Despite the large shortfall, the BTA found sufficient funding in place to grant an exemption for prospective use as of January 1, 2001.

There was one final question at which the BTA looked – “the effect, if any, of the fact that the exempt use was never realized and the school never opened.” (Decision and Order at 10). The BTA stated that it did not find “the fact that the exempt purpose was never accomplished sufficient to deny the subject property exemption for 2001.” (Decision and Order at 12). Thus, the BTA has, as a practical matter, told the Commissioner to ignore known facts in reaching his decision.

Certainly, ESC's Board was able to raise and to spend a significant amount of money in an attempt to use the former Natural History Museum building as a school. However, the percentage of the money raised and spent was only a small part of what was really needed to transform the old, thick-walled, asbestos-filled former Natural History Museum into a school. (Supp. 168-170). Most of the Board's effort toward its goal took place prior to the purchase of the building on November 21, 2000. At the time of the purchase during the next two months, the Board came to understand it could not raise sufficient money to cover the cost of renovation and opening the school in the former Natural History Museum building.

Perhaps if another site had been chosen or another building chosen for use, ESC would have easily been able to realize its dream and open a school with the amount of money the Board raised. But, to make the dream a reality in that particular building, the Board needed significantly more money. ESC never raised the money needed to proceed with the project and complete it.

LAW AND ARGUMENT

PROPOSITION OF LAW:

The Tax Commissioner cannot grant an exemption for property to be used for educational or charitable purposes when it is clear that the applicant for the exemption of the property had abandoned the exempt use at the time the application for exemption was filed.

ESC planned to use a specific building for a school and that plan, as noted by the BTA was never realized. As the BTA stated, at the time ESC applied for an exemption, the plan to use that particular building for a school had been effectively abandoned. The question before this Court is whether ESC should receive an exemption from tax for the former Natural History Museum building for the one full year beginning on tax lien date January 1, 2001 that the building was in ESC's possession, even though it never realized its dream and knew it would not do so at the time it filed its Application for exemption.

A. When the BTA decision is neither reasonable nor lawful, it must be reversed.

In reviewing a BTA decision, this court looks to see whether that decision was "reasonable and lawful." *Columbus City School Dist. Bd. of Edn. v. Zaino* (2001), 90 Ohio St.3d 496, 497, 2001-Ohio-5. When a decision is unreasonable or unlawful, this Court has said that it "will not hesitate to reverse a BTA decision that is based on an incorrect legal conclusion." *Gahanna-Jefferson Local School Dist. Bd. of Edn. v. Zaino* (2001), 93 Ohio St.3d 231, 232, 2001-Ohio-1335.

The Supreme Court described its review of the BTA decisions on ultimate factual conclusions, i.e., legal conclusions in *SFZ Transp., Inc. v. Limbach* (1993), 66 Ohio St. 3d 602, 604. This Court wrote as follows: "The decision of the board derived from an inference of an ultimate fact, i.e., a factual conclusion derived from given basic facts. The reasonableness of such an inference is a question appropriate for judicial determination. What the evidence in a case tends to prove, is a question of law; and when all the facts are admitted which the evidence tends to prove, the effect of such facts raises a question of law only." *SFZ Transp., Inc. v. Limbach*, at 66 Ohio St. 3d 604; citing *Ace Steel Baling, Inc. v. Porterfield* (1969), 19 Ohio St.2d 137.

B. Exemptions from taxation must be strictly construed and the burden of establishing that real property should be exempt is always on the taxpayer and is a heavy burden.

All real property in this state is subject to taxation, except only such as is expressly exempted therefrom. R.C. 5709.01. Thus, exemption from taxation is the exception to the rule. *Seven Hills Schools v. Kinney* (1986), 28 Ohio St. 3d 186. Statutes granting exemptions must be strictly construed. *American Society for Metals v. Limbach* (1991), 59 Ohio St. 3d 38. Consequently, the taxpayer has the burden of proving it is entitled to the exemption. *OCLC Online Computer Library Center, Inc. v. Kinney* (1984), 11 Ohio St. 3d 198. "The rationale justifying a tax exemption is that there is a present benefit to the general public from the operation of the charitable institution sufficient to justify the loss of tax revenue. *Philada Home Fund v. Board of Tax Appeals* (1966), 5 Ohio St. 2d 135.

The burden of establishing that real property should be exempt is always on the taxpayer and is a heavy burden. As the Ohio Supreme Court stated in *Joint Hospital Services v. Lindley* (1977), 52 Ohio St. 2d 153: "Exemptions are recognized only upon

the showing that which is claimed to be exempt falls clearly within the express meaning of the statute granting the exemption. The General Assembly encourages certain activities through the grant of tax-exempt status, but tax exemption is in derogation of the rights of all taxpayers and necessarily shifts a heavier tax burden upon the nonexempt.” *Id.* at 154-155. See also *Faith Fellowship Ministries, Inc. v. Limbach* (1987), 32 Ohio St. 3d 432, 434. Thus, the underlying principle governing all tax exemptions is that an “exclusion from taxation must be construed *strictly against* the taxpayer.” *H.R. Options, Inc. v. Wilkins*, 102 Ohio St.3d 1214; 2004-Ohio-2085.

C. A tax exemption should not be a reward for a taxpayer who has raised some funding and has taken steps toward an exempt use of property but who has effectively abandoned intent to use the property for exempt purposes at the time of filing the application for exemption.

1. R.C. 5709.07, R.C. 5709.12 and R.C. 5709.121 allow for property used for specifically designated purposes to receive an exemption from taxation. ESC only took steps toward using the former Natural History Museum building for exempt purposes, but never used the building for any exempt purpose.

ESC filed for an exemption under R.C. 5709.07, R.C. 5709.12 and R.C. 5709.121. All three statutes grant an exemption for property when it is used exclusively for specific purposes. R.C. 5709.07 exempts property used as a “school house” or a “house of public worship.” R.C. 5709.12 exempts property used “for exclusively charitable purposes,” while R.C. 5709.121 exempts property if it is owned by a charitable or educational or public institution and used for charitable, educational or public purposes.

Only if the applicant filing for exemption for the property uses the property for exempt purposes is the property then qualified for tax exemption under R.C. 5709.07, R.C. 5709.12 or R.C. 5709.121. *Hubbard Press v. Tracy* (1993), 67 Ohio St.3d 564, 566.

A building may only receive an exemption as a school if it is used for educational purposes. *Seven Hills Schools v. Kinney*, 28 Ohio St. 3d at 186.

ESC took some steps toward opening a school in the former Natural History Museum building, but never used the building for a purpose that would qualify for an exemption under R.C. 5709.07, R.C. 5709.12 or R.C. 5709.121. ESC never raised sufficient funds to renovate and then to open the former Natural History Museum as a school.

ESC had a dream of using the property for a school, but it remained just a dream. The cost of realizing the dream, of opening the building was far higher than anticipated. With asbestos, thick walls and other problems, the dream of renovating the former Natural History Museum building into a school would have taken close to \$20 million. Then, as ESC's witness pointed out at the BTA hearing, ESC needed an additional \$40 million to provide scholarships to inner city children and to make the school fully operative. The property was never used for an exempt purpose under R.C. 5709.07, R.C. 5709.12 or R.C. 5709.121.

The BTA incorrectly found that sufficient funding was in place to renovate and open the school in the former Natural History Museum building on January 1, 2001. In reality, ESC's Board had not raised anywhere close to the amount of money needed for that purpose. While the ESC Board planned to have a bond issue for \$10 million dollars to use to pay off the bridge loan and provide extra financing for the school renovation and opening, there never was a bond issue. For whatever reason that bond did not materialize. Even if it had, that amount of money raised from the bond would not have

been sufficient to finance both the renovation of the former Natural History Museum building and the cost of opening the school in that building.

2. The Supreme Court's prospective use test is available when the applicant demonstrates that there is active work toward the exempt purpose at the time the application for exemption is filed and the applicant either is using the property for the exempt purpose at that time or will effectuate that use within a reasonable time.

Even before it formally created a “prospective use” test, this Court exempted property during the construction of a new house of public worship when the applicant had used the property before and after construction as a synagogue. *In re Exemption* (1951), 156 Ohio St. 183. The BTA had affirmed the removal of the property from the exempt list during the construction of the new synagogue building. *Id.* This Court stated that the period of time involved in the tearing down of the old house of public worship and the construction of the new building was not an unreasonable length of time. For that reason, the construction should not be considered an interruption of the use of such church property exclusively for public worship.” *Id.* at 185.

This Court understood that when property is entitled to be exempted from taxation, it may take time to ready the property for its intended use – i.e. to build the property, to raise the money for the plans, the construction, etc. *Carney v. Cleveland Public Library* (1959), 169 Ohio St. 65. In *Carney*, this Court developed a prospective use test allowing for an exemption for property intended for use as a library, a public purpose, prior to the opening of the library. The exempt use was to continue for as long as the property was used for exempt purposes and was to be removed if it was used for nonexempt or commercial purpose. *Id.*

This Court created a prospective use test to be applied specifically to charitable, educational and religious institutions in *Holy Trinity*, 172 Ohio St. at 103. An applicant can obtain a tax exemption for its property if the property is to be used for exempt purposes within a reasonable period of time after filing the application. *Id.* at 103. This Court also required the applicant to be taking significant steps toward the exempt goal and still be taking such steps to make the dream concrete and actual at the time the application for exemption is filed. *Id.* If the applicant showed proof of intent to use the property in an exempt manner within a reasonable time from the filing of the exemption and provided tangible evidence that the property would be so used, the exemption for the property could be granted prior to the applicant starting the exempt use. *Ohio Operating Engrs. Apprenticeship Fund v. Kinney* (1980), 61 Ohio St. 2d 359, 362-363.

This Court distinguished a private, religious institution from a governmental entity in which it would be “sufficient if the property had been acquired by the organization entitled to the exemption, with the intention of devoting it to the exempt use.” *Holy Trinity Church v. Bowers*, 172 Ohio St. at 107. Even though actual physical use of the property of a governmental agency for the exempt purpose has not yet begun, “such property is entitled to be exempted from taxation, as long as it is not devoted to a nonexempt or commercial use.” *Id.* at 106. The rationale for the distinction is the fact that “the sole legitimate purpose of taxation is to benefit the public;” therefore, the taxation of property already devoted to public use is merely “diverting funds from one public benefit to another.” *Carney v. Cleveland Public Library*, 169 Ohio St. at 67. Property, when owned by a governmental entity, would remain exempt “until such time

as, among other things, the exempted purpose was abandoned or ceased to exist. *Lake Cty. Bd. of Commrs. v. Supanick* (1972), 32 Ohio St.2d 45.

