

In the
Supreme Court of Ohio

NBC-USA HOUSING, INC. -FIVE,	:	
D/B/A LOVE ZION MANOR,	:	
	:	
Appellant,	:	
	:	Case No. 2009-0919
v.	:	
	:	Appeal from Ohio Board of Tax Appeals
WILLIAM W. WILKINS	:	Case No. 2006-N-1492
[RICHARD A. LEVIN],	:	
Ohio Tax Commissioner, <i>et al.</i> ,	:	
	:	
Appellees.	:	

BRIEF OF APPELLEE RICHARD A. LEVIN, OHIO TAX COMMISSIONER

KAREN H. BAUERNSCHMIDT (0006774)
 (Counsel of Record)
 CHARLES J. BAUERNSCHMIDT (0004648)
 KAREN H. BAUERNSCHMIDT CO., LPA
 1370 West 6th Street, Suite 200
 Cleveland, Ohio 44113
 Telephone: (216) 566-8500
 Facsimile: (216) 566-0942
 karen@khtaxlaw.com

RICHARD CORDRAY
 Attorney General of Ohio
 SOPHIA HUSSAIN (0081326)
 Assistant Attorney General
 (Counsel of Record)
 30 East Broad Street, 25th Floor
 Columbus, Ohio 43215-3428
 Telephone: (614) 466-5967
 Facsimile: (614) 466-8226
 sophia.hussain@ohioattorneygeneral.gov

Counsel for Appellant,
 NBC-USA Housing, Inc. - Five

Counsel for Appellee, Richard A. Levin,
 Ohio Tax Commissioner

PAUL M. STICKEL (0025007)
 (Counsel of Record)
 Assistant Franklin County Prosecutor
 373 S. High Street, 20th Floor
 Columbus, Ohio 43215
 Telephone: (614) 462-3500

MARK H. GILLIS (0066908)
 (Counsel of Record)
 Rich & Gillis Law Group
 6400 Riverside Dr., #D
 Dublin, Ohio 43017
 Telephone: (614) 228-5822
 Facsimile: (614) 540-7474

Counsel for Appellee,
 Franklin County Auditor

Counsel for Appellee, Board of Education of
 the Columbus City School District

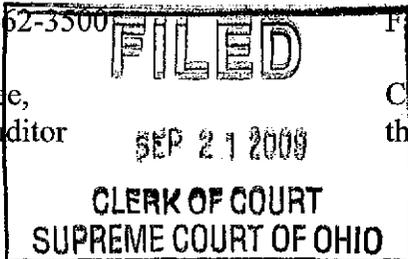


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Proposition of Law:

The provision of low-income rental housing for the elderly and disabled does not, in itself, qualify as a charitable use for the purposes of the R.C. 5709.12 real property tax exemption. Rather, under R.C. 5709.12(B), to qualify for the exemption, the housing must be “used exclusively as a ‘home for the aged,’” as defined in R.C. 5701.13

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INTRODUCTION

The appellant, NBC-USA Housing Inc. – Five dba Love Zion Manor (“NBC”), provides low-income rental housing to persons who are either above the age of 62 or disabled. NBC seeks real property tax exemption for that housing under the charitable exemption set forth in R.C. 5709.12. Unfortunately for NBC’s exemption claim, this Court long has held that the provision of low-income rental housing for the elderly or disabled does not, in itself, constitute a qualifying “charitable” use of real property under the R.C. 5709.12 exemption. See *Philada Home Fund v. Bd. of Tax Appeals* (1996), 5 Ohio St.2d 135; *Toledo Retirement Living v. Bd. of Tax Appeals* (1971), 27 Ohio St.2d 255; *Nat’l Church Residences v. Lindley* (1985), 18 Ohio St.3d 53.

Rather, under the express language of R.C. 5709.12(B), and as this Court has uniformly held, in order for real property used to provide low-income rental housing for elderly and disabled residents to qualify for the R.C. 5709.12 exemption, the housing must meet the specific requirements defining a “home for the aged,” as set forth in R.C. 5701.13. *Toledo Retirement*, 27 Ohio St.2d at 258; *Nat’l Church Residences*, 18 Ohio St.3d at 57-58; *Cogswell Hall, Inc. v. Kinney* (1987), 30 Ohio St.3d 43, 44; accord, *Rickenbacker Port. Auth. v. Limbach* (1992), 64 Ohio St.3d 628, 631.

NBC does not assert and did not factually establish that it meets the R.C. 5701.13 requirements of a “home for the aged.” In fact, the evidentiary record affirmatively establishes that NBC’s housing does not meet the requirements defining a “home for the aged.” Among other things, contrary to the “home for the aged” definition, NBC’s housing is not provided rent-free if the financial plight of the elderly resident would require it. See R.C. 5701.13 (B)(1)(e) (requiring that the housing must be provided “for the life of each resident without regard to the resident’s ability to continue payment for the full cost ***) and *Toledo Retirement*, 27 Ohio

St.2d at 258. Instead, NBC's lease agreements permit it to evict its elderly and disabled tenants for non-payment of rent. See, e.g., S. Supp. 6-8, BTA Hearing Exhibit ("HR Ex.") B1 pp. 2-4 at ¶¶9(b)(2), 9(d) and 9(i)(2) & (8).

Thus, this appeal presents nothing new. Under the plain meaning of R.C. 5709.12(B) and R.C. 5701.13, and this Court's well-settled decisional law applying the plain meaning of those statutes, the BTA and the Commissioner reasonably and lawfully denied NBC's exemption claim.

STATEMENT OF THE CASE

On June 23, 2004, NBC filed an application seeking a real property exemption under R.C. 5709.12 for the property located at 2436 Ennis Road, Columbus, Ohio (parcel numbers 010-215287-00 and 010-146485-00) (the "subject property").¹ Supp. 2; ST 7. NBC also stated that "[s]ince the beginning the property has been solely used for federally subsidized low-income Section 8 Elderly and Handicapped families." Supp. 2, ST 7. See also Supp. 3, ST 8 ("[t]he property is used solely as a residence for elderly and handicapped families that are low income.").

The Tax Commissioner issued his Final Determination in which he found that the subject property was being used to provide low-income housing and that this use, in itself, was not sufficient to qualify the subject property as held "exclusively for charitable purposes" within the meaning of the R.C. 5709.12 exemption. Thus, in accordance with *Philada Home Fund* and *Cogswell Hall*, the Commissioner denied NBC's exemption claim.

¹ In its exemption application, NBC incorrectly identified the current tax year as 2003, instead of 2004. Supp. 1, ST 6. In accordance with R.C. 5715.27(F), the Tax Commissioner treated the application as pertaining to tax year 2004, since that was the year in which NBC filed its application. Additionally, even though NBC sought remission of taxes and penalties for tax years 1990 through 2002, the Tax Commissioner limited his consideration of remission to the three years prior to the application being filed as required by R.C. 5713.081.

