

ORIGINAL

IN THE SUPREME COURT OF OHIO

THE CHAPEL

Case No. 10-0562

Appellant

**On Appeal from The Ohio Board
of Tax Appeals (Case No. 2007-V-2)**

-vs-

**WILLIAM W. WILKINS
(now Richard A. Levin)
Tax Commissioner of Ohio**

Appellee

APPELLANT'S, REPLY BRIEF

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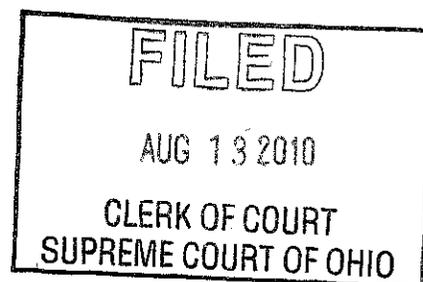
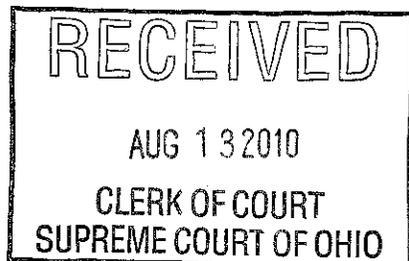


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**APPELLEE’S ARGUMENT, IN HIS SECOND PROPOSITION OF LAW, THAT THE
CHAPEL’S USE OF ITS RECREATIONAL FIELDS BARS THE GRANTING OF AN
EXEMPTION UNDER R.C. 5709.07 NOTWITHSTANDING THE EXTENSIVE PUBLIC
USE OF THAT PROPERTY**

Appellee is unable to decide on what basis Appellant should be denied exemption from real estate taxation for the property at issue. On November 17, 2005, the Appellee preliminarily determined that Appellant’s property was not entitled to exemption because

The Ohio Supreme Court has held that an organization which is primarily a religious institution is not entitled to an exemption under R.C. 5709.12 and R.C. 5709.121. *Summit United Methodist Church v. Kinney* (1983), 7 Ohio St.3d 13; *Summit United Methodist Church v Kinney* (1982), 2 Ohio St.3d 72.

(Recommendation, p. 2, at Appendix A-2)

After Appellant pointed Appellee to *True Christianity Evangelism v Zaino* (2001), 91 Ohio St.3d 117, 118, 742 N.E.2d 638, which reversed the holding of the two *Summit United Methodist Church v. Kinney* cases and held that religious organization are institutions for purposes of R.C. 5709.12, Appellee then decided that Appellant’s property was not entitled to an exemption because

the primary users of the recreation fields are outside parties, including independent sports leagues, baseball clinics, cycling clubs and youth sports programs conducted through the City of Green. Additionally, the applicant allows the public to use its walking and jogging trails. As the applicant itself is not using the property for charitable purposes but rather is merely holding the property open to the public and allowing various third parties to use it, its use is not charitable and thus does not qualify for exemption under R.C. 5709.12.

(Final determination, p. 2, Appendix A-5)

Appellee thus conceded that the subject property is, in fact, used for charitable purposes.

Recognizing his concession, before the Board of Tax Appeals Appellee changed his argument again and contended that the property at issue is not entitled to an exemption because it

is owned by a church. In other words, contrary to *True Christianity Evangelism v Zaino, supra*, and *Wehrle Foundation v. Evatt* (1943), 141 Ohio St. 467, 49 N.E.2d 52, a church is not an institution for purposes of R.C. 5709.12. In Appellee's view, whether Appellant is or is not using its property for charitable purposes it is not entitled to an exemption. This argument is starkly stated in his brief to the Board of Tax Appeals where he stated "Church owned property that is designated for athletic or recreational uses does not qualify for exemption." (Appellee's Brief to the Board of Tax Appeals, p.7, Appendix A-13) Thus, the Board of Tax Appeals concluded that "The commissioner argues . . . that because the property is owned by a church, the Appellant should be limited to seeking exemption under R.C. 5709.07." Of course, Appellant is not entitled to an exemption under R.C. 5709.07 for the property at issue.

Now Appellee shifts his argument again and contends that because Appellant is using the subject property to further limited purposes of its own, Appellant must be denied an exemption notwithstanding the fact that the property is clearly open to use by and is extensively used by the public. It is now Appellant's use that, in Appellee's view, disqualifies the property for exemption. Consequently, Appellee's argument inevitably leads to the result that, on the one hand, a secular organization that uses property and also opens its property to use by the public for charitable purposes is entitled to an exemption pursuant to R.C. 5709.12 (*Highland Park v. Tracy* (1994), 71 Ohio St.3d 405, 644 N.E.2d 284) and, on the other hand, a religious organization that uses property and opens it to use by the public for charitable purposes is not entitled to an exemption pursuant to R.C. 5709.12. Unquestionably, if Appellant were a secular organization the uses to which it has dedicated its property would qualify for exemption for charitable purposes. Also unquestionably, if Appellant were a religious organization other than a church the uses to which it has dedicated its property would qualify for exemption for charitable

purposes. The disqualifying factor in Appellant's view is that Appellant is a church. Why a church is disqualified from exemption under R.C. 5709.12 is not explained by the Appellee. It merely insists that a church cannot obtain an exemption under R.C. 5709.12 because it is a church. Appellee's real argument then is that a church is not a religious organization, or an institution, for purposes of R.C. 5709.12. In so arguing, it seeks to exclude churches from the holdings of the Court in *True Christianity v. Zaino, supra*, which held that a religious institution is an institution for purposes of R.C. 5709.12, and *Wehrle Foundation v. Evatt, supra*, which held that *any* institution, irrespective of its charitable or non-charitable character, may take advantage of a tax exemption if it is making exclusive charitable use of its property. The question then before the court is whether a church, with a recreational park that is used by its members and that is also freely open to and extensively used by the public, is somehow disqualified for exemption under R.C. 5709.12. As the Board of Tax Appeals observed, Appellee "does not dispute . . . that the property is open for use by the public for recreational purposes."¹ He merely protests that Appellant's own use of the property has some vaguely religious overtones.