In contrast, this Court held that property belonging to a nongovernmental entity could be exempted before use begins when the ownership of the property is “coupled with the purpose, supported by tangible evidence, that the property **will be devoted to an actual physical use** for the public benefit. The intent to use such property for an exempt purpose must be one of substance and not a mere dream that sometime in the future, if funds can be obtained, the entity would so use such property.” *Holy Trinity Church v. Bowers* (1961), 172 Ohio St. 103, 107. This language does not allow an applicant to rest on mere intent. Rather, the applicant must demonstrate that the property “will be devoted to an actual physical use.” *Id.* The syllabus of that opinion elaborates on this point:

A religious institution which purchases vacant land for the purpose of erecting a house of worship thereon is entitled to have such land exempted from taxation, where such institution is actively working toward the use of such land for the public benefit; and the intent to make such a use of the land may be evidenced by a showing that **plans have been prepared and funds were available, or were to be available, to effectuate actual construction of such house of worship within a reasonable time from the filing of the exemption.** (emphasis added).

Thus, to grant an exemption, it is the obligation of the grantor to look at the plans, the funding and the intent to “effectuate” the actual construction of the property at the time of application. *Id.* If the applicant is still taking concrete steps toward completing the goal at the time the applicant files the application, the chances are much higher that the applicant will actually use the property for the exempt purpose.

The BTA acknowledged that the use of the property had been abandoned before the application was filed as emphasized by the sale of the property prior to the date the Tax Commissioner issued his Final Determination. In addition, the BTA’s own findings

demonstrate that ESC never had adequate funds in place to proceed with the opening of the school in the former Natural History Museum building.

The BTA ignored the abandonment of the use at the time of the application and the sale prior to the BTA hearing to a for-profit company. The BTA wrote that it applied the “prospective use” test, developed by the Supreme Court in *Holy Trinity*, but, instead of applying the test, the BTA created a new one. The BTA looked at the steps taken and the financing and plans in place on January 1, 2001. The BTA found what was in place on January 1 constituted sufficient funding to open the school and sufficient steps toward an exempt purpose to grant the exemption even though the exempt purpose was never realized and the funding was never sufficient for ESC to use that particular building as a school. (Decision and Order at 10-12).

The problem started when, instead of using the date of application as a base for discussion, the BTA mistakenly looked at the tax lien date as the critical date for determining exemption under the prospective use test. But, while tax lien date, created by the General Assembly in R.C. 323.11, is to be used to determine if the exemption is in place on January 1, 2001, tax lien date should not be used to determine prospective use. This is so because tax lien date is different in purpose and in function from the date of application for an exemption.

The General Assembly in R.C. 323.11 mandated January 1 as the date the lien of the state for taxes levied attaches to real property annually, even though the tax has yet to be assessed. *City of Cleveland v. Limbach* (1988), 40 Ohio St.3d 295. January 1 is also used for purposes of determining the ownership of property and whether or not its owner is using the property for an exempt purpose under R.C. 5709.07, R.C. 5709.12 or R.C.

5709.121. In *Christian Benevolent*² this Court pointed out that a nursing facility could not be exempted for a given year under R.C. 5709.12(B) and 5701.13, unless it had its license to operate the facility by the tax lien date of that year. *Christian Benevolent Assn. of Greater Cincinnati* (1994), 69 Ohio St.3d 296 at syllabus. The first January 1 after the institute received the nursing home license became the critical date for starting the exemption from taxation.

While tax lien date is statutorily required to determine the lien of taxes and, if property is exempt for a particular year because the exempt use is in place at that time, it should not be used as the basis for the prospective use test. Too many problems can arise from the time property is purchased, positive steps are taken and the completion of the exempt project. In this instance, the cost of turning the former Natural History Museum building into a school and operating it were significantly underestimated. Further, some of the funding upon which ESC relied, a bond issue, never materialized.

Regardless of how altruistic a particular applicant may be, the taxpayers of Ohio should not be forced to subsidize the cost of an unsuccessful project or dream that never can be realized. Moreover, where an applicant is seeking an exemption for prospective use, the applicant must have an objective basis for its statements that it will be using property for an exempt purpose. *Holy Trinity Church v. Bowers*, 172 Ohio St. at 103, 107.

The BTA decision undermines that principal, awarding an exemption where an applicant knows or should know that the purpose will not be achieved. The BTA's

² As the Court stated, "the license requirement of R.C. 5701.13, by its very nature, precludes an application of the prospective use test." *Id.* Thus, there can be no nursing home until licensed as such.

approach rewards insincerity by the applicant or those filing on its behalf, encouraging an applicant, or those filing on its behalf, to ignore facts regarding the current status of the project and to attempt to get taxpayer support while providing no benefit to the public. In *Carney*, supra, this Court reasoned that taxation of property devoted to public use is “diverting funds from one public benefit to another.” Id. at 67. Here, the applicant seeks to divert funds from public benefits as determined by the legislature to a project that it knew, on the application date, would never provide a public benefit.

Because of the risk that an institution will never use property for exempt purposes, this Court wisely chose the date of application as the yardstick for an exemption when the actual exempt use is still in the future. The property should be granted an exemption when, on the date an application for exemption is filed, a taxpayer has concrete and actual plans, including sufficient funding to effectuate the exempt use in a reasonable time and continues to develop the property toward its exempt use after filing. *Cleveland Memorial Medical Foundation v. Perk* (1967), 10 Ohio St. 2d 72, 73. If, as in this instance, the taxpayer has effectively abandoned all intention to use property for an exempt purpose as of the date the taxpayer filed the application for exemption, the exemption should be denied.

In only one instance has a court of appeals found the property of a religious institution deserving of an exemption when the use had been abandoned at the time of application. The Eight Appellate District Court of Appeals granted a Jewish house of worship an exemption for its property in the Village of Pepper Pike when, after all plans had been made, property purchased and funds raised to build the property, the Village passed zoning legislation which effectively banned the synagogue’s use of the property as

a synagogue. *Community Temple v. Voinovich* (1976), No. 35395; 1976 Ohio App. LEXIS 8333. The synagogue fought Pepper Pike in court for several years. This case represents a situation where legal forces outside of the control of the institution seeking an exemption destroyed any possibility for the institution to get the exemption even though the applicant had all pieces necessary to complete the exempt structure.

That certainly isn't the case for ESC's attempt to convert the former Natural History Museum building into a school. ESC managed the legal problems involved with the building by getting the covenant changed to allow the property to be used for a school and then having the covenant removed when it needed to rid itself of the building. *Community Temple* is also distinguished from this case because the synagogue had sufficient funding to construct and would have, but for the last minute legal impediment. ESC never came close to raising the type of money it needed to renovate the former Natural History Museum building or to operate the school in that building.

ESC's problem was that its dream of using this particular building for a school was not grounded in reality. The steps taken were in no way sufficient to result in a successful end.

ESC knew that it must make continued progress toward the exempt purpose after the lien date to get the exemption. After the application for exemption had been filed but before the Tax Commissioner issued his Final Determination, an attorney for ESC assured the Department of Taxation that the building would eventually be used for the exempt purpose and that the exempt use had only been delayed. The November 4, 2002 date on the letter indicated the attorney had written it just days after the City of Cincinnati released the covenant on the building and weeks after a story about the building's

pending sale had appeared in a local newspaper. Only eleven days after the date of the letter, the property was sold to a for-profit local television station, which demolished the building soon thereafter. Had ESC believed from the start that having taken some steps toward an exempt goal by tax lien date were sufficient for an exemption, there would have been no reason to send a letter to the Tax Commissioner saying that work toward the exempt use was still in progress.

ESC never used the former Natural History Museum building for any exempt purpose. ESC never raised sufficient money to use the building as a school. ESC had, as the BTA wrote, "effectively abandoned" any possibility at using the building as a school by the time ESC filed the Application. ESC was able, in a very short time to alter a covenant on the property, restricting its use to museum use only and then, in 2002, had the covenant removed completely. As a result, a valuable piece of property that was donated by a family to the City with the hope it would always be used for a museum and open to the public became the property of a local, for-profit, private business. There was never a school use of the building.

Although the ESC Board suffered a financial loss because they greatly underestimated the cost of developing the Natural History Museum building into a school and overestimated their ability to raise sufficient funding for that purpose, this is not a reason to grant an exemption from real property taxation. This group of people may not have attempted to deceive the Tax Commissioner and obtain tax money for a project that never came to fruition. But, ESC and its representatives were not forthcoming as to their abandonment of the construction of a school in the building, claiming the building would still be used for an exempt purpose just days before the building was sold. A grant of

exemption to ESC could inspire another group to conceal abandonment in order to obtain an exemption for property never used for an exempt purpose.

Finally, changes in the law may have limited the need to use the prospective use test. In early years, an application for exemption was just for one year and did not allow a remission of tax for prior years. See, e.g. *Pfeiffer v. Jenkins* (1943), 141 Ohio St. 66. Under the previous law, a library which purchased property and renovated it for part of the first year was not using the property for the exempt purpose during the renovation period. *Id.* For that reason, this Court's decision in *Carney* that "it is not necessary that actual physical use of property for an exempt purpose be commenced before it is entitled to be exempted from taxation" was revolutionary. *Carney v. Cleveland Public Library*, 169 Ohio St. at 67.

Taking a hint from the Supreme Court's decisions, the General Assembly passed R.C. 5713.081, which permitted an applicant for exemption to receive the exemption not only for the year of application but also to have tax remitted. With the enactment of a three-year remission of taxes prior to the date of acquisition, a taxpayer is protected by a four year window in which the taxpayer can actively accomplish its goals. R.C. 5713.081(A).

Under R.C. 5713.081(A), had ESC seen a means to raise sufficient funds to complete its project instead of totally scuttling its plans to use the building, ESC could have waited to apply for exemption until 2004. Then, if ESC applied at the time construction was about to start and the chance of completing the project close at hand, ESC could have also had tax from 2001 through 2003 remitted.

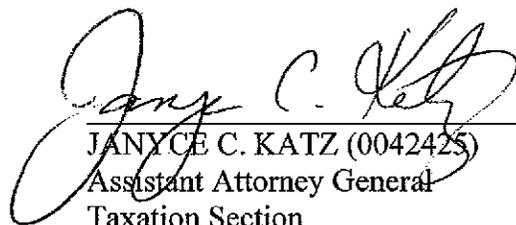
Instead, in December of 2001, ESC abandoned the use of the former Natural History Museum building as a school. By February of 2003, WCPO had razed the building.

The chances of a project actually being completed are far greater if, at the date of application, the institution is taking concrete and actual steps toward the realization of the dream. Granting relief from taxes for an exempt use that never materializes is bad policy as well as bad law. For that reason, the Tax Commissioner asks that the BTA's decision be reversed and his lawful, reasonable findings be reinstated.

CONCLUSION

For all the above reasons, the Court should overturn the Decision and Order of the Board of Tax Appeals and reinstate the Tax Commissioner's Final Determination.

Respectfully submitted,
MARC DANN (0039425)
Attorney General



JANYCE C. KATZ (0042425)
Assistant Attorney General
Taxation Section
30 East Broad Street, 16th Floor
Columbus, Ohio 43215-3428
Telephone: (614) 466-5967

IN THE SUPREME COURT OF OHIO

Appeal from the Board of Tax Appeals

EPISCOPAL SCHOOL OF CINCINNATI,

Appellee,

v.