NBC timely appealed the Tax Commissioner's final determination to the Board of Tax Appeals ("BTA"). In its Notice of Appeal to the BTA, NBC asserted the following errors in the Tax Commissioner's final determination:

- 1) The Final Determination of the Tax Commissioner unlawfully denied the Taxpayer's request for an exemption under Ohio Revised Code §5709.12 since the property is used exclusively for charitable purposes.
- 2) The Tax Commissioner erred in determining that the subject property, which is used exclusively as housing for low income elderly or handicapped individuals, does not meet the requirement of being used exclusively for charitable purposes under Ohio Revised Code §5709.12.
- 3) The Tax Commissioner unreasonably and unlawfully relied on *Philada Home Fund v. Bd. of Tax Appeals* (1996), 5 Ohio St.2d 135 and *Cogswell Hall, Inc. v. Kinney* (1987), 30 Ohio St.3d 43, to deny the exemption for the subject real property.
- 4) The Tax Commissioner failed to consider in its [sic] determination that the subject property is owned by a religious non-profit organization whose purpose is to provide housing to the aged, low-income residents.
- 5) The Final Determination of the Tax Commissioner is unreasonable and unlawful since it misinterpreted R.C. §5709.12(B), §5709.12(C) and §5709.12(E).
- 6) The Final Determination of the Tax Commissioner is against the manifest weight of the evidence.

Supp. 22-23, NBC's BTA Notice of Appeal at 1-2.

Following a hearing on its appeal, NBC claimed exemption under R.C. 5709.121 for the first time in its brief, despite not identifying that section in either its exemption application or Notice of Appeal. The BTA found that the services provided to tenants, including any religious services, were only vicariously charitable in nature, and that NBC itself provided only subsidized housing for low-income elderly and physically handicapped individuals. Therefore, the BTA

held that the subject property was not used for charitable purposes as required by R.C. 5709.12. BTA Decision and Order at 12-13, NBC Appx. 16-17. The BTA emphasized that it is the owner's use of the property that is at issue as it relates to an exemption under R.C. 5709.12(B). *Id.* at 11, NBC Appx. 15. Additionally, the BTA held that NBC was jurisdictionally barred from seeking exemption under R.C. 5709.121 because NBC had not asserted that section in its application or its notice of appeal, raising only that the Commissioner's final determination misinterpreted "R.C. §5709.12(B), §5709.12(C) and §5709.12(E)." *Id.* at 5, f.n.1, NBC Appx. 9.

NBC timely appealed to this Court as of right from the BTA's decision.

STATEMENT OF THE FACTS

A. NBC's Housing Project

NBC is a non-profit corporation. ST 7. Its primary purpose is to provide "safe, sanitary, affordable housing so [its tenants] can live with dignity and pride." Supp. 37, HR 43. See also Supp. 29, HR 12. In 1989, NBC purchased the subject property and, shortly thereafter, constructed Love Zion Manor on the property. Supp. 1-2; ST 6-7. Love Zion Manor is a housing project consisting of twenty-five (25) one-bedroom apartments rented to low-income individuals or families that are either elderly (62 years of age or older) or physically disabled individuals and families. Supp. 32, HR 24-25.²

NBC financed the construction of Love Zion Manor with a Section 202 loan from HUD, which is secured by a mortgage on the subject property. Supp. 12, ST 17. See also Supp. 5-8, ST 10-13. Additionally, NBC receives Section 8 rent subsidies for the project. Supp. 35, HR 34; Supp. 2; ST 7; NBC Br. at 17. NBC and HUD executed the loan, mortgage and regulatory documents on September 28, 1989. See Supp. 5, ST 10. According to Love Zion Manor's

² During the BTA hearing, NBC's manager testified that six (6) of its twenty-six (26) tenants were physically disabled. Supp. 32, HR 25.

manager, a local church, Love Zion Baptist Church, was the Section 202 “sponsor” for Love Zion Manor. Supp. 29-30, HR 13-14.

B. NBC’s Lease Agreements and Rental Charges

NBC’s tenants enter into lease agreements with NBC for an initial term of one year, and the leases are automatically renewed for successive terms of one month. See S. Supp. 5-6, HR Ex. B1 pp. 1-2 at ¶¶1, 9. Those lease agreements permit NBC to evict its tenants under a variety of circumstances, including non-payment of rent within the grace period, using illegal drugs, or engaging in criminal activity. S. Supp. 6-8, HR Ex. B1 pp. 2-4 at ¶¶9(b)(2), 9(d) and 9(i)(2) & (8). The lease agreements also give NBC the authority to remove a tenant’s federal rent subsidy in certain situations. S. Supp. 8, 10, Ex. B1 pp. 4, 6 at ¶¶12, 25.

None of Love Zion Manor’s tenants live rent-free. See S. Supp. 6, HR Ex. B1 p. 2 at ¶5. Rather, HUD requires tenants to pay thirty percent (30%) of their adjusted income in rent. See 42 U.S.C. 1437a(a)(1)(A); 24 C.F.R. 813.107. See also Supp. 35, 37-38, HR 34, 45-47; S. Supp. 8, HR Ex. B1 pp. 2, 4 at ¶¶5, 10-11. If the tenant or his or her family’s composition or income changes, NBC can adjust the tenant’s monthly rental payment. S. Supp. 8, 10, HR Ex. B1 pp. 4, 6 at ¶¶11, 22 & 24. NBC receives the remainder of its full-rental charge from HUD in the form of a Section 8 subsidy. See Supp. 35, 37-38, HR 34, 45-46. See also 24 C.F.R. 880.201. See also S. Supp. 6, HR Ex. B1 p. 2 at ¶5.

In 2002, 2003, and 2004, NBC received rental income of \$225,748.00, \$269,708.00, and \$275,450.00, respectively. S. Supp. 38, 52, 66, HR Exs. C1, C2, C3 (NBC’s IRS Forms 990). It receives at least current market rental rates for its apartments. Supp. 35, HR 35-36; S. Supp. 10, HR Ex. B1 p. 6 at ¶¶24(c), 25(a). At the time it applied for the exemption, the “contract rent,” the amount received by NBC for the one-bedroom apartments in Love Zion Manor, was \$863.00

per month. S. Supp. 5, HR Ex. B1 p. 1 at ¶2; Supp. 3, ST 8. At the August 30, 2007 BTA Hearing, Love Zion Manor’s manager testified that the “contract rent” had increased to \$986.00 per month. See Supp. 35, HR 35. At that time, the average monthly rent for one- to three-bedroom apartments in the local area was between \$525.00 and \$700.00 per month. See S. Supp. 78, HR Ex. C4.

C. Background on HUD’s Section 202 Direct Loan Program and Section 8 Rental Assistance

The HUD Section 202 housing program is authorized by Section 202 of the National Housing Act of 1959, 12 U.S.C. 1701q (“Section 202”). In 1989, Section 202 was a direct loan program with rental assistance (subsidies) provided pursuant to Section 8 of the United States Housing Act of 1937, 42 U.S.C. §1437f (“Section 8”).