The public use of the subject property is extensive. A walking and jogging trail is open and available to the public for their use twenty-four hours a day. Members of the community obtain access to the trail by freely coming onto The Chapel's property. Hundreds of people from the general community make daily extensive use of the trail year-round. The Green YMCA sponsors an annual walk-a-thon on the trail. No fees of any kind or for any purpose are charged

¹ Decision and Order, p. 9.

for the use of the trail at any time. (Tr: p. 86, lines 22-23; and, p. 87, line 18 through p. 88, line 11.)

There are also athletic fields that were constructed and are maintained solely by The Chapel at its expense. No other persons or entities contributed or contribute to or are charged a fee to defray the cost of construction, maintenance, repair or use of those fields. (Tr: p. 138, lines 8-16) The fields are used extensively by: leagues sponsored and operated by members of the community; leagues sponsored and operated by the City of Green Parks and Recreation Department; activities organized and sponsored by corporations; activities organized and sponsored by the YMCA; training of comfort dogs by a separate not for profit organization that is not affiliated with The Chapel; and, other public activities and casual use as hereafter appears.

At least seven community organized and operated soccer leagues and fourteen community organized and operated softball leagues also use the athletic fields. The Chapel has no involvement in these leagues other than by permitting the public to use the acreage at issue and other than having one team in a league of ten or more teams, on average. Separate community soccer teams are permitted to use the fields when they are not otherwise scheduled. Occasionally, the Green High School team will use the fields for community recreational soccer. No fees are charged to any of these leagues, teams, or team members for use of the recreational areas or the ball fields or for any other purpose. (Tr: p. 109 line 12 through p. 111 line 6; p. 128 line 15 through p. 129 line 8; p. 130 lines 11-18; and, p. 154 line 15 through p. 155 line 23)

The Softball and Baseball Federation of the City of Green Parks and Recreation Department use the ball fields at least two days a week. The Chapel has no involvement with the organization or operation of the Federation. The Federation has six games per night on two different nights. The Federation does not pay The Chapel anything for the use of the fields or for

any other purpose. None of the participants pays The Chapel for use of the fields or for any other purpose. (Tr: p. 89 line 21 through p. 90 line 1; p. 97 line 17 through p. 98 line 19; p. 107 lines 17-23; p. 109 lines 7-11; p. 111 lines 12-15; p. 151 line 21 through p. 152 line 4; and, p. 153 line 24 through p. 154 line 14)

At least two corporations (FedEx Express Custom Critical and Chik-Fil-A) use the ball fields as do teams from an industrial league. That league plays on Monday evenings. It is not run by nor is it sponsored by The Chapel. Only one Chapel organized team is a member of the league. (Tr: p. 90 lines 3-8; p. 100 lines 18-20; p. 108 line 20 through p. 109 line 3; p. 109 lines 14-15; p. 130 lines 19-24; p. 152 lines 5-11; and, p. 169 lines 16-22)

The YMCA uses the recreational acreage. It has offered Frisbee golf and other Frisbee activities. It has also sponsored a sports clinic. It is charged nothing for its use of the recreational areas. (Tr: p. 88 lines 1-4; p. 105 line 23 through p. 106 line 7; p. 124 lines 17-19; p. 153 lines 5-23; and, p. 173 lines 12-25)

WAGS is a canine training service in the Green community. It uses the recreational acreage to train dogs for comfort, companionship and therapy. The dogs are used in hospitals and senior citizen facilities. WAGS is not connected to The Chapel in any way. (Tr: p. 124 lines 19 through p. 125 line 2; and, p. 152 line 12 through p. 153 line 5)

Occasionally high school, community league, or independent soccer teams request use of the soccer field and are, when possible, accommodated. Casual use of the baseball fields, when they are not being used by one of the scheduled leagues, is freely available. If the athletic fields are not otherwise in use by one of the leagues, community members are free to, and do, come there and play softball, baseball, or just have fun. Anyone can come on to the property and use those fields unless otherwise scheduled. In order to avoid chaos and to permit the maximum

usage of the athletic fields, all league games and other organized activities are scheduled through The Chapel. As a result, the fields are pretty much in nonstop use seven days a week. (Tr: p. 89 lines 18-22; p. 94 lines 14-23; p. 109 lines 13-15; p. 112 lines 19-22; p. 115 lines 17-20; and, p. 173 lines 12-25)

Appellee works very hard to demonstrate that Appellant uses the subject property for purposes that are merely supportive of public worship. In order to reach that point, Appellee uses Appellant's Thoreauian view of its use of the property to claim it is overtly supportive of public worship. For example, Appellee is troubled by one of Appellant's witnesses who stated "I think we do as much worship on our fields and in our gyms as we do in sanctuaries or worship centers within the confines of the buildings. ... you worship God by making use of the bodies that he's given us and the talent that he's given us" (Appellee's merit brief, p. 8) Such use under any view is not sectarian unless it is in a vague general sense.