WILLIAM W. WILKINS [RICHARD A.
LEVIN], TAX COMMISSIONER OF OHIO,

Appellant.

07-0126

Case No. _____

Appeal from BTA Case
No. 2004-R-230

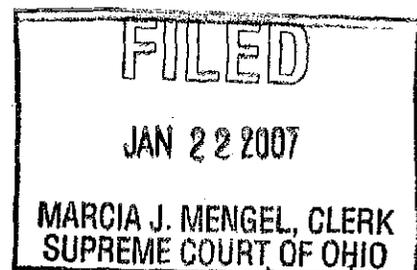
NOTICE OF APPEAL OF TAX COMMISSIONER OF OHIO

SAMUEL M SCOGGINS (0003352)
(Counsel of Record)
JOSEPH J. DEHNER (0011321)
Frost Brown Todd LLC
201 East Fifth Street, Suite 2200
Cincinnati, Ohio 45202
Telephone: (513) 651-6800
Facsimile (513) 651-6981
sscoggins@fbtlaw.com

ATTORNEYS FOR APPELLEE

MARC DANN (0039425)
Attorney General of Ohio
JANYCE C. KATZ (0042425)
Assistant Attorney General
(Counsel of Record)
30 East Broad Street, 16th Floor
Columbus, Ohio 43215-3428
Telephone: (614) 466-5967
Facsimile: (614) 466-8226
jkatz@ag.state.oh.us

ATTORNEYS FOR APPELLANT



Appx. 1

IN THE SUPREME COURT OF OHIO

Appeal from the Board of Tax Appeals

EPISCOPAL SCHOOL OF CINCINNATI, :
 :
 Appellee, :
 : Case No. _____
 :
 v. :
 : Appeal from BTA Case
 WILLIAM W. WILKINS [RICHARD A. :
 LEVIN], TAX COMMISSIONER OF OHIO, : No. 2004-R-230
 :
 Appellant. :

NOTICE OF APPEAL OF TAX COMMISSIONER OF OHIO

Richard A. Levin, Tax Commissioner of Ohio, successor to William W. Wilkins, hereby gives notice of his appeal as of right, pursuant to R.C. 5717.04, to the Supreme Court of Ohio, from a decision and order of the Board of Tax Appeals (“BTA”), journalized on December 22, 2006, in Case No. 2004-R-230. A true copy of the BTA decision and order being appealed is attached hereto and incorporated herein by reference.

The errors in the decision and order of the BTA of which the Tax Commissioner complains are as follows:

- (1) The BTA erred when it decided that the property owned by the Episcopal School of Cincinnati (“ESC”) should be exempted from taxation for year 2001 even though the ESC “never accomplished” its exempt purpose.
- (2) The BTA erred in finding that the “prospective use” test could be applied to property for which an exemption from taxation was sought under R.C. 5709.08, R.C. 5709.12 or R.C. 5709.121, if the owner of the property never used the property for the exempt purpose.

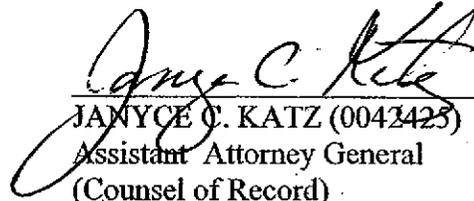
- (3) The BTA erred when it ignored the clear holding of the Supreme Court in *Holy Trinity Church v. Bowers* (1961), 172 Ohio St. 103, 107 that property belonging to a nongovernmental entity could be exempted before except use begins only when the ownership of the property is “coupled with the purpose, supported by tangible evidence, that the property will be devoted to an actual physical use for the public benefit. The intent to use such property for an exempt purpose must be one of substance and not a mere dream that sometime in the future, if funds can be obtained, the entity would so use such property.”
- (4) The BTA erred in not following the *Holy Trinity Church v. Bowers* (1961), 172 Ohio St. 103 syllabus in which the Supreme Court based the prospective exemption on a showing “that plans have been prepared and funds were available, or were to be available, to effectuate actual construction of such house of worship within a reasonable time from the filing of the exemption” when it ignored the fact that any possibility of using the property for an exempt purpose had been abandoned by the time the application for exemption was filed.
- (5) The BTA erred in finding that a prospective use exemption should be granted to property even though at the time the application for exemption was filed, it was clear that the owner had failed to raise adequate funding or to complete other essential tasks necessary to use the property for exempt purposes under R.C. 5709.07, R.C. 5709.12 or R.C. 5709.121.
- (6) The BTA erred when it granted an exemption to property owned by a school which was never to be used as a school when it was known at the time of the filing of the application

for exemption that the property would never be used as a school or for any other exempt purpose by the owner.

(7) The BTA erred in failing to follow the legal standards and controlling precedent of cases such as *Holy Trinity Church v. Bowers* (1961), 172 Ohio St. 103.

Respectfully submitted,

MARC DANN (0039425)
Attorney General



JANYCE C. KATZ (0043425)
Assistant Attorney General
(Counsel of Record)
30 East Broad Street 16th Floor
Columbus, Ohio 43215
Telephone: (614) 466-5967
Facsimile: (614) 466-8226

OHIO BOARD OF TAX APPEALS

Episcopal School of Cincinnati,)	
)	CASE NO. 2004-R-230
Appellant,)	
)	(REAL PROPERTY TAX
vs.)	EXEMPTION)
)	
William W. Wilkins,)	DECISION AND ORDER
Tax Commissioner of Ohio,)	
)	
Appellee.)	

APPEARANCES:

For the Appellant - Frost & Jacobs
 Samuel M. Scoggins
 2500 Central Trust Tower
 201 East Fifth Street
 Cincinnati, OH 45202

For the Appellee - Jim Petro
 Attorney General of Ohio
 Janyce C. Katz
 Assistant Attorney General, Taxation Section
 State Office Tower, 16th Floor
 30 East Broad Street
 Columbus, OH 43215

Entered **DEC 22 2006**

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

The Board of Tax Appeals considers this matter pursuant to an appeal filed by the appellant, Episcopal School of Cincinnati ("ESC"). ESC appeals a final determination issued by the Tax Commissioner, in which the commissioner denied appellant's application for exemption of real property from taxation for tax year 2001.

ESC was established in 2000 as a nonprofit corporation. S.T. at 156-158.

ESC acquired the subject property on November 29, 2000. The property consists of 3.075 acres of land, improved with a building that for many years had housed the Cincinnati Natural History Museum. It is located in the Cincinnati City School District, Hamilton County, Ohio. It is identified in the auditor's records as permanent parcel number 071-0001-0115-00. ESC acquired the subject property with the intention to open an inner-city, multiracial, religiously affiliated elementary and middle school. H.R. at 22-23. No part of its earnings were to inure to the benefit of any private individual. S.T. at 47-49.

In December 2001, ESC applied for exemption of the subject real property from taxation, pursuant to R.C. 5709.07, 5709.12, and 5709.121, for the year 2001. At that time, the exempt use had not yet begun. ESC contends that since it had a plan for an exempt use of the property and was taking steps to accomplish that plan as of January 1, 2001, the subject property was entitled to exemption.

The Tax Commissioner, however, argues that although steps were taken, the plan was never properly funded and the exempt use was never realized. Therefore, the property does not qualify for exemption.

The matter is submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript ("S.T.") certified to this board by the Tax Commissioner, the record of the merit hearing ("H.R.") before this board, including exhibits, and briefs of counsel. Both the appellant and the appellee appeared and were represented by counsel. ESC called two witnesses to testify on its behalf, Rev. James A. Hanisian, Archdeacon of the Episcopal Diocese of Southern Ohio, and Ms. Patricia B. Hassel, CPA

and financial officer of the Episcopal Diocese of Southern Ohio.

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

Turning to ESC's claim for exemption, we first note the general rule that "[a]ll real property in this state is subject to taxation, except only such as is expressly exempted therefrom." R.C. 5709.01(A). It is as a result of this rule that "[i]n any consideration concerning the exemption from taxation of any property, the burden of proof shall be placed on the property owner to show that the property is entitled to exemption." R.C. 5715.271; see, also, *OCLC Online Computer Library Ctr. v. Kinney* (1984), 11 Ohio St.3d 198. The Supreme Court of Ohio explained the rationale for this principle in *Akron Home Medical Services, Inc. v. Lindley* (1986), 25 Ohio St.3d 107:

"Exceptions to a particular tax are governed by the oft-stated rules to be found in *Youngstown Metropolitan Housing Authority v. Exdtl* (1944), 143 Ohio St. 268, 273 [28 O.O. 163]:

"By the decisions it is established in Ohio that exemption statutes are to be strictly construed, it being the settled policy of this state that all property should bear its proportional share of the cost and expense of government; that our law does not

favor exemption of property from taxation; and hence that before particular property can be held exempt, it must fall clearly within the class of property specified *** to be exempt.

“The foundation upon which that policy rests is that statutes granting exemption of property from taxation are in derogation of the rule of uniformity and equality in matters of taxation. (See 38 Ohio Jurisprudence, 853, section 114.)” See, also, *Id.* at paragraph two of the syllabus; *Cleveland-Cliffs Iron Co. v. Glander* (1945), 145 Ohio St. 423, 430 [31 O.O. 39]; *Natl. Tube Co. v. Glander* (1952), 157 Ohio St. 417 [47 O.O. 313], paragraph two of the syllabus; *First Natl. Bank of Wilmington v. Kasydar* (1976), 45 Ohio St.2d 101 [74 O.O.2d 206]; *Southwestern Portland Cement Co. v. Lindley* (1981), 67 Ohio St.2d 417, 425 [21 O.O.3d 261]; *Natl. Church Residences v. Lindley* (1985), 18 Ohio St.3d 53, 55.” *Id.* at 108.

See, also, *White Cross Hosp. Assn. v. Bd. of Tax Appeals* (1974), 38 Ohio St.2d 199, 201.

“Exemption is the exception to the rule and statutes granting exemptions are strictly construed.” *Am. Soc. for Metals v. Limbach* (1991), 59 Ohio St.3d 38; *Seven Hills Schools v. Kinney* (1986), 28 Ohio St.3d 186.

In its application, ESC claimed exemption under R.C. 5709.12, 5709.121, and 5709.07. As to R.C. 5709.12, the Tax Commissioner did not find that ESC’s request for exemption should be considered because the Supreme Court of Ohio held that for property to be exempt, it must qualify under the statute that specifically applies rather than the provisions of a more general statute. See *Rickenbacker Port Auth. v. Limbach* (1992), 64 Ohio St.3d 628, and *Toledo Business & Professional Women’s Retirement Living, Inc. v. Bd. of Tax Appeals* (1971), 27 Ohio St.2d 255. See, also, *Athens Cty.*

Auditor v. Zaino (Mar. 19, 2004, BTA No. 2002-A-1152, unreported (affirmed in *Athens Cty. Auditor v. Wilkins*, 106 Ohio St.3d 293, 2005-Ohio-4986)). As to R.C. 5709.121 and 5709.07, the commissioner found that there was no actual or prospective use of the subject property that was consistent with an exempt purpose.