1. Section 202 Loans

In 1989, at the time NBC received its loan from HUD, Section 202 authorized HUD to make loans to finance the construction or rehabilitation of residential housing projects for elderly (sixty-two years of age or older) and handicapped individuals and families.³ 12 U.S.C. 1701q, et seq.; 24 C.F.R. 885.1(b). The first step to receiving a Section 202 loan was the filing of an application. 24 C.F.R. 885.205; 24 C.F.R. 885.210. The application required the name, address, and telephone number of the “borrower” and of the “sponsor” (if any). 24 C.F.R. 885.210(b)(1). Section 202’s regulations provided that the “borrower” is a private nonprofit corporation that, if the application is accepted, receives a Section 202 loan and “execute[s] a mortgage in connection therewith as the legal owner of the project.” 24 C.F.R. 885.5. A “sponsor” is a private nonprofit

³ All citations to federal statutes and regulations are to the version of such statutes and regulation that were in effect on September 28, 1989, the date that NBC entered into the loan and regulatory agreements with HUD. See Supp. 5, ST 10. When an agreement is entered into, the law then in force defines the duties and rights of the parties under it. *Goodale v. Fennell* (1875), 27 Ohio St. 426, 432.

entity. Id. The applicant must also provide HUD with (1) the number of apartments for which Section 8 Housing Assistance is requested; (2) the dollar amount of the Section 202 direct loan requested; and (3) a description of the proposed housing project. 24 C.F.R. 885.210(b).

Additionally, if the sponsor is a religious organization, then the borrower is required to be a separate legal entity and must have a separate tax exempt ruling from the Internal Revenue Service (“IRS”):

If the Sponsor is a religious body, the Borrower corporation must be a separate legal entity, and no reference to religion or religious purposes may be included in its Articles of Incorporation or By-Laws. Additionally, a Borrower corporation may not engage in any other business or activity (including the operation of any other rental project), or incur any liability or obligation not related to the proposed project.

* * *

*Additionally, Sponsors, including churches, must have a currently effective tax exemption ruling from the Internal Revenue Service (IRS), and, where the Sponsor and the Borrower are not the same legal entity, the Borrower must furnish evidence that it also has received a Section 501(c)(3) or (4) tax exemption ruling from the IRS * * **

24 C.F.R. 885.210(b)(9) & (13)(emphasis added). In other words, while a religious organization may be a sponsor of a Section 202 project, it cannot receive the loan or own the project. Accordingly, because it is merely the “sponsor,” Love Zion Baptist Church cannot possibly hold any ownership interest, even indirectly, in the subject property.

2. Section 8 Rent Subsidies

The purpose of Section 8 is to assist lower-income individuals and families in renting decent, safe and sanitary housing of modest design with suitable amenities. See 24 C.F.R. 880.204(a). For each apartment in a Section 8 project rented to an eligible tenant, the owner receives an amount known as the “contract rent.” The amount of the “contract rent” varies by

project and depends on the cost of constructing the project, the projected expenses necessary to operate the project, and debt service. 24 C.F.R. 880.308; 24 C.F.R. 880.309; 24 C.F.R. 880.311; and 24 C.F.R. 880.405.

Section 8 tenants are required to pay, as rent, to the owner of a Section 8 project a percentage of their monthly adjusted income not to exceed thirty percent (the “tenant rent”). See 42 U.S.C. 1437a(a)(1)(A); 24 C.F.R. 813.107. For each apartment rented to a Section 8 tenant, HUD pays the owner, in the form of a subsidy, an amount equal to the difference between the “contract rent” and the “tenant rent.” 24 C.F.R. 880.201.

The owner is required to reexamine each tenant’s income on an annual basis and to adjust the tenant rent to reflect any changes in his or her income. 24 C.F.R. 880.603(c). Any increase or decrease to the tenant rent is offset by a corresponding decrease or increase in the amount of the HUD subsidy. *Id.* Additionally, the amount of the “contract rent” received by the owner is adjusted annually to reflect changes in the market in the housing area for similar types and sizes of apartments. See 42 U.S.C. 1437f(c)(2)(A). Further adjustments to the “contract rent” may be made to reflect increases in real property taxes, utility rates, or similar costs which are not adequately compensated for by the annual market adjustment. 42 U.S.C. 1437f(c)(2)(B).

a. The Owner of a Section 8 Project Can Receive More Rent than Owners of Comparable Non-Section 8 Apartment Owners

The amount of the contract rent for a Section 8 apartment may exceed what HUD has already determined to be the “fair market rent” (including utilities and housing services necessary to attract private development) by as much as twenty percent. 24 C.F.R. 880.203; 24 C.F.R. 880.204. In fact, apartments generally available in the market that are comparable to Section 8 project apartments are often rented for less than “contract rent.” See *Alliance Towers, Ltd. v. Stark Cty. Bd. of Rev.* (1988), 37 Ohio St.3d 16, 21 at n. 4. Additionally, in certain

circumstances, the owner of a Section 8 project receives a percentage of the HUD subsidy even if an apartment is vacant. 24 C.F.R. 880.501(d)(2) & (3); 24 C.F.R. 880.611.

b. Section 8 Property Owners Benefit from Accelerated Depreciation

The primary reason for investing in such subsidized housing projects is the favorable after-tax cash flow generated by the accelerated depreciation permitted under the Economic Recovery Tax Act of 1981. *Alliance Towers, Ltd.*, 37 Ohio St.3d at 21 n. 5, citing Pub. L. 97-34 (Aug. 13, 1981), 95 Stat. 172 (26 U.S.C. 1 et seq.).

D. NBC Arranges for Outside Community Organizations to Serve Its Tenants

NBC is responsible for maintaining the property and employs a part-time maintenance person. S. Supp. 9, HR Ex. B1 p. 5 at ¶17; Supp. 29, HR 12. NBC also employs a manager and a full-time service coordinator for the purpose of meeting the tenants' housing and non-housing needs. Supp. 33, 35-36, HR 29, 37-38. Generally, if a tenant has a need, NBC attempts to put him or her in touch with community organizations that may be able to provide the needed service. Supp. 33-34, 36, HR 29-30, 38-40. For example, the manager and service coordinator arrange for outside organizations, such as the Salvation Army, St. Stephens Community House, and Meals on Wheels, to deliver food to Love Zion Manor's residents. Supp. 30, 36, HR 15, 38. The service coordinator also arranges for speakers to come in and talk about general health matters. Supp. 33, HR 28-29. Finally, NBC goes through Senior Independence and Franklin County Senior Options to get its tenants the services they need. Supp. 33-34, HR 29-30.

NBC's manager testified that no mental health services or drug counseling is provided at the subject property. Supp. 33, HR 28-29. However, as the BTA found, blood pressure and diabetes screenings are provided through an outside program on a monthly basis. Supp. 33, HR 29.