Appellee is also troubled by the fact that a devotional is performed in every one of the leagues that The Chapel sponsors. (Appellee's merit brief, p. 9) Appellee ignores the content of the devotional. The same witness testified that the topics of the devotionals are character and behavioral issues and, further, that there is no overt proselytizing or effort to get people in the door of the The Chapel. In fact, if no one came to The Chapel as a result of its sports ministries, those activities would continue. (Tr. 174-175) Rather, Appellee's purpose is simply to permit the use of the subject property

for recreational purposes within our community ... as a means of contribution to the well-being of our community ... something to enhance the programming in our community for the City's use. ... Our mission would be to, in a sense, do good to the community. So our mission is not only to do such things for people who would call themselves members or regular attendees of The Chapel, but at the same time use our resources ... as a means to do good for the community.

(Tr. 74-75)

In addition to the strictly public uses of the subject areas, The Chapel sponsors soccer, flag football, and softball leagues as well as other activities that are completely open to the public. Several community organized soccer teams are members of the soccer leagues. One league, The Little Lions Soccer League, is for five and six year olds and is designed to teach basic soccer skills. It is conducted in the spring and the fall. It draws hundreds of children from the community as participants along with their parents, grandparents, aunts and uncles as spectators. None of the teams in this league are organized by The Chapel. There is also a men's fall soccer league in which The Chapel has one sponsored team out of 10 or more teams. The Chapel also sponsors a recreational coed soccer program in which many husbands and wives participate. While the adults are playing, coaches provide instructional activities for children whose parents are playing. Instruction includes soccer skills and a Bible story. On Saturdays, The Chapel sponsors "the World Cup games" which has 400 participants. Finally, The Chapel sponsors a recreational soccer league that draws its teams from the community. (Tr: p. 89, lines 5-14; p. 92, line 2 through p. 93, line 24; p. 99, lines 9-11; p 113 l. 15 through p. 114, line 9; p. 138, line 22 through p. 140, line 19; p. 141, lines 5-20; p. 148, line 15 through p. 149, line 3.)

The men's spring and fall flag football leagues consist of teams organized by university fraternities, by community members, and by neighboring community members. There are eight teams, none of which are sponsored by The Chapel. (Tr: p. 89, lines 15-18; p. 90, 23 through p. 91, line 5; p. 95, lines 1-16; p. 114, lines 10-12; p. 123, lines 20-25; p. 135, line 19 through p. 137, line 1; p. 138, lines 17-21; and p. 142, lines 7-14)

The women's softball league has only one team sponsored by The Chapel. All of the other teams are organized by and made up of members of the community. The men's Saturday morning softball double-header league consists of 14 teams, only one of which is a Chapel

sponsored team. All of the other teams are organized solely by and consist solely of members of the public. One of the teams is comprised of members of a University of Akron fraternity. The others are community members, community groups, groups from Akron, and groups from Stark County. The Chapel is not involved in organizing or creating the teams that come out of the community. There is no charge for participation. No fees are charged for the use of the fields or for any other purpose. The-Chapel sponsors a coed softball league in which there are 12 teams, only one of which was a Chapel sponsored team. The rest are community organized and sponsored teams. (Tr: p. 89, line 25 through p. 90, line 1; p. 92, line 25 through p. 94, line 13; p. 96, lines 5-14; p. 99, lines 11-15; p. 114, lines 14-15; p. 115, lines 4-16; p. 122, line 20 through p. 123, line 1; p. 125, line 21 through p. 126, line 3; p. 141, line 21 through p. 142, line 2; and, p. 146, line 20 through p. 148, line 25)

The Chapel sponsors a one-day soccer clinic. The clinic is run by a volunteer who is usually a former college player or coach. The Chapel also sponsors a one-week soccer camp that is run by Ambassadors in Sports, an organization that is completely separate from The Chapel and in no way affiliated with it. Ambassadors in Soccer brings in coaches from Brazil, England, Czech Republic, and many other countries. While a fee for this camp only is charged to each participant, this defrays only part of the cost. The balance is paid by The Chapel. The Chapel sponsors one day baseball clinics as well. One of the clinics used coaches, volunteers, and players from the Akron Aeros minor-league baseball team and another clinic included players from the Cleveland Indians. (Tr: p. 115, lines 21-23; p. 143, line 12 through p. 144, line 2; p. 144, line 3 through p. 146, line 19; and p. 149, line 4 through p. 150, line 1)

Campus Focus, a Chapel ministry to college students, uses the fields one evening per week. Campus Focus is predominantly comprised of students from the University of Akron.

The Chapel's singles Ministry uses the recreational acreage for campfires. That ministry is open to and includes members of the public. On Sundays and on Wednesday evenings, the children's ministry uses the recreational acreage simply to take the children out and play. The Chapel sponsors a day camp, Camp Straight Street, which is wholly open to the public and is attended by hundreds of children. They use the fields on a daily basis for an eight week period in the summer for a variety of purposes including Frisbee, Frisbee golf, hide-and-go-seek, and parachute. (Tr: p. 90, lines 8-15; p. 99, lines 4-8; p. 100, lines 1-17; p. 102, line 10 through p. 103, line 20; p. 124, lines 1-16; p. 127, line 9 through p. 128, line 7; p. 150, line 24 through p. 151, line 13; p. 157, line 22 through p. 158, line 9; and, p. 158, lines 15-19.)

The Chapel is committed to involvement in the public community and to benefitting that community. One expression of its commitment is the design, planning, and development of recreational acreage that otherwise would lie fallow and permitting wide public use of that acreage by the public. While The Chapel also makes use of the recreational areas, its use is overwhelmingly for the benefit of the community.