R.C. 5709.12 reads as follows:

“Exemption of property used for charitable or public purposes.

“(B) *** Real and tangible personal property belonging to institutions that is used exclusively for charitable purposes shall be exempt from taxation.”

R.C. 5709.121 states the following:

“Exclusive charitable or public use, defined.

“Real property and tangible personal property belonging to a charitable or educational institution or to the state or a political subdivision, shall be considered as used exclusively for charitable or public purposes by such institution, the state, or political subdivision, if it meets one of the following requirements:

“(A) 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:

“***

“(2) For other charitable, educational, or public purposes;

“(B) It is made available under the direction or 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 the view to profit.”

R.C. 5709.07 provides an exemption from real property taxation for property that is used exclusively as a public schoolhouse. That section reads, in pertinent part:

“(A) The following property shall be exempt from taxation:

“(1) Public schoolhouses, the books and furniture in them, 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; ***.”

Accordingly, in order to determine whether the subject property qualifies for exemption under R.C. 5709.07, there must be an actual or prospective use of the property as a public schoolhouse during the period in question.

The prospective use test is based upon the understanding that the actual exempt use cannot always begin immediately. Therefore an exemption may be granted while the real property is being prepared for that exempt use. However, the property owner must be actively working toward the exempt use. It must show that it had definite plans. “The intent to use such property for an exempt purpose must be one of substance and not a mere dream that sometime in the future, if funds are obtained, the entity would so use the property.” *Holy Trinity Protestant Episcopal Church v. Bowers* (1961), 172 Ohio St. 103, at 107.

Evidence of these steps toward exempt use must exist as of the tax lien date for the year the property owner is requesting exemption. *City of Cleveland v. Carney* (1959), 169 Ohio St. 259; *Carney v. Cleveland City School Dist. Pub. Library* (1959),

169 Ohio St. 65. See, also, *Cleveland Mem. Med. Found. v. Peck* (1967), 10 Ohio St.2d 72.

Once a property is determined to be exempt under the prospective use test, the exemption continues until the exempt purpose has been abandoned or the efforts to realize that purpose have ceased, so long as the property has not been used for non-exempt or commercial purposes. *Bd. of Cty. Commrs. of Lake Cty. v. Supanick* (1972), 32 Ohio St.2d 45 (note, however, that this was public property rather than private). See, also, *Community Temple v. Voinovich* (Apr. 8, 1976), Cuyahoga App. No. 35395, unreported.

In the present case, meetings regarding starting a school began as early as 1997. H.R. at 21, 55. Prior to purchasing the subject property, a feasibility study was undertaken at a cost of \$75,000. H.R. at 55-56. Prior to the tax lien date, ESC took the following steps:

1. Formed a nonprofit, 501(c)(3) corporation (S.T. at 47-49, 156-158; H.R. at 21-22, 57);
2. Recruited a volunteer board of trustees and adopted a code of regulations (S.T. at 126-155, 175-177; H.R. at 23);
3. In 1999, hired a coordinator, Dr. Hansel, to complete the steps necessary to open the school (S.T. at 173-174; H.R. at 23, 56, 91);
4. Set up committees for curriculum, personnel, and property site (H.R. at 49-52);

5. Contributed \$4,500,000 to the Cincinnati Museum Center to acquire the subject property, subject to a covenant that legally restricted the property's use to educational or museum purposes (S.T. at 79; H.R. at 24-25; Appellant's Ex. 4);
6. Purchased an additional parcel of land for approximately \$1,800,000 and transferred it to the Cincinnati Museum Center (H.R. at 24-26; Appellant's Ex. 4);
7. In January 2000, engaged an architectural firm to prepare a feasibility study, floor plans, and furniture plans; cost was approximately \$462,000 (S.T. at 262-301; H.R. at 24-26, 89-90; Appellant's Ex. 4);
8. Engaged a construction company that prepared a construction budget (S.T. at 364-401, 481);
9. In June of 2000, prepared and filed school certification documents with the Ohio Department of Education, which included descriptions of academic programs, resources, administration, staff and faculty, admission, enrollment projections, school year calendar, daily schedule, technology, marketing, governance, facilities, funding, and capital requirements (S.T. at 303-361);
10. Hired and paid Head of School, Chief Financial Officer, and Development Director (S.T. at 402-404; H.R. at 31, 91);
11. Held press conference on September 11, 2000 to announce school with opening date a year later (S.T. at 201; H.R. at 31);

12. Created brochure regarding school that was widely distributed (Appellant's Ex. 8);
13. Obtained a \$500,000 grant from the William Cooper Procter Fund of the Episcopal Diocese of Southern Ohio (H.R. at 92);
14. Negotiated a committed line of credit from PNC Bank for \$6,500,000 to finance the acquisition of the subject property, which the Episcopal Diocese guaranteed (S.T. at 409-478; H.R. at 91);
15. Also obtained a \$10,500,000 letter of credit for school construction (S.T. 424-478); and
16. In January 2001, executed a construction contract with Frank Messer & Sons Construction Co. to complete the renovations (H.R. at 34).

By April 2001, ESC was experiencing financial difficulties. H.R. at 36. It was then that ESC realized the September 2001 opening date was in jeopardy, and it failed to complete the conversion of the property. H.R. at 35-36, 42, 75-78. Dr. Hansel left Cincinnati. H.R. at 36. ESC attempted to get scaled-down plans from the architects. S.T. at 218; H.R. at 43. The principal and staff left in June of 2001. H.R. at 64.

By September 2001, ESC was making payment only for legal fees associated with the bond levy, utilities, and severance pay. H.R. at 97. By November 2001, only utilities and maintenance payments were being made to prevent the deterioration of the building. H.R. at 99-100. By the time the application for exemption was filed in December 2001, ESC had already begun considering the possibility of starting a school in another building. *Id.* The subject property was sold to Scripps

Howard, a for-profit corporation, in November 2002 after the city of Cincinnati was persuaded to release the use restrictions on the property. H.R. at 44, 72-73; Appellant's Ex. 5.

It is clear from the record that ESC was organized as a nonprofit corporation for the purpose of starting a school, which purpose would be exempt under R.C. 5709.07. It is also equally as clear that ESC had a plan for constructing and operating this school and took steps toward implementation of that plan. Two questions remain, however, in resolving the issue of exempt status in this matter: as of what date are we to determine exempt status, the tax lien date or the date of application for exemption, and was adequate funding in place to make this plan more than a "mere dream." A final consideration is the effect, if any, of the fact that the exempt use was never realized and the school never opened.

The Tax Commissioner submits that the date that is to be used for determining whether an exemption is granted should be the date of the filing of the application based upon language in *Holy Trinity*, supra. In the present case, as of the filing date in December 2001, plans for using the subject property as a school had effectively been abandoned and other sites were being considered.

However, a review of case law establishes that the crucial date for determining whether a property is exempt from taxation is the tax lien date. See *Freshwater v. Belmont Cty. Bd. of Revision* (1997), 80 Ohio St.3d 26; *Christian Benevolent Assn. of Greater Cincinnati, Inc. v. Limbach* (1994), 69 Ohio St.3d 296; *City of Grove City, Ohio v. Zaino* (Sept. 24, 2004), BTA No. 2003-K-722, unreported.

Therefore, the board finds that the exemption status of property is to be determined as of the applicable tax lien date.

The Tax Commissioner maintains that the minutes of the board of trustees' meetings as early as December 2000 reflect that the project was not viable due to a lack of funding. However, although funding was discussed and considered in these board of trustees' meetings, it appears that the intent to continue with the project remained. Also, ESC continued to take affirmative steps toward the exempt purpose, i.e., by signing a construction contract in January 2001. Therefore, the board finds that as of the tax lien date, January 1, 2001, ESC was actively proceeding toward constructing and operating a school.

The Tax Commissioner submits that adequate funding for the project needs to be in place before the prospective use test can be utilized. See *Cleveland Mem. Med. Found.*, supra. See, also, *Holy Trinity*, supra, (holding that funds need to be available within a reasonable time). In *Cleveland Mem. Med. Found.*, supra, the Supreme Court of Ohio reversed the Tax Commissioner's denial of exemption, noting that over one-half of the funds necessary to complete the exempt purpose had been raised. In *Grove City*, supra, availability of funds was also stressed.

As the Tax Commissioner points out, this project became increasingly more expensive and less feasible. It appears that costs were initially somewhat underestimated and then grew substantially. ESC, however, had significant funding in place by the tax lien date. On November 21, 2000, PNC bank had approved the bridge loan in the amount of \$6,500,000, and ESC had procured a letter of credit totaling \$10,500,000. Further, as

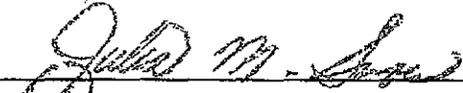
of the end of 2000, progress was being made on a bond levy, which bond levy was later abandoned by the underwriters subsequent to the tax lien date. When it became clear to ESC that funding was inadequate, instead of abandoning the project, ESC attempted to scale it down. Therefore, the board does not find that funding was inadequate, or that inadequate funding should be a basis for denying ESC an exemption from taxation for the subject property, as of January 1, 2001.

The board does not find the fact that the exempt purpose was never accomplished sufficient to deny the subject property exemption for 2001. Once exempt status is established, then that property is entitled to exemption until either the purpose is abandoned or efforts to realize the exempt purpose have ceased. *Bd. of Cty. Commrs. of Lake Cty.*, supra. See, also, *Community Temple*, supra.

Based upon the foregoing, this board finds that ESC presented sufficient competent, probative, and reliable evidence to demonstrate that the Tax Commissioner erred in his final determination, thereby rebutting the presumption in favor of the Tax Commissioner's findings and decision.

Accordingly, it is the decision and order of the Board of Tax Appeals that the decision of the Tax Commissioner must be, and hereby is, reversed.

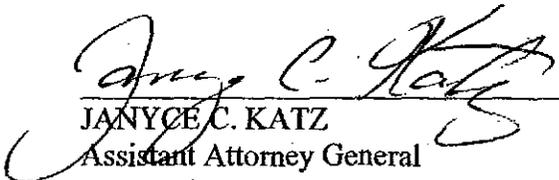
I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.



Julia M. Snow, Board Secretary

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Notice of Appeal was sent by certified U.S. mail to Samuel M. Scoggins and Joseph J. Dehner, Frost Brown Todd, LLC, 201 East Fifth Street, Suite 2200, Cincinnati, Ohio 45202, counsel for appellee, on this 22nd day of January, 2007.