E. Services Provided by Local Church Volunteers, and Not by NBC

Throughout its Brief, NBC repeatedly references numerous services that it claims to provide to its tenants. See NBC Br. at 2, 12, 18, 19, 23. However, the undisputed evidence establishes that such services are actually provided by volunteers from Love Zion Baptist Church, not NBC. See Supp. 30, 33, HR 14-15, 27-29. NBC's manager testified that volunteers from Love Zion Baptist Church go to Love Zion Manor each month to offer a bible study and a luncheon to NBC's residents. Supp. 30, 33, HR 14-15, 27. She also testified that some volunteers have "taken it upon themselves" to adopt a tenant and help that tenant with whatever needs he or she may have, such as taking the tenant to the grocery store. Supp. 30, HR 15. The church also provides for various social activities throughout the year, such as cook-outs in the summer and holiday dinners. Supp. 33, HR 28.

ARGUMENT

PROPOSITION OF LAW :

The provision of low-income rental housing for the elderly and disabled does not, in itself, qualify as a charitable use for purposes of the R.C. 5709.12 real property tax exemption. Rather, under R.C. 5709.12(B), to qualify for the exemption, the housing must be "used exclusively as a 'home for the aged,'" as defined in R.C. 5701.13.

A. Standard of Review

While the General Assembly has exercised its authority to enact legislation to exempt qualifying property from taxation, it has also expressed the limited scope of the grant, acknowledging that "all real property in this state is subject to taxation, except only such as is expressly exempted therefrom." R.C. 5709.01(A). As a result, "in 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. Therefore,

“[e]xemption is the exception to the rule and statutes granting exemptions are strictly construed.”
Seven Hills Schools v. Kinney (1986), 28 Ohio St.3d 186.

When reviewing a decision of the BTA, this Court is not a trier of fact de novo. *Operation Evangelize v. Kinney* (1982), 69 Ohio St.2d 346, 347, paragraph one of the syllabus. Instead, in accordance with R.C. 5717.04, this Court should limit its review to a determination of whether the BTA’s decision is “reasonable and lawful.” *Id.* Further, the Tax Commissioner’s “findings are presumptively valid absent a showing that they are clearly unreasonable or unlawful.” *Shiloh Automotive, Inc. v. Levin*, 117 Ohio St.3d 4, 2008-Ohio-68, ¶16. The Court has stated that “[t]he BTA is responsible for determining factual issues and, if the record contains reliable and probative support for these BTA determinations, we will affirm.” *American Nat’l Can Co. v. Tracy* (1995), 72 Ohio St.3d 150, 152. “In all doubtful cases exemption is denied.” *A. Schulman, Inc. v. Levin*, 116 Ohio St.3d 105, 2007-Ohio -5585, ¶7 (quoting *Youngstown Metro. Hous. Auth. v. Evatt* (1944), 143 Ohio St. 268, 273).

B. Because NBC’s property fails to meet the R.C. 5701.13 definition of “home for the aged,” it fails to qualify for the R.C. 5709.12(B) exemption, under which only such housing that is used “exclusively as a home for the aged,” qualifies for exemption.

- 1. Under R.C. 5709.12(B), the General Assembly expressly has limited real property tax exemption to only such low-income rental housing for the elderly and disabled that meets the definitional criteria of a “home for the aged” as set forth in R.C. 5701.13.**

R.C. 5709.12(B) provides, in relevant part, that:

*** Real and tangible personal property belonging to institutions that is used exclusively for **charitable purposes** shall be exempt from taxation, * * * 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.

(Underlining and emphasis added).

Thus, under the express language of R.C. 5709.12(B), property used “exclusively for a home for the aged” is exempt from real and personal property taxation. In turn, R.C. 5701.13(B) defines “home for the aged,” in part, as follows:

(B) As used in Title LVII 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 either of the following:

(1) A place or residence for *aged and infirm* persons that satisfies division (B)(1)(a) to (e) of this section:

(a) *It is a nursing home, residential care facility, or adult care facility.*

* * *

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

(2) **A place of residence that satisfies divisions (B)(1)(b), (d), and (e) of this section;** that satisfies the definition of “nursing home,” “residential care facility,” or “adult care facility” under section 3721.01 or 3722.01 of the Revised Code regardless of whether it is licensed as such a home or facility; and that is provided at no charge to individuals on account of their service without compensation to a charitable, religious, fraternal, or educational institution, which individuals are aged or infirm and are members of the corporation, association, or trust that owns the place of residence....

(Emphasis added).

Thus, as the underscored language of R.C. 5701.13(B) shows, in order to qualify under the “home for the aged” definitional criteria, a housing facility must, among many other requirements, provide “services for the life of each resident without regard to [the resident’s] ability to continue payment for the full cost of the services.” Further, these express definitional

requirements mandate “the availability of medical, nursing, and additional services for full care.” *Cogswell Hall*, 30 Ohio St.3d at 44, f.n.1.

NBC’s low-income rental housing fails to meet the foregoing requirements. Rather, under NBC’s lease agreements, its tenants enter into an initial one-year lease, with monthly renewals, pursuant to which NBC may evict its tenants, or decline to renew the tenant’s lease under a variety of circumstances, including for non-payment of rent within the grace period. S. Supp. 6-8, HR Ex. B1 pp. 2-4 at ¶¶9(b)(2), 9(d) and 9(i)(2) & (8). The lease agreements also give NBC the authority to remove a tenant’s federal rent subsidy, in certain situations. S. Supp. 7, 10, Ex. B1 pp. 4, 6 at ¶¶12, 25.

Similarly, NBC’s leases do not obligate NBC to provide the elderly or disabled tenants with the “medical, nursing and additional services” constituting “full care,” as required to meet the statutory definition of “home for the aged.” In fact, the “medical, nursing or additional care” that is provided is purely *de minimus* and unfunded, consisting only of NBC’s arranging for volunteers to provide blood pressure and blood sugar checks. See Section E of the Statement of Facts, *supra*.

2. **Throughout the history of Ohio taxation, this Court’s well-established decisional law holds that a lessor/owner’s provision of low-income rental housing, in itself, never has been considered “charitable” for property tax exemption purposes.**

Under the real property tax “charitable” exemption currently set forth in R.C. 5709.12, this Court always has held that the provision of low-income rental housing for the elderly or disabled, or for any other group of tenants, does not, in itself, constitute a qualifying “charitable” use of real property. See *St. Barnabas v. Bd. of Tax Appeals* (1948), 150 Ohio St. 484; *Beerman Found., Inc. v. Bd. of Tax Appeals* (1949), 152 Ohio St. 179; *Philada Home Fund*, 5 Ohio St.2d 135; *Toledo Retirement*, 27 Ohio St.2d 255; *Nat’l Church Residences*, 18 Ohio St.3d 53;

Cogswell Hall, 30 Ohio St.3d 43; see also, *Nat'l Steelworkers Oldtimers Community Urban Development Co. v. Wilkins* (Jan. 20, 2009), BTA Case Nos. 2006-H-728 and 729, 5-6, 23, unreported (appeal pending,⁴ 5th App. No. 2009 CA 00024) (applying this Court's uniform decisional law in denying exemption under R.C. 5709.12 for low-income rental housing for the elderly and disabled that failed to qualify as a "home for the aged"), T.C. Appx. 100-115. Rather, to constitute "charity" the provision of the housing must be provided to tenants charitably, i.e., without regard to the tenants' ability to pay.