R.C. 5709.12 exempts property belonging to an institution where the property is used for charitable purposes. A religious organization is an institution for purposes of R.C. 5709.12. *True Christianity Evangelism v Zaino, supra*, and *Wehrle Foundation v. Evatt, supra*. A church is undoubtedly a religious organization. Therefore, it is an institution for purposes of R.C. 5709.12.

Recreational uses open to the public constitute charitable purposes under R.C. 5709.12. *Highland Park v. Tracy, supra*. The Chapel's acreage at issue is indisputably open to the public for recreational purposes. Therefore, The Chapel's acreage is used for charitable purposes under

R.C. 5709.12. Inevitably, then, The Chapel's property is to be exempted from real estate taxation.

APPELLEE'S ARGUMENT, IN HIS THIRD PROPOSITION OF LAW, THAT SINCE THE RECREATIONAL AREAS WERE NOT USED AS OF THE APPLICABLE TAX LIEN DATE AND ONE OF THE ATHLETIC FIELDS IS NOT YET IN USE EXEMPTION FROM REAL ESTATE TAXATION MAY NOT BE GRANTED

For the first time in any stage of the various proceedings below, Appellee claims Appellant's recreational acreage was not used for an exempt purpose as of the applicable tax lien date. At no point previously has Appellee made this contention. As he observed in his merit brief, "this Court has repeatedly held that it cannot consider an issue unless it was raised in the proceedings below. See e.g. *Ohio Bell Tel. Co.*, 2009-Ohio-6189, ¶ 16; *Brown*, 2008-Ohio-4081, ¶ 17; *Queen City Valves*, 161 Ohio St. at 583." Paraphrasing Appellee, he failed to raise this issue in the proceedings below and before the Board of Tax Appeals. "Accordingly, the Court lacks jurisdiction to consider" this issue now.

Nevertheless, it is undisputed that Appellant held the property for its charitable use on the tax lien date. *At the time The Chapel* prepared its site plan and *purchased the subject parcels*, it specifically intended to and did hold 20.9195 acres for, and to develop and use that acreage for, public recreational uses. Prior to completing the purchase, Appellee worked with an architectural design firm to prepare a master plan that included the recreational areas. This is the area in question for which exemption has been denied and which is the subject of this appeal. (Tr. 41-42, 64, and 80)

After acquiring the parcels and constructing its church building and parking lots, Appellant then constructed two baseball/softball fields, a soccer field, and a walking/jogging trail on the recreational acreage. Appellee's original site plan delineates the planned recreational

areas which were at all times held for that intended purpose. (Tr: p. 44, line 13 through p. 46, line 22; p. 47, line 6 through p. 48, line 4; p. 57, line 22 through p. 59, line 3; p. 64, lines 8-13; , p. 65, lines 9-11; and p. 66, lines 6-19.)

Construction on the walking-jogging trail was started in 2004 and was completed and opened to the public in 2005. (Tr: p. 44, line 20 through p. 45, line 21; p. 50, line 10 through p. 51, line 6; p. 60, lines 15-18; and, p 68, lines 3-18.)

The rest of the recreational acreage at issue contains two softball/baseball fields and a soccer field. There is a fourth field that has not been constructed as yet due to settling of top soil and organic materials removed from other parts of the subject parcels. Appellee was advised that the area designated for the fourth athletic field should not be developed until the organic materials had fully settled. While that area is being held for future construction of a field, no date has been set for it. (Tr: p. 45, line 24 through p. 46, line 23; p. 47 line 6 through p. 48, line 4.)

The Court in *Carney v. Cleveland City School District Public Library* (1959), 169 Ohio St. 65, paragraph 1 of the syllabus, 157 N.E.2d 311, held that

Where an entity, which under the law is entitled to have its property exempted from taxation, acquires real property with the intention of devoting it to a use exempting it from taxation, such property is entitled to be exempted from taxation, as long as it is not devoted to a nonexempt or commercial use, even though actual physical use of the property for the exempt purpose has not yet begun.

See also *Episcopal School of Cincinnati v. Levin* (2008), 2008-Ohio-939, 117 Ohio St.3d 412, 884 N.E.2d, 561. The subject property precisely fits within the parameters of both cases. Before purchasing the property, the Chapel designed into its master plan the acreage at issue for recreational purposes. That acreage has at all times been held for those purposes. No other years

has been made of that acreage. Thus, the fact that the recreational areas were not immediately constructed does not disqualify them from exemption from real estate taxation.

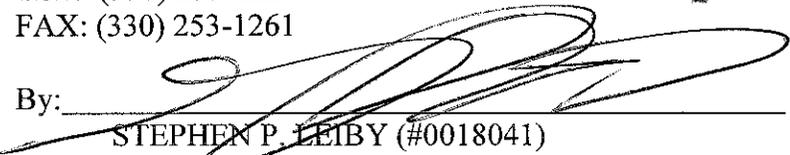
**APPELLEE'S ARGUMENT, IN HIS FOURTH PROPOSITION OF LAW, THAT
A NEW ISSUE MAY NOT BE RAISED ON APPEAL WHERE THAT ISSUE WAS NOT
RAISED IN THE PROCEEDINGS BELOW**

Appellee argues that, for the first time in its notice of appeal, Appellant raised two constitutional issues which it did not raise in the proceedings before the Board Of Tax Appeals. Appellee disregards the fact that the constitutional issues are not argued in Appellant's merit brief. Obviously, then, Appellant is not arguing those issues or seeking a ruling on them from this Court.