JANYCE C. KATZ
Assistant Attorney General

In The Supreme Court of Ohio
Case Information Statement

Case Name:

Episcopal School of Cincinnati

Case No.:

07-0126

I. Has this case previously been decided or remanded by this Court? Yes No

If so, please provide the Case Name: _____

Case No.: _____

Any Citation: _____

II. Will the determination of this case involve the interpretation or application of any particular case decided by the Supreme Court of Ohio or the Supreme Court of the United States? Yes No

If so, please provide the Case Name and Citation: *Holy Trinity Church v. Bowers* (1961), 172 Ohio St. 103

Will the determination of this case involve the interpretation or application of any particular constitutional provision, statute, or rule of court? Yes No

If so, please provide the appropriate citation to the constitutional provision, statute, or court rule, as follows:

U.S. Constitution: Article _____, Section _____ **Ohio Revised Code:** R.C. 5709.07; R.C. 5709.12; R.C. 5709.121

Ohio Constitution: Article _____, Section _____ **Court Rule:** _____

United States Code: Title _____, Section _____ **Ohio Admin. Code:** O.A.C. _____

III. Indicate up to three primary areas or topics of law involved in this proceeding (e.g., jury instructions, UM/UIM, search and seizure, etc.):

1) Real Property Taxation

2) Exemption

3) Charity

4) Public School

IV. Are you aware of any case now pending or about to be brought before this Court that involves an issue substantially the same as, similar to, or related to an issue in this case? Yes No

If so, please identify the Case Name: _____

Case No.: _____

Court where Currently Pending: _____

Issue: _____

Contact information for appellant or counsel:

Janyce C. Katz 0042425

Name Atty.Reg. #

(614) 466-5967; (614) 466-8226

Telephone # Fax #

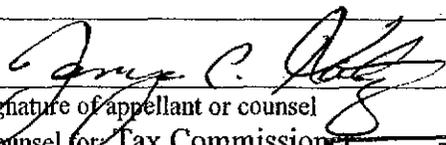
Address

30 East Broad Street, 16th Floor

Address

Columbus OH 43215-3428

City State Zip Code


Signature of appellant or counsel

Counsel for: Tax Commissioner

FILED

JAN 22 2007

MARCIA J. MENDEL, CLERK
SUPREME COURT OF OHIO

BEFORE THE BOARD OF TAX APPEALS
STATE OF OHIO

EPISCOPAL SCHOOL OF CINCINNATI, :

Appellee, :

v. :

WILLIAM W. WILKINS [RICHARD A. LEVIN], TAX COMMISSIONER OF OHIO, :

Appellant. :

Case No. 07-0126

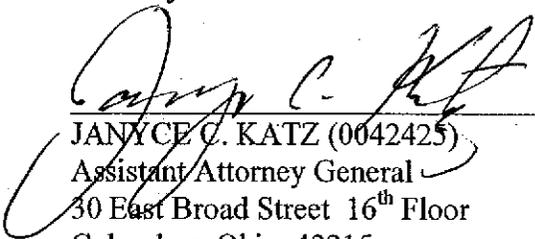
Appeal from BTA Case
No. 2004-R-230

PRAECIPE

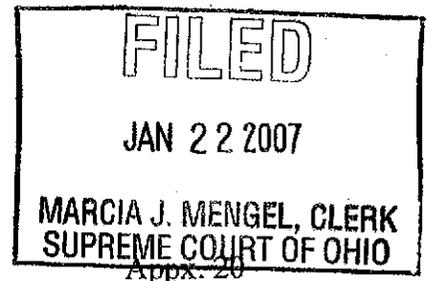
Demand is hereby made that the Ohio Board of Tax Appeals prepare, transmit and file with the Supreme Court of Ohio a certified transcript of the record of the proceedings of the Board pertaining to its decision and order in the above-styled matter, including in the certified transcript its journal entry, the original papers in the case or a transcript thereof and all evidence with originals or copies of all exhibits as adduced in the proceedings considered by the Board in making its decision and order.

Respectfully submitted,

MARC DANN (0039425)
Attorney General

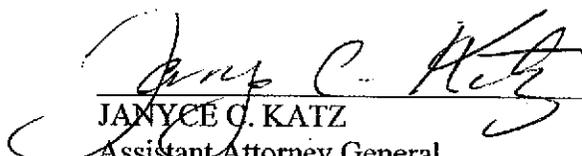


JANYCE C. KATZ (0042425)
Assistant Attorney General
30 East Broad Street 16th Floor
Columbus, Ohio 43215
Telephone: (614) 466-5967
Facsimile: (614) 466-8226



CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Praecipe was sent by certified U.S. mail to Samuel M. Scoggins and Joseph J. Dehner, Frost Brown Todd, LLC, 201 East Fifth Street, Suite 2200, Cincinnati, Ohio 45202, counsel for appellee, on this 22nd day of January, 2007.



JANYCE C. KATZ
Assistant Attorney General

Date: FEB 10 2004

Episcopal School of Cincinnati
c/o Joseph J. Dehner, Esq.
Frost Brown Todd LLC
2200 PNC Center
201 E. Fifth Street
Cincinnati, OH 45202-4182

Re: DTE No.: GE 3684
Auditor's No.: 1-298
County: Hamilton
School District: Cincinnati City School District
Parcel Number: 0710001011500

This is the final determination of the Tax Commissioner on an application for exemption of real property from taxation for the tax year 2001.

The attorney examiner in this matter issued a recommendation on May 19, 2003 recommending that the application be denied. The applicant filed written objections to that recommendation on May 30, 2003.

The applicant is requesting exemption pursuant to R.C. 5709.07, R.C. 5709.12, and R.C. 5709.121 for 3.075 acres and the improvements on the land. The applicant acquired the property on November 29, 2000 with the intention of using it as a school. At the time this application was filed in December 2001 this use had not begun.

Additional information provided by the applicant's attorney in November 2002 indicates that the Rt. Rev. Herbert Thompson, Jr., Bishop of Southern Ohio, had a vision of creating an Episcopal School in Cincinnati. This would be a religiously based school located near the center of the city to serve inner-city and other children, and it would be devoted to diversity. The property in question is the former Natural History Museum, on the edge of downtown Cincinnati. The applicant had done substantial planning for the school, including recruiting a volunteer board of directors for this project and hiring a director for the proposed school. In its objections the applicant states that the applicant had hired a coordinator, a parents' handbook was created, bank accounts were opened, architects and construction firms were hired, work was done to define a curriculum, and the State of Ohio Board of Education certification documents were filed.

However, problems arose in early 2001. There was a major downturn in the economy and a dramatic reversal in stock market values. This resulted in the inability to raise the ten to fifteen million dollars necessary to renovate the building and to create an endowment to ensure the success of a school opening. Because fund raising was not possible on the scale intended, the plans for the school were delayed. Other problems included the early departure of the

0000000227

Coordinator and uncertainty over the ability to attract sufficient faculty and students for a September 2001 opening, and the tense racial climate in Cincinnati at that time. For a combination of reasons beyond the control of the Board or the Diocese, it was decided to reconsider the plan for this property. Because of the continuing challenges, the Diocese and School ultimately decided to sell this property in order to preserve funds for other educational and religious uses. The applicant has stated in its objections that it transferred title to the property on November 15, 2002 and therefore has no continuing interest in the property. The county auditor's property card shows that this property was sold to the Scripps Howard Broadcasting Company. The applicant did not put the property to any use for profit during the time that it held title.

R.C. 5709.07(A)(1) provides exemption for "(p)ublic schoolhouses, the books and furniture in them 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". In order to be entitled to exemption under this section, there must be actual or prospective use of the property as a public schoolhouse. Since the applicant did not use the property as a school then it must satisfy the requirements of the prospective use test.

Exemption based on the prospective use of property is based on the common knowledge that the actual use for an exempt purpose can not always begin immediately. This principle is not based simply on the intent of the property owner, but instead is focused on the use of the property. It is assumed that the prospective use will become an actual use within a reasonable time. Even if there is an existing structure, as in this case, structural changes may be necessary to fit the intended use. In these cases, funds must be procured, plans must be prepared and construction must be done. Because these delays are necessary and unavoidable, an exemption may be granted during this preparatory period. However, the property owner must be actively working toward an exempt use of the property. It must show that it had definite plans and proof of available financing so that construction could begin within a reasonable time from the filing of an exemption application. *Holy Trinity Protestant Episcopal Church v. Bowers* (1961), 172 Ohio St. 103. In that case the court stated that "the intent to use such property for an exempt purpose must be one of substance and not a mere dream that sometime in the future, if funds are obtained, the entity would so use the property." *Id.* at 107. Evidence of those preparation efforts must exist as of tax lien date for the year the taxpayer is requesting exemption. *City of Cleveland v. Carney* (1959), 169 Ohio St. 259 (per curiam), and *Carney v. Cleveland City School Dist. Pub. Library* (1959), 169 Ohio St. 65.

Even though the Episcopal School of Cincinnati intended to use the property in question as a school when it acquired title, and even though it made some progress toward that goal, its intention did not materialize into an actual use of the property in question, and it has transferred title to another entity. Nevertheless, the applicant asserts that the property should be exempt because it intended to use the property for an exempt purpose, took steps toward that goal, and did not use the property for profit. However, the cases cited above do not hold that the eventual use for an exempt purpose is relevant. The applicant has cited *Community Temple aka Congregation Beth Am v. Voinovich* (Apr. 8, 1976), Cuyahoga App. No. 35395, unreported. However, this case does not establish precedent for the application under review, because the property in question is not located in that appellate district. It also cites *County Commrs. v. Supanick* (1972), 32 Ohio St. 2d 45. The syllabus for that case states:

Where a board of county commissioners acquires real property with the ultimate purpose of devoting it to a specified use which would exempt it from taxation, such property is entitled to be exempted from taxation until such time as the ultimate purpose has been abandoned, or efforts to realize the ultimate purpose have ceased, or the property has been put to a nonpublic use, even though actual physical use of the property for the intended exempt purpose *has not yet begun*. (Emphasis added).

Although the exempt use had not yet begun in that case, the property owner continued its efforts toward that goal. This case holds that property may be exempt even though the use has not yet begun. It does not hold that property may be exempt whether or not the exempt use ever begins. The applicant had abandoned its intention as well as all effort to use the property for an exempt purpose prior to transferring title.

In reviewing this application, the passing of time has proven to be a benefit because the facts available to us now are more complete and accurate than those available at the time this application was filed. Since it has been established that the applicant's intention did not result in an exempt use of the property, then neither the actual nor prospective use test have been satisfied, and the requirements of R.C. 5709.07 have not been satisfied.

The applicant asserts that this application should also be reviewed under R.C. 5709.12, citing *True Christianity Evangelism v. Zaino* (2001), 91 Ohio St. 3d 117. R.C. 5709.12 provides that "real and tangible personal property belonging to institutions that is used exclusively for charitable purposes shall be exempt from taxation." In order to be entitled to exemption under this section, two requirements must be met: the property must belong to an institution, and the property must be used exclusively for charitable purposes. *Highland Park Owners, Inc. v. Tracy* (1994), 71 Ohio St. 3d 405. The applicant is an institution. Therefore, the first requirement of this section is satisfied.