As a general matter, although the General Assembly has not defined what activities of an institution constitute "charitable purposes" for property-tax-exemption purposes, this Court has defined "charity" as:

the attempt in good faith, spiritually, physically, intellectually, socially and economically to advance and benefit mankind in general, or those in need of advancement and benefit in particular, **without regard to their ability to supply that need from other sources, and without hope or expectation, if not with positive abnegation of gain or profit by the donor or by the instrumentality of the charity.**"

Planned Parenthood Assn. v. Tax Commr. (1966), 5 Ohio St.2d 117, paragraph one of the syllabus (emphasis and underlining added). Further, this Court has held that "[w]hether an institution renders sufficient services to persons who are unable to afford them to be considered as making charitable use of property must be determined on the totality of the circumstances * * *." *Bethesda Healthcare, Inc. v. Wilkins*, 101 Ohio St.3d 420, 2004-Ohio-1749, ¶39. In the context of low-income rental housing, this Court repeatedly has held that the provision of low-income rental housing by the owner/lessor is not a "charitable" use of property.

⁴Following the completion of the parties' briefing, the appellant taxpayer in *Nat'l Steelworkers* filed a notice of voluntary dismissal with the 5th District Court of Appeals on September 10, 2009. See T.C. Appx. 117-118 (notice of voluntary dismissal) and 116 (5th District's docketing statement for the case).

Over sixty years ago, in 1948, this Court held that property used to “provide low-rent housing accommodations for nurses” was not being used for charitable purposes. *St. Barnabas*, 150 Ohio St. at 487. In reaching its decision, the Court placed significance on the fact that none of the nurses lived rent-free on the property—in other words, all of the residents were charged to reside on the premises. *Id.*

A year later, the Court was faced with a similar issue in *Beerman*. In *Beerman*, the property was used to furnish low-rent housing to disabled veterans of World War II. Rental rates were far below the prevailing market rate in the area; however, none of the veterans lived rent-free. Again, the Court determined that the property was not being used for charitable purposes because each occupant was required to pay for accommodations. *Beerman*, 152 Ohio St. at 181-182.

Any doubt about the non-exempt status of low-income housing for the elderly and disabled under R.C. 5709.12(B) seemingly was laid to rest in *Philada Home Fund*. In that case, this Court held that:

Real property owned by a nonprofit charitable corporation the stated purpose of which is to secure and operate resident apartments for aged and needy persons is not exempt from taxation under Section 5709.12, Revised Code, even though it is shown that the rent intended to be charged is at or below cost, and in no event to result in a profit, and that it is expected that some persons unable to pay the full rental will be assisted by subventions from corporate funds.

Philada Home Fund, 5 Ohio St.2d at paragraph one of the syllabus.

In spite of the sweeping pronouncement in *Philada Home Fund* denying the exemption for low-income housing, however, shortly thereafter, the Court temporarily created a limited exception to the *per se* non-exempt status of such property in *Carmelite Sisters, St. Rita's Home Fund v. Bd. of Review* (1969), 18 Ohio St.2d 41. In that non-tax case involving R.C.

4141.01(B)(2)(h) of the Ohio Unemployment Compensation Fund law, the Court factually and legally distinguished the holding of *Philada Home Fund*. The property at issue in *Carmelite Sisters* was used to provide low-income housing to the aged and needy of sixty-five years or older. However, unlike in *Philada Home Fund*, the residents of the property in *Carmelite Sisters* received the benefit of services not typically found in traditional apartment settings. For example, residents were cared for by medical professionals that worked on the property. Additionally, meals were also provided to the residents. The Court granted the employer who operated the facility an exemption from the requirements of the unemployment compensation fund based upon the provision of these additional services.

To the extent that *Carmelite Sisters* signaled an expansion of the charitable exemption to encompass some kinds of rental housing for the elderly or disabled, however, the General Assembly swiftly took corrective measures. Specifically, “[a]fter the issues in *Carmelite Sisters* were framed, but prior to [this Court’s] consideration of the case, the General Assembly amended several tax exemption statutes, including [R.C. 5709.12(B)], and enacted R.C. 5701.13[,] effective May 31, 1968[,]” creating an exemption for property “used exclusively for a home for the aged.” *Nat’l Church Residences*, 18 Ohio St.3d at 57.

Under R.C. 5709.12 as amended effective May 31, 1968, “[t]he result of the amendments was to supplant the “services exception” established in *Carmelite Sisters* and to impose a requirement that **in order for low-rent apartments for the aged ... to be eligible for tax-exempt status, the facilities must meet the criteria contained in R.C. 5701.13.**” *Id.* at 57-58 (emphasis added) (footnote omitted). In fact, in summarizing the plain meaning of the May 31, 1968 amendments to the charitable exemption law, the *Nat’l Church Residences* Court relied

heavily on the Court's 1971 decision that likewise was decided under the post-1968 amended law, namely, *Toledo Retirement*.

This Court's decision in *Toledo Retirement* represented the first case decided under the law as amended by the General Assembly to define a "home for the aged." In that case, the taxpayer owned and operated "low-rent retirement living apartments with attendant facilities for aged occupants." *Toledo Retirement*, 27 Ohio St.2d at 256. The taxpayer tacitly conceded that its low-income rental property did not meet the definitional requirements of a "home for the aged" under R.C. 5701.13, but, nonetheless, sought exemption under R.C. 5709.12 and R.C. 5709.121 on the asserted basis that the housing was used "exclusively for charitable purposes." The Court upheld the Tax Commissioner's and BTA's denial of the taxpayer's exemption application, holding that the intervening amendment of R.C. 5709.12(B) and the enactment of R.C. 5701.13 limited the judiciary to applying the statutory criteria defining a "home for the aged." *Id.* at 258.⁵ Moreover, the Court further held that the taxpayer could not qualify for exemption under R.C. 5709.121, since such section's general language (providing exemption for the property of a "charitable institution" when used in furtherance of charitable purposes) cannot be construed as applying to property for which specific criteria had been established. *Id.* at 258-259.⁶

⁵ See also, *Rickenbacker Port. Auth.*, 64 Ohio St.3d at 631 (citing to *Toledo Retirement*, for the well established tax-exemption principle that "a property, to be exempt, must qualify under the criteria of the statute specifically applicable to that property").