CONCLUSION

Appellant, The Chapel, owns 20.9195 acres that were one of the subjects of its application for exemption and remission of real estate taxes under R.C. 5709.12. The Board of Tax Appeals decision denying exemption for the subject acreage was unlawful and unreasonable because it determined that The Chapel, as a church, is not an institution for purposes of R.C. 5709.12. A church is nothing if not an institution. The subject acreage is widely held open to and is extensively used by the public for recreational purposes, purposes which the neither the Board of Tax Appeals disputed nor which Appellee disputed until its Merit Brief herein. Such purposes constitute charitable purposes under R.C. 2709.12. Since the property in question is owned by an institution and is used for charitable purposes, it inevitably is entitled to exemption from real estate taxation under R.C. 5709.12. The Board of Tax Appeals decision should be reversed and exemption should be granted to the subject acreage.

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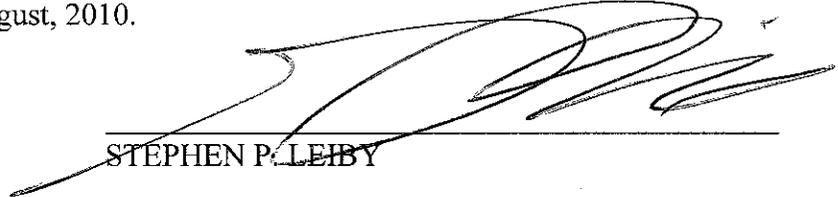
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Appellant's Reply Brief* was forwarded to Ryan P. O'Rourke, Assistant Attorney General, Taxation Section, attorney for Appellee by regular U.S. mail this 12th day of August, 2010.


STEPHEN P. LEIBY

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Ohio Department of TAXATION

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor - Columbus, OH 43215
tax.ohio.gov

RECOMMENDATION

Date: NOV 17 2005

The Chapel
c/o Stephen P. Leiby-Parker, Leiby, Hanna & Rasnick, LLC
388 South Main St-Suite 402
Akron, OH 44311

Re: DTE No.: HE 3809
Auditor's No.: 8812
County: Summit
School District: Green SD
Parcel Number(s): 2806681
2806683
2813492

This is a recommendation of the agent examiner in the matter of an application for tax exemption filed with the Tax Commissioner on December 30, 2002. It is not a final decision 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 decision is issued in this matter.

I. Factual Background

Applicant, The Chapel, is requesting exemption for 78.8963 acres of land and the improvements located thereon. The subject property contains a church, teaching classrooms, parking areas, recreation fields, and basketball and volleyball courts. There is a 1.52 acre jogging trail that encompasses the church and most of the recreation areas. The recreation areas are open to the public without any charge. The church is located in a 136,000 square foot building. There are 1,800 seats in the sanctuary in addition to 87 classrooms and 17 offices. There are two producing oil and gas wells on the property. The applicant receives a one-eighth royalty on the production from each oil and gas well. The applicant submitted a site plan with their application for exemption. The site plan identified ten areas as "preserved wetlands" on undeveloped property in various locations around the church and recreation fields. The applicant is requesting that 57.9768 acres of land be exempted under Ohio Revised Code Section 5709.07, public worship. The applicant has requested that the remainder of the property be exempted under ORC Section 5709.12, charitable.

Property for which an applicant seeks exemption from real property taxation must have been owned by the applicant and used for an exempt purpose as of the tax lien date, January 1, in the year in which exemption is sought. See *Greater Cincinnati, Inc. v. Limbach (1994)*, 69 Ohio

St.3d 296; R.C. 323.11; R.C 5713.08. Here the applicant did not acquire title to the property until June 15, 2000 for parcels 2806681 and 2806683, and March 28, 2001 for parcel 2813492. Therefore, exemption cannot be reviewed for tax year 2000 for parcels 2806681 and 2806683 and tax year 2001 for parcel 2813492.

II. Ohio Revised Code Section 5709.07

Applicant has requested tax exemption pursuant to R.C. 5709.07, which provides tax exemption for "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."

The main sanctuary, teaching classrooms, the grounds attached, and the parking areas used for the support of the church, are used exclusively for public worship, and qualify for exemption under R.C. 5709.07.

However, the jogging track and various athletic fields are used for recreation. Church-owned property that is designated for athletic or recreational uses does not qualify for exemption. The Ohio Supreme Court has held that church-owned recreational areas are at best, merely supportive of public worship. *Moraine Heights Baptists Church v. Kinney* (1984), 12 Ohio St.3d 134. Property with uses that are merely supportive of public worship may not be exempted. *Faith Fellowship Ministries, Inc. v. Limbach* (1987), 32 Ohio St.3d 432. Therefore, the jogging track and athletic fields used for church recreation do not qualify for exemption under R.C. 5709.07.

II. Ohio Revised Code Sections 5709.12

Ohio Revised Code section 5709.12 provides that "(r)eal and tangible personal property belonging to institutions that is used exclusively for charitable purposes shall be exempt from taxation." In *Highland Park Owners, Inc. v. Tracy* (1994), 71 Ohio St.3d 405, 406-407, the Supreme Court held that "to grant exemption under R.C. 5709.12, the arbiter must determine that (1) the property belongs to an institution, and (2) the property is being used exclusively for charitable purposes."