The relevant issue is whether the applicant used the property exclusively for charitable purposes. The applicant is an educational institution and its intent was to use this property to establish a school. The Ohio Supreme Court has held that in order for property to be exempt, the property must qualify under the statute that specifically applies to that property rather than under the more general provisions of another statute. *Rickenbacker Port Auth. v. Limbach* (1992), 64 Ohio St. 3d 628 and *Toledo Business & Professional Women's Retirement Living, Inc. v. Bd. of Tax Appeals* (1971), 27 Ohio St. 2d 255. Since R.C. 5709.07 provides for exemption for property used as a public schoolhouse, then this application should properly be reviewed under that section rather than under R.C. 5709.12. However, even if this application were reviewed under R.C. 5709.12, it would not qualify for exemption, because there has been no actual or prospective use for an exempt purpose, as discussed above.

R.C. 5709.121 provides:

Real property and tangible personal property belonging to a charitable or educational institution or to the state or a political subdivision, shall be considered as used exclusively for charitable or public purposes by such institution, the state, or political subdivision, if it is either:

(A) Used by such institution, the state, or political subdivision, ~~or by one or more~~ ^{or by one or more} other such institutions, the state, or political subdivision under a lease, sublease, or other contractual arrangement:

(1) As a community or area center in which presentations in music, dramatics, the arts, and related fields are made in order to foster public interest and education therein;

(2) For other charitable, educational, or public purposes;

(B) Otherwise made available under the direction or 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 the view to profit.

Under this section, property which belongs to a charitable or educational institution or to the state or political subdivision is considered to be used for a charitable or public purpose if it is used by or leased to another such institution. As discussed above, there was no actual or prospective use of the property in question for a charitable or educational purpose. Therefore, the use of the property does not satisfy the requirements of this section.

Based upon information available to the Tax Commissioner, the Tax Commissioner finds that the property described in the application is not entitled to be exempt from taxation and the application is therefore denied.

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

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

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

William W. Wilkins
WILLIAM W. WILKINS
TAX COMMISSIONER

/s/ William W. Wilkins

William W. Wilkins
Tax Commissioner

00005

RECOMMENDATION

Date: **MAY 19 2003**

Name of Applicant: Episcopal School of Cincinnati

Re: DTE No.: GE 3684
Auditor's No.: 1-298
County: Hamilton
School District: Cincinnati City School District
Parcel Number: 0710001011500

This is a recommendation of the attorney examiner in the matter of an application for tax exemption filed with the Tax Commissioner. It is not a final determination of the Tax Commissioner. The applicant has ten days from receipt of this recommendation to file written objections. Any written objections will be considered before a final determination is issued in this matter.

I. Factual Background

The applicant is requesting exemption pursuant to R.C. 5709.07, R.C. 5709.12, and R.C. 5709.121 for 3.075 acres and the improvements on the land. The applicant acquired the property on November 29, 2000 with the intention of using it as a school. At the time this application was filed in December 2001 this use had not begun.

Addition information provided by the applicant's attorney in November 2002 indicates that the Rt. Rev. Herbert Thompson, Jr., Bishop of Southern Ohio, has a vision of creating an Episcopal School in Cincinnati. This would be a religiously based school located near the center of the city to serve inner-city and other children, and it would be devoted to diversity. The property in question is the former Natural History Museum, on the edge of downtown Cincinnati. The applicant has done substantial planning and activity for the school, including recruiting a volunteer board of directors for this project and hiring a director for the proposed school. Unfortunately, the timing coincided with a major downturn in the economy and a dramatic reversal in stock market values. This resulted in the inability to raise the ten to fifteen million dollars necessary to renovate the building and to create an endowment to ensure the success of a school opening. Because fund raising was not possible on the scale intended, the plans for the school have been delayed. As a result, it has not been possible to prepare the property for an opening at this time. Because of the financial pressures created by the financial uncertainty caused by forces beyond the applicant's and the Diocese's control, it is necessary for them to consider a sale of the property in order to preserve funds for other educational and religious uses. The applicant has not put the property to any use for profit.

II. Ohio Revised Code Section 5709.07

R.C. 5709.07(A)(1) provides exemption for "(p)ublic schoolhouses, the books and furniture in them 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". In order to be entitled to exemption under this section, there must be actual or prospective use of the property as a public schoolhouse. Since the applicant has not begun to use the property as a school then it must satisfy the requirements of the prospective use test.

In order for unused property to be entitled to exemption, the taxpayer must be actively working toward the actual use intended. It must show that it had definite plans and proof of available financing so that construction could begin within a reasonable time from the filing of an exemption application. Holy Trinity Protestant Episcopal Church v. Bowers (1961), 172 Ohio St. 103. In that case the court stated that "the intent to use such property for an exempt purpose must be one of substance and not a mere dream that sometime in the future, if funds are obtained, the entity would so use the property." Id. at 107. Evidence of those preparation efforts must exist as of tax lien date for the year the taxpayer is requesting exemption. City of Cleveland v. Carney, (1959), 169 Ohio St. 259 (per curiam), and Carney v. Cleveland City School Dist. Pub. Library (1959), 169 Ohio St. 65. Moreover, construction must be complete within a reasonable time from filing the application.

Even though the Episcopal School of Cincinnati intended to use the property in question as a school when it acquired title, and even though it made some progress toward that goal, the actual use of the property as a school has not materialized. Plans for renovating the building so that the school can open have been indefinitely delayed, and it may be necessary to sell the property. Since the property has not been used as a school, and since there is no clear evidence that it will be used as a school within a reasonable time after this application was filed, then the requirements of R.C. 5709.07 have not been satisfied.

III. Ohio Revised Code Section 5709.12

R.C. 5709.12 provides that "real and tangible personal property belonging to institutions that is used exclusively for charitable purposes shall be exempt from taxation." In order to be entitled to exemption under this section, two requirements must be met: the property must belong to an institution, and the property must be used exclusively for charitable purposes. Highland Park Owners, Inc. v. Tracy (1994), 71 Ohio St. 3d 405. The applicant is an institution. Therefore, the first requirement of this section is satisfied.

The charitable use requirement may be satisfied by either the current use or the prospective use of the property. As discussed above, the applicant has not begun to use the property, and has not made sufficient progress toward using the property within a reasonable time after the application was filed. This does not satisfy the requirements of this section. In addition, even if sufficient progress toward its goal had been made, the property would not qualify for exemption under this section, because the applicant intended to use this property as a school rather than for a charitable use. The Ohio Supreme Court has held that in order for property to be exempt, the property must qualify under the statute that specifically applies to that property rather than under the more general provisions of another statute. Rickenbacker Port Auth. v. Limbach (1992), 64 Ohio St. 3d 628 and Toledo Business & Professional Women's Retirement Living, Inc. v. Bd. of Tax Appeals (1971), 27 Ohio St. 2d 255. Since R.C. 5709.07 provides for exemption for property used as a public schoolhouse, then this application should properly be reviewed under that section rather than under R.C. 5709.12.

IV. Ohio Revised Code Section 5709.121

This section provides:

Real property and tangible personal property belonging to a charitable or educational institution or to the state or a political subdivision, shall be considered as used exclusively for charitable or public purposes by such institution, the state, or political subdivision, if it is either:

(A) Used by such institution, the state, or political subdivision, or by one or more other such institutions, the state, or political subdivision under a lease, sublease, or other contractual arrangement:

(1) As a community or area center in which presentations in music, dramatics, the arts, and related fields are made in order to foster public interest and education therein;

(2) For other charitable, educational, or public purposes;

(B) Otherwise made available under the direction or 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 the view to profit.

Under this section, property which belongs to a charitable or educational institution or to the state or political subdivision is considered to be used for a charitable or public purpose if it is used by or leased to another such institution. As discussed above, the property in question is not used for a charitable or educational purpose. In addition, sufficient progress to use the property for an educational purpose within a reasonable time after this application was filed has not been made. Therefore, the use of the property does not satisfy the requirements of this section.

V. Conclusion

It is the recommendation of the attorney examiner that the property should not be exempt and that the application should be denied.

INSTRUCTIONS FOR SUBMITTING OBJECTIONS

If you wish to object to this recommendation, submit your written objections to the Division of Tax Equalization, Department of Taxation, P.O. Box 530, Columbus, Ohio 43216-0530.

LK

APPLICATION FOR REAL PROPERTY TAX
EXEMPTION AND REMISSION

HAMILTON

COUNTY NAME

<p>DEC 21 2001</p>
<p>Date Received by County Auditor</p>

<p>FILED FEB 04 2002 DIVISION OF TAX EQUALIZATION</p>
<p>Date Received by DTE</p>

<p>OFFICE USE ONLY</p>
<p>1-298 County Application Number</p>
<p>DTE Application Number GE 3684</p>

GENERAL INSTRUCTIONS

Submit three (3) copies of this application to the auditor's office in the county where the property is located. (Make a copy for your records.) Applications should not be filed until the year following acquisition of the property. The final deadline for filing with the county auditor is December 31 of the year for which exemption is sought. If you need assistance in completing this form, contact your county auditor.

Both the County Auditor's Finding and the Treasurer's Certificate on page 4 of this application must be completed. Ask your county auditor for the procedure to follow to obtain the Treasurer's Certificate. Obtain a copy of the property record card from the county auditor and enclose it with this application.

Answer all questions on the form. If you need more room for any question, use additional sheets of paper to explain details. Indicate which question each additional sheet is answering.

PLEASE TYPE OR PRINT CLEARLY.

Application is hereby made to have the following property removed from the tax list and duplicate and placed on the tax exempt list for the current tax year 2001, and to have the taxes and penalties thereon remitted for these preceding tax years: _____

Applicant Name:	Episcopal School of Cincinnati		
	Name		
Notices concerning this application should be sent to:	Joseph J. Dehner, Esq.		
	Name (If different than Applicant)		
	Frost Brown Todd LLC, 2200 PNC Center, 201 E. Fifth Street		
	Address		
	Cincinnati	Ohio	45202-4182
	City	State	Zip
			(513) 651-6800
			Phone Number

1. Parcel Number(s):
(If more than 4, continue on an attached sheet.)
- All parcels must be in the same School District.
- a) 0710001011500
 - b) _____
 - c) _____
 - d) _____

00107

Appx. 29

2. School District where Located: Cincinnati City School District

4. Street address or location of property: 1720 Gilbert Avenue
Cincinnati, Ohio

5. Title to this property is in the name of: Episcopal School of Cincinnati

6. If the title holder is different from the applicant please explain: _____

7. Title holder is (check one): a nonprofit corporation an unincorporated association/organization
 an individual other _____

8. Exact date title was acquired: 11/29/00 9. Title was acquired from: Cincinnati Museum Center
Please attach copy of the deed. See attached Exhibit A.

10. Does the applicant have a lease or land contract for this property
If yes, please attach a copy? yes no

11. Amount paid by title holder for the property: \$ 4,500,000.00

12. Exact date the exempt use began: 11/29/00

13. Under what section(s) of the Ohio Revised Code is exemption sought?
O.R.C. 5709.07 O.R.C. 5709.12 O.R.C. 5709.121

14. How is this property now being used? Do not give conclusions such as charitable purpose, public worship, or public purpose. Be specific about what is being done on the property and who uses it. If the property is not currently being used, but there is an intent to use it later for an exempt purpose, describe the intended use and the date set for the intended use.