⁶ As we discuss in Section C 1 of this Proposition of Law, *infra*, in its BTA brief, NBC belatedly sought exemption on the asserted basis that it constituted a "charitable institution" and that the subject property was used in furtherance of "charitable purposes" under R.C. 5709.121. NBC, however, failed to raise any such claim in proceedings before the Commissioner or in its notice of appeal to the Board. Accordingly, the Board properly held that NBC had not invoked the Board's jurisdiction to consider that issue. Moreover, in any event, as we detail in Section C 2, *infra*, this Court's decision in *Toledo Retirement* makes clear that R.C. 5709.121 does not provide any basis for granting the exemption to low-income rental housing. Rather, to qualify

Then, in *Nat'l Church Residences*, this Court again held that “in order for low-rent apartments for the aged * * * to be eligible for tax-exempt status, the facilities must meet the criteria contained in R.C. 5701.13.” *Nat'l Church Residences*, 18 Ohio St.3d at 57. In that case, as in the present case, the property consisted of an apartment complex financed by HUD funds. Residents were required either to have attained the age of sixty-two or to be handicapped. Rental units were not limited to low-income persons; however, HUD subsidies were available only to those whose income did not exceed a threshold level. The property owners made arrangements with various third-party community agencies to provide services to the residents, including meal preparation and nursing visits.

In yet a third decision, *Cogswell Hall*, this Court emphatically affirmed its previous decisions in *Toledo Retirement* and *Nat'l Church Residences*. In *Cogswell Hall*, the property at issue was used to provide low-income housing to women of any age. The property owners could not meet the home for the aged criteria set forth in R.C. 5701.13. Thus, in order to prevail under R.C. 5709.12(B), the property owners were forced to ask the Court to overrule *Philada Home Fund*. The Court declined to do so, and stated that “any change thereof is, of course, the prerogative of the General Assembly.” *Cogswell Hall*, 30 Ohio St.3d at 44-45. In short, based on a uniform body of precedent rejecting the same arguments as NBC advances in the present case, the *Cogswell Hall* Court summarily denied the request for exemption under R.C. 5709.12(B)⁷. So it should here.

for exemption, the property must meet the specific criteria of a “home for the aged” in R.C. 5701.13.

⁷ See also, *First Baptist Church of Milford, Inc. v. Wilkins*, 110 Ohio St.3d 496, 2006-Ohio-4966, ¶21 (quoting *W. Res. Academy v. Bd. of Tax Appeals* (1950), 153 Ohio St. 133, 136 (“Residence in a dwelling ... must necessarily be a private use of the premises. Where the exercise of such private rights constitutes the primary use of [the] property, * * * such property is no longer used exclusively for a charitable purpose.”)).

Just like the appellant taxpayers in *Toledo Retirement*, *Nat'l Church Residences*, and *Cogswell Hall*, NBC is not seeking exemption pursuant to the qualifications contained within R.C. 5701.13 as a “home for the aged,” nor could it. The criteria for qualifying as a “home for the aged” are specific, obligating the party seeking exempt status to provide accommodations, supervision, and personal care services to its residents, as well as additional services for the full care residents, and to provide these “services for the life of each resident without regard to the resident’s ability to continue payment for the full cost of the services.” See specifically, R.C. 5701.13(B)(1)(e); and generally, R.C. Chapters 3721 (governing “nursing home” and “residential care facilities”) and 3722 (governing “adult care facilities”). Thus, the subject property is neither a “licensed nursing home, residential care facility, nor adult care facility,” so that it fails to meet even the most threshold of the criteria of a “home for the aged.”

Further, as emphasized supra, the tenants of the subject property, Love Zion Manor, are required to make rent payments, varying in amount based on income (Supp. 35, HR 34), and NBC does not claim to provide tenancy for the life of each resident without regard to the resident’s ability to continue payment. Instead, the initial lease agreements are for one-year, with monthly renewals dependent on the tenant’s compliance with rent payment obligations. None of the residents at Love Zion Manor live rent-free. S. Supp. 6, HR Ex. B1 pp. 1-2 at ¶¶2, 5. The governing lease agreement permits NBC to evict their residents under a variety of circumstances, including non-payment of rent. S. Supp. 6-8, HR Ex. B1 pp. 2-4 at ¶¶9(b), 9(d) and 9(i). And the evidence establishes that NBC is a landlord that provides residential housing to low-income elderly and handicapped individual for which it receives at least market rental rates. See Supp. 2-3, ST 7-8; Supp. 35, 37, HR 37, 43. In sum, the BTA properly affirmed the Tax Commissioner’s denial of NBC’s exemption application.

In an effort to avoid the foregoing result under this Court's settled law, NBC advances three arguments, all of which disregard the plain meaning of the relevant statutes and constitute variations on arguments already rejected by this Court. First, NBC argues that HUD's restrictions limiting the use of the subject property to low-income housing for the elderly and handicapped are imposed for the "general welfare" and, therefore, NBC's use of the property is somehow "inherently charitable." Second, NBC argues that the subject property should be exempt because it directly provides its tenants with services in addition to basic housing, an argument that was directly addressed and rejected by this Court in *Toledo Retirement* and *Nat'l Church Residences*. Third, NBC argues the subject property is used exclusively for charitable purposes because the property is managed by and associated with an organization and individuals who spread Christian beliefs.

a. HUD's Use Restrictions on the Subject Property Do Not Transform NBC's Leasing of Such Property Into a Charitable Use.

First, NBC argues that its use of the subject property is "inherently charitable" because that use assertedly "coincides with Congress's express public policy goals" and because HUD's restrictions on the use of the property, like those imposed on properties for which federal low-income housing credit tax credits are available, are imposed for the "general welfare." NBC Br. at 16. Such argument fails because Congress frequently attempts to further public policies, but the use of real property to further those policies in no way transforms the use of such property into a charitable use for Ohio tax exemption purposes.

Moreover, the case upon which NBC relies, *Woda Ivy Glen Ltd. Partnership v. Fayette Cty. Bd. of Revision*, 121 Ohio St.3d 175, 2009-Ohio-762, is wholly inapposite. That case involved whether federal low-income housing tax credit use restrictions imposed on property by Title 26 of the Internal Revenue Code must be taken into account when determining the value of

such property for real property tax purposes. This Court concluded that such use restrictions should be taken into account because they were governmental restrictions, not private encumbrances. The Court explained how its decision was consistent with its conclusion in *Alliance Towers, Ltd.*, 37 Ohio St.3d 16, that the federal subsidies should not inflate the value of Section 8 properties for tax purposes. *Id.* at ¶29.