The Supreme Court has defined "charity" as "the attempt in good faith, spiritually, physically, intellectually, socially and economically to advance and benefit mankind in general, or those in need of advancement and benefit in particular, without regard for their ability to supply that need from other sources, and without hope or expectation, if not with positive abnegation, of gain or profit by the donor or by the instrumentality of the charity." *Planned Parenthood Association v. Tax Commissioner* (1966), 5 Ohio St. 2d 117. This definition has been used by Ohio courts to determine whether the use of the property in question is exclusively charitable.

The Ohio Supreme Court has held that an organization which is primarily a religious institution is not entitled to tax exemption under R.C. 5709.12 and R.C. 5709.121. *Summit United Methodist Church v. Kinney* (1983), 7 Ohio St.3d 13; *Summit United Methodist Church v. Kinney* (1982), 2 Ohio St.3d 72. Since the applicant is primarily a religious institution, the first

part of the test for exemption under this section is not satisfied. Therefore, the jogging track and athletic fields used for church recreation do not qualify for exemption under R.C. 5709.12.

III. Conclusion

R.C. 5713.04 provides that portions of property used exclusively for exempt purposes shall be regarded as separate entities and listed as exempt while the balance thereof used for a non-exempt purpose shall be listed at its taxable value. Accordingly, the agent examiner in this matter recommends split-listing the applicant property as follows:

Property to be exempted from taxation:

The church building, parking areas, access roads and 30 acres of land. The agent/examiner recommends that exemption be granted to this part of the property for tax years 2002, 2003, and 2004, and that taxes, penalties and interest for tax year 2001 for parcels 2806681 and 2806683 be remitted.

Property to remain on tax list:

The balance of the property. The agent/examiner recommends that penalties assessed against this portion of the property for these tax years be remitted.

INSTRUCTIONS FOR SUBMITTING OBJECTIONS

If you wish to object to this recommendation, submit your written objections to the Division of Tax Equalization, ATTN.: Don Kernich, Department of Taxation, P.O. Box 530, Columbus, Ohio 43216-0530, or fax your objections to (614) 752-9822.

cc: The Honorable John A. Donofrio
Summit County Auditor

Date: NOV 07 2006

The Chapel
c/o Stephen P. Leiby
Parker, Leiby, Hanna & Rasnick, LLC
388 South Main St., Suite 402
Akron, OH 44311

Re: DTE No.: HE 3809
Auditor's No.: 8812
County: Summit
School District: Green LSD
Parcel Numbers: 2806681, 2806683, 2813492

This is the final determination of the Tax Commissioner in the matter of an application for tax exemption filed on December 30, 2002. A recommendation was issued by the agent examiner in this matter, to which the applicant responded.

I. Factual Background

The applicant is requesting exemption of three parcels of land pursuant to R.C. sections 5709.07 and 5709.12. The applicant seeks exemption for tax year 2002 for all of the parcels and seeks remission of taxes and penalties for tax years 2000 and 2001 for parcel numbers 2806681 and 2806683. The parcels total approximately 78.8963 acres. The largest parcel, number 2813492, is approximately 76.6563 acres in size and adjoins the two smaller parcels. The property includes a 136,000 square feet church seating 1800 people and an 87 classroom building. These structures are used for public worship services and various church functions, including Sunday school, bible study and religious education, as well as various church fellowship and ministry activities.

According to information supplied by the applicant, the City of Green has mandated certain "set backs" for the church structure to screen it from two surrounding neighborhoods. Two operating oil wells are also located on the property, under parcel numbers 2802298 and 2807245, from which the applicant receives a one-eighth royalty on the production from each well.¹ Furthermore, ten areas of the property are designated as "preserved wetlands" and there are several areas designed for mandated detention basins, to collect run-off from the parking lots.

According to the site map provided by the applicant, a total of approximately 22.11 acres are designated as recreation fields. The applicant seeks exemption for these properties pursuant to R.C. 5709.12. According to the applicant, these areas are used for numerous activities, including inter-church softball leagues, a soccer camp, cycling races by independent cycling clubs and

¹ According to the applicant, these parcel numbers were assigned to the oil/gas well properties, with parcel number 2802298 being "deactivated" for tax year 2000. The auditor's records indicate that both parcel numbers are now defunct. Accordingly, for the sake of completeness, any real property associated with the oil/gas wells is addressed herein.

teams, fellowship and recreational activities co-sponsored by an independent University of Akron campus group, baseball clinics sponsored by an independent organization, community youth sports programs by the City of Green, independent soccer, baseball and softball leagues, and daily public use by the community of the walking/jogging trail.

II. Ohio Revised Code Section 5709.07 and 5709.12

The applicant seeks exemption pursuant to R.C. 5709.07 and 5709.12. The agent examiner recommended that the property be split listed, with that portion of the property not used for public worship or directly supportive of public worship remaining taxable.

R.C. 5709.07(A)(2), provides tax exemption for "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 property occupancy use and enjoyment." The subject property includes an 1800-seat church, as well as an 87 room classroom/bible study/church center. These clearly are either used for public worship or directly facilitate public worship. Additionally, the parking areas clearly qualify for exemption as they are necessary for the occupancy and use of the property. Similarly, the preserved wetlands and detention basins also qualify for exemption.

The applicant seeks exemption for the recreation fields pursuant to R.C. 5709.12. While the Ohio Supreme Court has recognized that religious institutions may seek exemption under R.C. 5709.12, see, *True Christianity Evangelism v. Zaino* (2001), 91 Ohio St. 3d 117, the Court has held that "[I]n order for its property to be considered for exemption under R.C. 5709.12, the religious institution itself must be using the property exclusively for charitable purposes." *First Baptist Church of Milford v. Wilkins* (2006) 110 Ohio St. 3d 496. According to the information supplied by the applicant, the primary users of the recreation fields are outside parties, including independent sports leagues, baseball clinics, cycling clubs and youth sports programs conducted through the City of Green. Additionally, the applicant allows the public to use its walking and jogging trails. As the applicant itself is not using the property for charitable purposes but rather is merely holding the property open to the public and allowing various third parties to use it, its use is not charitable and thus does not qualify for exemption under R.C. 5709.12.