See attached Exhibit B.

15. During the years in question, was any part of this property (check one):
a) Leased or rented to anyone else? yes no
If yes, please attach copy of lease agreement.
b) Used for the operation of any business? yes no
c) Used for agricultural purposes? yes no
d) Used to produce any income other than donations? yes no

00108

NOTE: If the answer to any part of question 15 is "Yes," enclose all details on a separate sheet of paper. If money is received, submit profit and loss statements, income and expense data, balance sheets, or any other financial statements.

16. Is anyone living or residing on any part of this property?
If yes, answer the following.

yes no

a) The person's name and position: _____

b) The resident's duties (if any) in connection with this property: _____

c) The rent paid, or other financial arrangements: _____

17. Is anyone using this property other than the applicant?
If yes, please enclose a complete, detailed explanation.

yes no

18. Does the applicant own property in this county which is already exempt from taxation?

yes no

19. Property used for Charitable Purposes.

If the applicant has not previously received exemption for property used exclusively for a charitable purpose, please provide Articles of Incorporation, Constitution or By-Laws, IRS Determination Letter, and any other similar relevant information. See attached Exhibit C.

20. Property used for Senior Citizens' Residences.

If the purpose of the property is to provide a place of residence for senior citizens, submit all information required by section 5701.13 of the Ohio Revised Code.

The Tax Equalization Division may set a hearing on this application. If there is a hearing, the applicant must present a witness who can accurately describe the use of the property in question. At least ten day's notice will be given to the applicant concerning the time and place of any hearing.

I declare under penalty of perjury that I have examined this application and, to the best of my knowledge and belief, it is true, correct, and complete.

Applicant or Representative

signature

Joseph J. Denner, Esq.

print name and title

- Attorney for Episcopal School of Cincinnati, and Chancellor, Episcopal Diocese of Southern Ohio

Frost Brown Todd LLC, 2200 PNC Center, 201 E. Fifth Street

address

Cincinnati

Ohio

45202-4182

city

state

zip

(513) 651-6800

phone number

00109

Appx. 31

Date

December 18, 2001

71-1-115

COUNTY AUDITOR'S FINDING

	LAND	BUILDING	TOTAL
Taxable Value in Year of Application <u>2002</u> (Year)	\$ 922500	\$ 1203600	\$ 2126100
Taxable Value in Prior Year <u>2001</u> (Year)	\$ //	\$ //	\$ //

This application covers property that is:

- Currently or Previously Exempt
 New Construction on Previously Exempt Parcel
 Currently or Previously on CAUV

Auditor's Recommendation: Grant Partial Grant Deny None

COMMENTS: H.B. 1-15-02.


County Auditor (Signature)

1/22/02
Date

Forward two (2) copies of the completed application to the Ohio Department of Taxation, Tax Equalization Division, P.O. Box 530, Columbus, OH 43216-0530.

TREASURER'S CERTIFICATE

If the Treasurer's Certificate is not properly filled out and signed, the Tax Commissioner will have no jurisdiction to act on the application, and it will be returned to the Treasurer's Office.

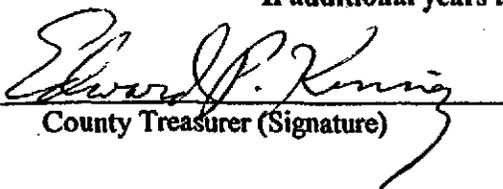
(Notice to Treasurer: The first paragraph of this certificate must always be complete).

I hereby certify that ALL TAXES, SPECIAL ASSESSMENTS, PENALTIES AND INTEREST levied and assessed against the above described property have been paid in full to and including the tax year 2000.

I further certify that the only UNPAID TAXES, SPECIAL ASSESSMENTS, PENALTIES AND INTEREST which are a lien and unpaid on this property are as follows:

TAX YEAR	TAXES (Including penalties and interest)	SPECIAL ASSESSMENTS (Including penalties and interest)
2001	\$ 46426.10	\$
	\$	\$
	\$	\$

If additional years are unpaid, please list on an attached sheet.


County Treasurer (Signature)

1/28/02
Date

323.11 State's lien for taxes attaches and continues until paid.

The lien of the state for taxes levied for all purposes on the real and public utility tax list and duplicate for each year shall attach to all real property subject to such taxes on the first day of January, annually, or as provided in section 5727.06 of the Revised Code, and continue until such taxes, including any penalties, interest, or other charges accruing thereon, are paid.

Taxes may be apportioned in case of transfer of a part of any tract or lot of real estate, in which case the lien of such taxes shall extend to the transferred part and the remaining parts only to the extent of the amounts allocated to such respective parts.

Effective Date: 07-02-1984

**R.C. § 5701.13 Criteria for qualifying as
"home for the aged."**

(A) As used in this section:

(1) "Nursing home" means a nursing home or a home for the aging, as those terms are defined in section 3721.01 of the Revised Code, that is issued a license pursuant to section 3721.02 of the Revised Code.

(2) "Residential care facility" means a residential care facility, as defined in section 3721.01 of the Revised Code, that is issued a license pursuant to section 3721.02 of the Revised Code.

(3) "Adult care facility" means an adult care facility as defined in section 3722.01 of the Revised Code that is issued a license pursuant to section 3722.04 of the Revised Code.

(B) As used in Title LVII [57] of the Revised Code, and for the purpose of other sections of the Revised Code that refer specifically to Chapter 5701, or section 5701.13 of the Revised Code, a "home for the aged" means a place of residence for aged and infirm persons that is either a nursing home, residential care facility, or adult care facility and that meets all of the following standards:

(1) It is owned by a corporation, unincorporated association, or trust of a charitable, religious, or fraternal nature, which is organized and operated not for profit, which is not formed for the pecuniary gain or profit of, and whose net earnings or any part of whose net earnings is not distributable to, its members, trustees, officers, or other private persons, and which is exempt from federal income taxation under section 501 of the "Internal Revenue Code of 1986," 100 Stat. 2085, 26 U.S.C. 1.

(2) It is open to the public without regard to race, color, or national origin;

(3) It does not pay, directly or indirectly, compensation for services rendered, interest on debts incurred, or purchase price for land, building, equipment, supplies, or other goods or chattels, which compensation, interest, or purchase price is unreasonably high;

(4) It provides services for the life of each resident without regard to his ability to continue payment for the full cost of the services.

Exemption from taxation shall be accorded, on proper application, only to those homes or parts of homes which meet the standards and provide the services specified in this section.

Nothing in this section shall be construed as preventing a home from requiring a resident with financial need to apply for any applicable financial assistance or requiring a home to retain a resident who willfully refuses to pay for services for which he has contracted even though he has sufficient resources to do so.

(C)(1) If a corporation, unincorporated association, or trust described in division (B)(1) of this section is granted a certificate of need pursuant to section 3702.52 of the Revised Code to construct, add to, or otherwise modify a nursing home, or is given approval pursuant to section 3791.04 of the Revised Code to construct, add to, or otherwise modify a residential care facility or adult care facility and if the corporation, association, or trust submits an affidavit to the tax commissioner stating that, commencing on the date of licensure and continuing thereafter, the home or facility will be operated in accordance with the requirements of divisions (B)(1), (2), (3), and (4) of this section, the corporation, association, or trust shall be considered to be operating a "home for the aged" within the meaning of division (B) of this section, beginning on the first day of January of the year in which such certificate is granted or approval is given.

(2) If a corporation, association, or trust is considered to be operating a "home for the aged" pursuant to division (C)(1) of this section, the corporation, association, or trust shall notify the tax commissioner in writing upon the occurrence of any of the following events:

(a) The corporation, association, or trust no longer intends to complete the construction of, addition to, or modification of the home or facility, to obtain the appropriate license for the home or facility, or to commence operation of the home or facility in accordance with the requirements of divisions (B)(1), (2), (3), and (4) of this section;

(b) The certificate of approval referred to in division (C)(1) of this section expires, is revoked, or is otherwise terminated prior to the completion of the construction of, addition to, or modification of the home or facility;

(c) The license to operate the home or facility is not granted by the director of health within one year following completion of the construction of, addition to, or modification of the home or facility;

(d) The license to operate the home or facility is not granted by the director of health within four years following the date upon which the certificate or approval referred to in division (C)(1) of this section was granted or given;

(e) The home or facility is granted a license to operate as a nursing home, residential care facility, or adult care facility.

(3) Upon the occurrence of any of the events referred to in divisions (C)(2)(a), (b), (c), (d), or (e) of this section, the corporation, association, or trust shall no longer be considered to be operating a "home for the aged" pursuant to division (C)(1) of this section, except that the tax commissioner, for good cause shown and to the extent he considers appropriate, may extend the time period specified in division (C)(2)(c) or (d) of this section, or both. Nothing in division (C)(3) of this section shall be construed to prevent a nursing home, residential care facility, or adult care facility from qualifying as a "home for the aged" if, upon proper application made pursuant to division (B) of this section, it is found to meet the requirements of divisions (A) and (B) of this section.

**R.C. § 5709.01 Taxable property entered
on general tax list and duplicate.**

(A) All real property in this state is subject to taxation, except only such as is expressly exempted therefrom.

(B) Except as provided by division (C) of this section or otherwise expressly exempted from taxation:

(1) All personal property located and used in business in this state, and all domestic animals kept in this state and not used in agriculture are subject to taxation, regardless of the residence of the owners thereof.

(2) All ships, vessels, and boats, and all shares and interests therein, defined in section 5701.03 of the Revised Code as personal property and belonging to persons residing in this state, and aircraft belonging to persons residing in this state and not used in business wholly in another state, other than aircraft licensed in accordance with sections 4561.17 to 4561.21 of the Revised Code, are subject to taxation.

(C) The following property of the kinds mentioned in division (B) of this section shall be exempt from taxation:

(1) Unmanufactured tobacco to the extent of the value, or amounts, of any unpaid nonrecourse loans thereon granted by the United States government or any agency thereof.

(2) Spirituous liquor, as defined in division (B)(5) of section 4301.01 of the Revised Code, that is stored in warehouses in this state pursuant to an agreement with the division of liquor control.

(3) Except as otherwise provided in section 5711.27 of the Revised Code, all other such property if the aggregate taxable value thereof required to be listed by the taxpayer under Chapter 5711. of the Revised Code does not exceed ten thousand dollars.

(a) If the taxable value of such property exceeds ten thousand dollars only such property having an aggregate taxable value of ten thousand dollars shall be exempt.