The Court's consideration of the governmental restrictions imposed on the operation of low-income housing in determining the true value of that property does not support NBC's claim to exemption here. In fact, to the extent that *Woda Ivy* has any possible relevance to the exemption issue presented here, it provides additional support for affirmance. Specifically, in holding that a property owner's receipt of federal subsidies or tax credits that resulted in restrictions on the use of his or her real property should be considered in reducing the assessed value of low-income housing, the Court hardly suggested that the true value should be reduced to a zero value, i.e., the result if such property were to be exempted from real property taxation altogether, as NBC requests here.

b. NBC Is Not Entitled to a Vicarious Charitable Exemption Based on Services Rendered by Church Volunteers and Other Third Parties.

NBC argues that the subject property should be exempt pursuant to R.C. 5709.12(B) because it provides "a wide range of charitable services" to its tenants. NBC Br. at 17-19. This argument amounts to nothing more than a thinly veiled attempt to resurrect the *Carmelite Sisters* "services exception," which was rendered a dead-letter by the enactment of R.C. 5701.13.

Further, even if the *Carmelite Sisters* "services exception" had not been supplanted by the General Assembly's amendment to R.C.5709.12 and its enactment of R.C. 5701.13, NBC's argument still would fail because NBC itself does not render any such services to its tenants. Rather, relatively *de minimus* medical, nursing and other non-housing kinds of services are

rendered by volunteers from Love Zion Baptist Church⁸ or by community organizations, such as the Salvation Army, St. Stephens Community House, and Meals on Wheels, that NBC contacted for the purpose of having them provide services for its tenants.

NBC attempts to claim that NBC itself provides the services rendered by Love Zion Baptist Church and its volunteers because that Church is assertedly a partial owner of NBC through sponsorship. Supp. 33, HR 28. However, the BTA was correct to find that “no corroborating evidence, in the form of documents showing ownership or costs borne by a church,” was in the record. BTA Decision and Order at 11, Appx. 15. Specifically, the Franklin County property records do not indicate Love Zion Baptist Church as being owner of the subject property. Supp. 20-21, ST 25-26. Further, NBC’s tax returns do not indicate any funds being provided by Love Zion Baptist Church in acquiring or maintaining the subject property. S. Supp. 41, 55 & 69, HR Ex. C1-C3, Schedule A at 3.

Thus, in essence, NBC is attempting to claim a vicarious tax exemption through third-party service providers. This Court has previously rejected such attempts to claim a vicarious tax exemption -- most notably, in *Nat’l Church Residences*. There, the Court explained:

Suffice it to say that any charitable activities which occurred in the case at bar were provided by volunteer agents or benevolent organizations, and not by appellants who simply contacted these persons or organizations for the purpose of having them provide services for their residents. In the final analysis, **appellants are attempting to obtain a vicarious charitable exemption similar to the theory advanced by the taxpayer and rejected by this court in *OCLC Online Computer Library Center, Inc. v. Kinney* (1984), 11 Ohio St.3d 198.**

Nat’l Church Residences, 18 Ohio St.3d at 58 (emphasis added).

⁸ As discussed above, 24 C.F.R. 885.210(b)(9) mandates that NBC be a “separate legal entity” from Love Zion Baptist.

In short, the subject property is not entitled to receive an exemption under R.C. 5709.12(B) based on any type of “services exception.”

c. HUD’s Regulations Prohibit NBC From Being a Religious Institution, but Even Disregarding those Regulations, the Spreading of Christian Beliefs at Love Zion Manor is Done by Love Zion Baptist Church, a Separate Entity.

As discussed in Section C of the Statement of Facts, supra, HUD mandates that NBC be a “separate legal entity” from Love Zion Baptist Church, and NBC’s Articles of Incorporation and by-laws do not have “any reference to religion or religious purposes.” 24 C.F.R. 885.210(b)(9). Thus, Love Zion Baptist Church’s religious mission cannot be imputed to NBC. Moreover, a property owner’s subjective motivation for using property in a certain manner is simply not relevant to the ultimate determination of its use.

Further, while NBC may be correct that the church volunteers who provide a *monthly* bible study to Love Zion Manor tenants use that bible study as a way to spread their Christian beliefs, the monthly bible studies can hardly be said to be NBC’s “primary use” of the subject property. Thus, even without considering that NBC is the owner of the property, the wholly incidental, non-primary use of the subject property for bible study makes this case easily distinguishable from *True Christianity Evangelism v. Zaino* (2000), 91 Ohio St.3d 117, where the Court held that the taxpayer owner’s dissemination of information attempting to encourage people to read the Bible and to live up to its moral standards constituted activities with charitable purposes. In *True Christianity*, the taxpayer stated that his entire purpose in using the real property at issue was “to inspire, enthuse, or to badger people into actually reading the Bible and finding out what it says and living up to its standards *** [and] *** encourag[ing] them to seek the highest moral standards they can from whatever source they will accept.” *True Christianity*, 91 Ohio St.3d at 119. He set out to accomplish his goal by “distribut[ing] *** literature,

influencing everyone [he could], in any way, to live up to the better moral standards of the Bible.” Id. NBC has provided little, if any, testimony and evidence of any evangelism done on the property.

In addition, even if the services rendered by the church volunteers could somehow be attributed to NBC’s use of the subject property, NBC has failed to provide competent and probative evidence regarding the frequency that such services are rendered, making it unable to establish under the totality of circumstance that such services are the “primary use” of the property.

3. **R.C. 5709.12(C)(1)’s declaration that “independent living facilities” are not exempt from taxation would be rendered meaningless if NBC received an exemption under R.C. 5709.12(B).**

Finally, NBC’s exemption claim fails for an additional, confirming reason. Pursuant to R.C. 5709.12(C)(1), “independent living facilities and the land connected with them are **not** exempt from taxation.” (Emphasis added.) R.C. 5709.12(A) defines “independent living facility” as “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.”

In *Nat’l Steelworkers*, the BTA found that, in accordance with *Toledo Retirement* and *Nat’l Church Residences*, even though the appellant stated that it provided services to some of its residents in the nature of assisting with some daily needs, the property remained an unlicensed “independent living facility” operated in connection with HUD programs. *Nat’l Steelworkers* at 3, 5. Similarly, in the present case, the fact remains that Love Zion Manor generally is an apartment complex that provides low-income housing to the aged and disabled and, thus, it is not a “nursing home, residential care facility, or adult care facility.” Consequently, in order for NBC’s property to qualify for real property exemption, NBC must meet the specific criteria

defining a “home for the aged” in R.C. 5701.13. Since NBC does not even assert, let alone establish, that the subject property meets the R.C. 5701.13 definitional criteria, the reality is that the subject properties are non-exempt “independent living facilities.”

In sum, reading R.C. 5709.12(B) and R.C. 5701.13 in conjunction with R.C. 5709.01(C)(1) simply confirms that the kind of low-income residential housing at issue in this case fails to qualify for exemption under R.C. 5709.12. In answer, NBC’s merit brief fails to respond to the fact that Love Zion Manor is essentially an independent living facility. Thus, granting exemption to NBC under R.C. 5709.12(B) would render meaningless R.C. 5709.12(C)(1).