The oil and gas wells are leased to a third party and the applicant derives a 1/8 royalty on the production from each well. As this use is neither charitable nor for public worship, these areas do not qualify for exemption.

Property for which an applicant seeks exemption from real property taxation must have been owned by the applicant and used for an exempt purpose as of the tax lien date, January 1, in the year in which exemption is sought. See *Greater Cincinnati, Inc. v. Limbach* (1994), 69 Ohio St.3d 296; R.C. 323.11; R.C. 5713.08. In addition to seeking exemption for the entire property for tax year 2002, the applicant seeks remission of taxes and penalties for two of the parcels (parcel numbers 2806681 and 2806683) for tax years 2000 and 2001. According to the record, the applicant did not acquire these parcels until June 16, 2000. Therefore, exemption cannot be reviewed for these parcels for tax year 2000.

III. Conclusion

Based on the foregoing, the Tax Commissioner finds that part of the subject property is entitled to exemption and part of the subject property is not.

Pursuant to R.C. 5713.04, the Tax Commissioner orders that the property be listed as follows:

Property exempt from taxation:

All property not specifically described below as taxable.

The Tax Commissioner orders that the real property for parcel numbers 2806681 and 2806683 not placed upon the tax list below be entered upon the list of property in the county which is exempt from taxation for tax year 2002, and that taxes, penalties and interest for the tax years 2001, 2002 and subsequent years be remitted.

The Commissioner further orders that the real property for parcel number 2813492 not placed on the tax list below also be entered upon the list of the property in the county which is exempt from taxation for tax year 2002 and that taxes, penalties and interest for tax year 2002 and subsequent years be remitted.

The subject property shall remain on the exempt list until either the county auditor or the Tax Commissioner restores the property to the tax list.

Property to remain on the tax list:

Approximately 22.11 acres designated by the applicant as the location of various recreation areas, as well as those portions of the property designated as the location of the oil/gas wells.

The Tax Commissioner orders that penalties charged against this part of the property for these tax years be remitted.

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

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

William W. Wilkins
WILLIAM W. WILKINS
TAX COMMISSIONER

/s/ William W. Wilkins

William W. Wilkins
Tax Commissioner

The Chapel owns 78.8963 acres of land situated upon three parcels in the city of Green, Summit County, Ohio. The land is improved with a 136,000-square-foot church, an 87-classroom building, paved parking lots, preserved wetland reserves, a jogging trail, baseball/softball diamonds, a soccer field, and an area designated for a fourth field. At issue is a portion of the land utilized for recreational purposes (i.e., jogging trail and athletic fields) which are situated across all three parcels before this board.

In its application for exemption, appellant sought to have the entire property exempted from real property taxation under two theories: land being used for public worship, R.C. 5709.07, and the recreational land used for charitable purposes, R.C. 5709.12. In general terms, the commissioner granted appellant's exemption under R.C. 5709.07 for portions of the property (church, classrooms, parking areas, access roads, preserved wetlands, and detention basins) used for public worship. However, the commissioner denied the remaining recreational areas and jogging path, finding that said areas did not qualify under R.C. 5709.12.

In denying the exemption under R.C. 5709.12, the commissioner held:

The applicant seeks exemption for the recreational fields pursuant to R.C. 5709.12. While the Ohio Supreme Court has recognized that religious institutions may seek exemption under R.C. 5709.12, see, *True Christianity Evangelism v. Zaino* (2001), 91 Ohio St.3d 117, the Court has held that '[I]n order for its property to be considered for exemption under R.C. 5709.12, the religious institution itself must be using the property exclusively for charitable purposes.' *First Baptist Church of Milford v. Wilkins* (2006) 110 Ohio St.3d 496. According to the information supplied by the applicant, the primary users of the recreation field are outside parties, including independent sports leagues, baseball clinics, cycling

clubs and youth sports programs conducted through the City of Green. Additionally, the applicant allows the public to use its walking and jogging trails. As the applicant itself is not using the property for charitable purposes but rather is merely holding the property open to the public and allowing various third parties to use it, its use is not charitable and thus does not qualify for exemption under R.C. 5709.12." S.T. at 2.

At hearing before this board, appellant provided the testimony of three of its pastors who testified about the subject property's recreational area and its use. The commissioner rested upon the cross-examination of appellant's witnesses.

Paul Sartarelli, appellant's co-senior pastor, identified appellant's articles of incorporation and letter from the Internal Revenue Service granting appellant 501(C)(3) status. H.R. at 9-10, Exs. 1 and 5. Sartarelli further testified that appellant's recreational areas are open for public use and that the appellant does not charge for its use. H.R. at 28-29, 34.