(b) If such property is located in more than one taxing district as defined in section 5711.01 of the Revised Code, the exemption of ten thousand dollars shall be applied as follows:

(i) The taxable value of such property in the district having the greatest amount of such value shall be reduced until the exemption has been fully utilized or the value has been reduced to zero, whichever occurs first;

(ii) If the exemption has not been fully utilized under division (C)(3)(b)(i) of this section, the value in the district having the second greatest value shall be reduced until the exemption has been fully utilized or the value has been reduced to zero, whichever occurs first;

(iii) If the exemption has not been fully utilized under division (C)(3)(b)(ii) of this section, further reductions shall be made, in repeated steps which include property in districts having declining values, until the exemption has been fully utilized.

(D) All property mentioned as taxable in this section shall be entered on the general tax list and duplicate of taxable property.

**R.C. § 5709.07 Exemption of schools, churches,
and colleges.**

(A) The following property shall be exempt from taxation:

(1) Public schoolhouses, the books and furniture in them, 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;

(2) Houses used exclusively for public worship, the books and furniture in them, and the ground attached to them that is not leased or otherwise used with a view to profit and that is necessary for their proper occupancy, use, and enjoyment;

(3) Real property owned and operated by a church that is used primarily for church retreats or church camping, and that is not used as a permanent residence. Real property exempted under division (A)(3) of this section may be made available by the church on a limited basis to charitable and educational institutions if the property is not leased or otherwise made available with a view to profit.[:]

(4) Public colleges and academies and all buildings connected with them, and all lands connected with public institutions of learning, not used with a view to profit.

(B) This section shall not extend to leasehold estates or real property held under the authority of a college or university of learning in this state; but leaseholds, or other estates or property, real or personal, the rents, issues, profits, and income of which is given to a municipal corporation, school district, or subdistrict in this state exclusively for the use, endowment, or support of schools for the free education of youth without charge shall be exempt from taxation as long as such property, or the rents, issues, profits, or income of the property is used and exclusively applied for the support of free education by such municipal corporation, district, or subdistrict.

(C) As used in this section, "church" means a fellowship of believers, congregation, society, corporation, convention, or association that is formed primarily or exclusively for religious purposes and that is not formed for the private profit of any person.

R.C. § 5709.12 Exemption of property used for charitable or public purposes.

(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.

(B) Lands, houses, and other buildings belonging to a county, township, or municipal corporation and used exclusively for the accommodation or support of the poor, or leased to the state or any political subdivision for public purposes shall be exempt from taxation. Real and tangible personal property belonging to institutions that is used exclusively for charitable purposes shall be exempt from taxation, including real property belonging to an institution that is a nonprofit corporation that receives a grant under the Thomas Alva Edison program authorized by division (C) of section 122.33 of the Revised Code at any time during the tax year and being held for leasing or resale to others. If, at any time during a tax year for which such property is exempted from taxation, the corporation ceases to qualify for such a grant, the director of development shall notify the tax commissioner, and the tax commissioner shall cause the property to be restored to the tax list beginning with the following tax year. All property owned and used by a nonprofit organization exclusively for a home for the aged, as defined in section 5701.13 of the Revised Code, also shall be exempt from taxation.

(C) If a home for the aged is operated in conjunction with or at the same site as independent living facilities, the exemption granted in division (B) of this section shall include kitchen, dining room, clinic, entry ways, maintenance and storage areas, and land necessary for access commonly used by both residents of the home for the aged and residents of the independent living facilities. Other facilities commonly used by both residents of the home for the aged and residents of independent living units shall be exempt from taxation only if the other facilities are used primarily by the residents of the home for the aged. Vacant land currently unused by the home, and independent living facilities and the lands connected with them are not exempt from taxation. Except as provided in division (A) of section 5709.121 [5709.12.1] of the Revised Code, property of a home leased for nonresidential purposes is not exempt from taxation.

(D)(1) A private corporation established under federal law, defined in 36 U.S.C. 1101, Pub. L. No. 102-199, 105 Stat. 1629, as amended, the objects of which include encouraging the advancement of science generally, or of a particular branch of science, the promotion of scientific research, the improvement of the qualifications and usefulness of scientists, or the increase and diffusion of scientific knowledge is conclusively presumed to be a charitable or educational institution. A private corporation established as a nonprofit corporation under the laws of a state, that is exempt from federal income taxation under section 501(c)(3) of the Internal Revenue Code of 1986, 100 Stat. 2085, 26 U.S.C.A. 1, as amended, and has as its principal purpose one or more of the foregoing objects, also is conclusively presumed to be a charitable or educational institution.

The fact that an organization described in this division 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. Nor shall the fact that any scientific information diffused by the organization is of particular interest or benefit to any of its individual members be used to deny the exemption granted by this section, provided that such scientific information is available to the public for purchase or otherwise.

(2) Division (D)(2) of this section does not apply to real property exempted from taxation under this section and division (C) of section 5709.121 [5709.12.1] of the Revised Code and belonging to a nonprofit corporation described in division (D)(1) of this section that has received a grant under the Thomas Alva Edison grant program authorized by division (C) of section 122.33 of the Revised Code during any of the tax years the property was exempted from taxation.

When a private corporation described in division (D)(1) of this section sells all or any portion of a tract, lot, or parcel of real estate that has been exempt from taxation under this section and section 5709.121 [5709.12.1] of the Revised Code, the portion sold shall be restored to the tax list for the year following the year of the sale and a charge shall be levied against the sold property in an amount equal to the tax savings on such property during the four tax years preceding the year the property is placed on the tax list. The tax savings equals the amount of the additional taxes that would have been levied if such property had not been exempt from taxation.

The charge constitutes a lien of the state upon such property as of the first day of January of the tax year in which the charge is levied and continues until discharged as provided by law. The charge may also be remitted for all or any portion of such property that the tax commissioner determines is entitled to exemption from real property taxation for the year such property is restored to the tax list under any provision of the Revised Code, other than sections 725.02, 1728.10, 3735.67, 5709.40, 5709.41, 5709.62, 5709.63, 5709.71, 5709.73, 5709.78, and 5709.84, upon an application for exemption covering the year such property is restored to the tax list filed under section 5715.27 of the Revised Code.

(E) Real property held by an organization organized and operated exclusively for charitable purposes as described under section 501(c)(3) of the Internal Revenue Code and exempt from federal taxation under section 501(a) of the Internal Revenue Code, 26 U.S.C.A. 501(a) and (c)(3), as amended, for the purpose of constructing or rehabilitating residences for eventual transfer to qualified low-income families through sale, lease, or land installment contract, shall be exempt from taxation.

**R.C. § 5709.12 Exemption of property used for
charitable or public purposes.
(Continued)**

The exemption shall commence on the day title to the property is transferred to the organization and shall continue to the end of the tax year in which the organization transfers title to the property to a qualified low-income family. In no case shall the exemption extend beyond the second succeeding tax year following the year in which the title was transferred to the organization. If the title is transferred to the organization and from the organization to a qualified low-income family in the same tax year, the exemption shall continue to the end of that tax year. The proportionate amount of taxes that are a lien but not yet determined, assessed, and levied for the tax year in which title is transferred to the organization shall be remitted by the county auditor for each day of the year that title is held by the organization.

Upon transferring the title to another person, the organization shall file with the county auditor an affidavit affirming that the title was transferred to a qualified low-income family or that the title was not transferred to a qualified low-income family, as the case may be; if the title was transferred to a qualified low-income family, the affidavit shall identify the transferee by name. If the organization transfers title to the property to anyone other than a qualified low-income family, the exemption, if it has not previously expired, shall terminate, and the property shall be restored to the tax list for the year following the year of the transfer and a charge shall be levied against the property in an amount equal to the amount of additional taxes that would have been levied if such property had not been exempt from taxation. The charge constitutes a lien of the state upon such property as of the first day of January of the tax year in which the charge is levied and continues until discharged as provided by law.

The application for exemption shall be filed as otherwise required under section 5715.27 of the Revised Code, except that the organization holding the property shall file with its application documentation substantiating its status as an organization organized and operated exclusively for charitable purposes under section 501(c)(3) of the Internal Revenue Code and its qualification for exemption from federal taxation under section 501(a) of the Internal Revenue Code, and affirming its intention to construct or rehabilitate the property for the eventual transfer to qualified low-income families.

As used in this division, "qualified low-income family" means a family whose income does not exceed two hundred per cent of the official federal poverty guidelines as revised annually in accordance with section 673(2) of the "Omnibus Budget Reconciliation Act of 1981," 95 Stat. 511, 42 U.S.C.A. 9902, as amended, for a family size equal to the size of the family whose income is being determined.

**R.C. § 5709.121 Exclusive charitable or
public use, defined.**

Real property and tangible personal property belonging to a charitable or educational institution or to the state or a political subdivision, shall be considered as used exclusively for charitable or public purposes by such institution, the state, or political subdivision, if it meets one of the following requirements:

(A) 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, sub-lease, or other contractual arrangement:

(1) As a community or area center in which presentations in music, dramatics, the arts, and related fields are made in order to foster public interest and education therein;

(2) For other charitable, educational, or public purposes;

(B) It is made available under the direction or 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 the view to profit.

(C) It is used by an organization described in division (D) of section 5709.12 of the Revised Code. If the organization is a corporation that receives a grant under the Thomas Alva Edison grant program authorized by division (C) of section 122.33 of the Revised Code at any time during the tax year, "used," for the purposes of this division, includes holding property for lease or resale to others.

**R.C. § 5713.081 Collection of delinquent taxes
on publicly owned property.**

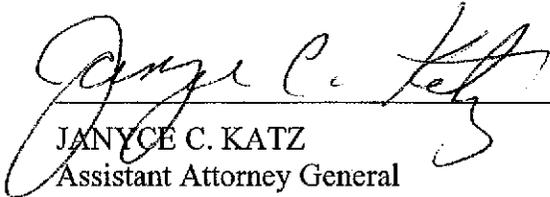
No application for real property tax exemption and tax remission shall be filed with, or considered by, the tax commissioner in which tax remission is requested for more than three tax years, and the commissioner shall not remit more than three years' delinquent taxes, penalties, and interest.

All taxes, penalties, and interest, that have been delinquent for more than three years, appearing on the general tax list and duplicate of real property which have been levied and assessed against parcels of real property owned by the state, any political subdivision, or any other entity whose ownership of real property would constitute public ownership, shall be collected by the county auditor of the county where the real property is located. Such official shall deduct from each distribution made by him, the amount necessary to pay the tax delinquency from any revenues or funds to the credit of the state, any political subdivision, or any other entity whose ownership of real property would constitute public ownership thereof, passing under his control, or which come into his possession, and such deductions shall be made on a continuing basis until all delinquent taxes, penalties, and interest noted in this section have been paid.

As used in this section, "political subdivision" includes townships, municipalities, counties, school districts, boards of education, all state and municipal universities, park boards, and any other entity whose ownership of real property would constitute public ownership.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Appellant was sent by regular U.S. mail to Joseph J. Dehner and Samuel M. Scoggins, Frost, Brown, Todd, LLC, 201 East Fifth Street, Suite 2200, Cincinnati, Ohio 45202, counsel for appellee, on this day of April 30th 2007.



JANYCE C. KATZ
Assistant Attorney General