C. NBC’s arguments under R.C. 5709.121 fail both jurisdictionally and substantively.

- 1. The BTA reasonably and lawfully held that NBC failed to raise any R.C. 5709.121 issue in proceedings before the Commissioner and in its notice of appeal to the BTA and, therefore, failed to confer the BTA with jurisdiction to consider any such exemption issue.**

Until filing its BTA brief, NBC sought exemption solely under R.C. 5709.12 (B) (C) and (E), and did not specify R.C. 5709.121 in its application for exemption filed with the Commissioner or in its notice of appeal to the BTA. See Supp. 2, ST 7 at ¶13 (NBC’s application for real property tax exemption); Supp. 22-23, NBC’s BTA Notice of Appeal at 1-2. It is well settled that the BTA has jurisdiction to consider only those issues that are raised by an appellant in proceedings before the Tax Commissioner and “specified” in clear and precise terms in its notice of appeal to the BTA. See *Moraine Hts. Baptist Church v. Kinney* (1984), 12 Ohio St.3d 134; *CNG Development Co. v. Limbach* (1992), 63 Ohio St.3d 28; *Queen City Valves, Inc. v. Peck* (1954) , 161 Ohio St. 579, 583 (holding that to “specify” means to “mention specifically, to state in full and explicit terms”); *Brown v. Levin*, 119 Ohio St. 3d 335; 2008-Ohio-4081, ¶¶17-19.

A review of NBC's application for exemption reveals that in response to question 13, which states "[u]nder what section(s) of the Ohio Revised Code is exemption sought?" NBC wrote "Elderly and Handicapped Housing, R.C. 5709.12, As per Ohio House Bill 95." Supp. 2, ST 7. Nor does NBC identify itself as a "charitable institution" or indicate that the property is used for charitable purposes in the application. Supp. 1-4, ST 6-9. Also, NBC failed to file any written objection to the Tax Commissioner's recommendation, a report that also limited discussion of the subject property to R.C. 5709.12. S. Supp. 1-2, ST 3-4. Accordingly, the Commissioner's final determination contained no analysis, or even any mention of, R.C. 5709.121. Likewise, in its notice of appeal to the BTA, NBC likewise made no mention, allusion or citation to R.C. 5709.121.

The real property exemptions in R.C. 5709.12 and R.C. 5709.121 are separate and distinct exemptions. See, e.g., *Community Health Professionals, Inc. v. Levin*, 113 Ohio St.3d 432, 2007-Ohio-2336, ¶8 (characterizing the issues on appeal as whether the taxpayer's property "qualified for a tax exemption pursuant to either R.C. 5709.12 or 5709.121"). Specifically, in order for the provisions of R.C. 5709.121 to apply, the owner/applicant must establish that it is a "charitable or educational institution." By contrast, under R.C. 5709.12, the owner/applicant need not establish that it qualifies as a "charitable" or "educational" institution, only that it is an "institution." Thus, this Court repeatedly has held that "R.C. 5709.121 has no application to non-charitable institutions seeking tax exemption under R.C. 5709.12." See, e.g., *Bethesda Healthcare*, 2004-Ohio-1749, ¶27; *Highland Park Owners, Inc. v. Tracy* (1994), 71 Ohio St.3d 405, 406; *Episcopal Parish of Christ Church v. Kinney* (1979), 58 Ohio St.2d 199, 200-201; and *The White Cross Hospital Assn. v. Board of Tax Appeals* (1974), 38 Ohio St.2d 199, 203 (Justice Stern concurring).

As applied here, NBC never asserted that it qualified as a “charitable institution,” and never otherwise asserted the applicability of R.C. 5709.121 as a basis for real property tax exemption. Accordingly, the BTA properly determined that NBC failed to confer the BTA with jurisdiction to consider that issue. BTA Decision and Order at 5, NBC Appx. 9. Further, as a substantive matter, and as we detail in the following Section C 2, NBC’s belated R.C. 5709.121 exemption claim has no merit and has been expressly rejected by this Court.

2. **NBC’s R.C. 5709.121 exemption claim fails because its provision of low-income rental housing for the elderly and disabled does not make it a “charitable institution” whose housing property is used for “charitable purposes,” as required under that statute.**

Because the General Assembly has set forth specific criteria in R.C. 5701.13 defining a “home for the aged” that have not been met in the present case, NBC’s claim under R.C. 5709.121 must fail. This Court specifically so held regarding the same R.C. 5709.121 claim advanced here by NBC, as follows:

The taxpayer urges that R.C. 5709.121, effective October 24, 1969, vitiates the dissenting opinion in *Philada Fund Home v. Board of Tax Appeals*, supra (5 Ohio St.2d 135). But its general language cannot be construed to affect the special requirements of R.C. 5709.12 and 5701.13, as amended and adopted respectively a year and one-half earlier.

Toledo Retirement, 27 Ohio St.2d at 258-259.

As detailed in Section B of this Proposition of Law, this Court’s decisions in *Nat’l Church Residences* and *Cogswell Hall* strongly affirmed *Toledo Retirement*. Just as was true of the appellant taxpayers’ provision of low-income rental housing in those cases, NBC’s provision of low-income rental housing for elderly and disabled tenants fails to meet the definitional requirements of a home for the aged, as set forth in R.C. 5701.13. Therefore, as a substantive matter, NBC’s R.C. 5709.121 claim fails for the same reasons that its R.C. 5709.12 claim fails; the provision of such housing is not, in itself, a charitable purpose.

CONCLUSION

For these reasons, this Court should affirm the BTA's decision and order upholding the Commissioner's denial of NBC's R.C. 5709.12 exemption claim.

Respectfully submitted,

RICHARD CORDRAY
Attorney General of Ohio

Sophia Hussain by
SOPHIA HUSSAIN (0081326)
Assistant Attorney General
30 East Broad Street, 25th Floor
Columbus, Ohio 43215
Telephone: (614) 466-5967
Facsimile: (614) 466-8226
sophia.hussain@ohioattorneygeneral.gov

Counsel of Appellee Richard A. Levin,
Ohio Tax Commissioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of Brief of Appellee Richard A. Levin, Ohio Tax Commissioner was served by regular U.S. mail on this 21st day of September, 2009 upon the following counsel:

Karen H. Bauernschmidt
Karen H. Bauernschmidt Co., LPA
1370 West 6th Street, Suite 200
Cleveland, Ohio 44113

Attorney for Appellant

Mark H. Gillis
Rich & Gillis Law Group, LLC
6400 Riverside Dr. #D
Dublin, Ohio 43017

Attorney for Appellee
Board of Education for the Columbus City
School District

Paul M. Stickel
Franklin County Assistant Prosecutor
373 S. High Street, 20th Floor
Columbus, Ohio 43215

Attorney for Appellee
Franklin County Auditor

Sophia Hussain by

SOPHIA HUSSAIN
Assistant Attorney General *[Signature]*