Michael Castelli, appellant's associate pastor, testified that appellant acquired the smaller parcels in June 2000 and the large parcel in April 2001. H.R. at 38-39, Exs. 6, 7. In 2000, Castelli worked with an architectural design firm to design the church facility and recreational fields. H.R. at 41-47. Castelli identified the engineer's map, dated October 11, 2000, which was subsequently attached to the exemption application. Ex. 8. Castelli testified that construction of the three recreational fields began in 2001 and the fourth field has yet to be constructed because topsoil from the construction of the facility has yet to fully settle in the area. H.R. at 47-48, 57-58. Castelli further testified that the two oil wells are not located on the

recreational areas at issue. *Id.* at 73. When asked how the recreational areas relate to the church's mission, Castelli testified:

“Our mission would include both of those, engaging our congregation and using our facilities to enhance fellowship or for recreational purposes within our community. But our mission would also include engaging our community and using what we own to – as a means of contribution to the well-being of the community. So benevolent use of the fields, something to enhance the programming in our community for the City's use.

“*** Our mission would be to, in a sense, do good to the community. So that fulfills our mission, while, at the same time, obviously, is a good thing for the City and the neighbors and those around us.

“So our mission is not only to do such things for people who would call themselves members of regular attendees of The Chapel, but at the same time use our resources, of which the recreational fields would be part of as a means to do good for the community.” *H.R.* at 74-75.

Castelli further surmised that roughly 50 percent of the use of the recreational fields is by individuals who have no formal connection to the church. *Id.* at 75.

Dale Saylor, pastor of the appellant, testified that he is in charge of appellant's sports ministry, which includes the coordinating activities on the recreational fields. *H.R.* at 86.

Regarding the jogging trail, Saylor testified it is used every day, twelve months a year by individuals in the community. Once a year, a walk-a-thon is conducted there in a partnership with the local YMCA. *Id.* at 87-88.

Regarding the recreational fields, Saylor testified that the appellant has 14 different sports ministry events that take place annually. *Id.* at 89. Saylor

identified a chart titled "2007 Impact Report" which quantifies the number of participants of the varied athletic groups. H.R. at 134-156, Ex. 10. Scheduled leagues for flag football spring and fall, youth soccer spring and fall, co-ed adult soccer, women's softball, co-ed softball, and men's softball use the recreational fields. H.R. at 138-158, 170-171. Additionally, the appellant hosts a one-day soccer clinic and a sports camp. Id. at 170-171. Depending on the league, Saylor testified that roughly half to slightly more than half of the teams are community groups with no affiliation to the church. Id. at 90-96. Further, ministry groups: college, singles, kids, and cycling, all utilize the recreational areas. Although Saylor admittedly does not monitor the numbers of individuals in the varied ministries, he testified that many individuals are not church members. Id. at 102-104. Additionally, groups and teams with no affiliation with the appellant routinely utilize the recreational fields such as: the City of Green Softball/Baseball Federation, adult and children's teams organized through the city of Green's parks department; Camp Straight Street, a youth summer camp; corporate groups from FedEx and Chick-Fil-A, and WAGS, a canine training group for use in hospitals. Id. 97-100, 109-110, 111, 152. In all, Saylor estimates that roughly 3,000 individuals use the recreational facilities in a year's time. Id. at 101. Saylor testified that, depending on the league, nominal fees are charged to participants to pay for umpires and team jerseys; however, the appellant does not charge any fee for the use of the recreational areas. H.R. at 122-123, 130, 138-158.

Saylor further testified that the recreational fields were opened in the spring of 2006 and the jogging trail opened late in the summer of 2005. H.R. at 105.

Appellant additionally provided the testimony of Daniel Croghan, former mayor of the city of Green from 2000 through 2003 and member of The Chapel. H.R. at 184-191. Croghan testified that the recreational areas at issue were identified in appellant's initial zoning plans with the city. *Id.* Croghan further testified that appellant's recreational areas have been a great benefit to the city because the city has not had to fund the development of additional youth baseball facilities. H.R. at 186-187. Further, Croghan testified, to the best of his knowledge, that the city of Green has never been charged a fee by the appellant for the use of appellant's recreational fields. *Id.* at 188-189.

In reviewing appellant's appeal, we recognize the presumption that the findings of the Tax Commissioner are valid. See *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121, 123. It is therefore incumbent upon a taxpayer challenging a finding of the commissioner to rebut the presumption and establish a right to the relief requested. *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St.2d 135, 143; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138, 142. Moreover, the taxpayer is assigned the burden of showing in what manner and to what extent the commissioner's determination is in error. *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213, 215.

Exemption

Because appellant seeks to exempt real property from taxation, we also note the general rule that statutes granting exemptions from taxation must be strictly construed. *Natl. Tube Co. v. Glander* (1952), 157 Ohio St. 407, at paragraph two of the

syllabus; *White Cross Hosp. Assn. v. Bd. of Tax Appeals* (1974), 38 Ohio St.2d 199, 201; *Am. Soc. for Metals v. Limbach* (1991), 59 Ohio St.3d 38. See, also, *Seven Hills Schools v. Kinney* (1986), 28 Ohio St.3d 186 (holding that “[e]xemption from taxation is the exception to the rule and statutes granting exemptions are strictly construed.”).

R.C. 5709.01(A) subjects all real property located in Ohio to taxation, except as expressly exempted by statute. The General Assembly is empowered by the Ohio Constitution to pass laws to exempt certain types of property. Section 2, Article XII, of the Ohio Constitution reads:

“*** Land and improvements thereon shall be taxed by uniform rule according to value ***. Without limiting the general power, subject to the provisions of Article I of this constitution, to determine the *** exemptions therefrom, general laws may be passed to exempt burying grounds, public school houses, houses used exclusively for public worship, institutions used exclusively for charitable purposes, and public property used exclusively for any public purpose, ***.”

Exemption from taxation is the exception to the rule. *Seven Hills Schools v. Kinney* (1986), 28 Ohio St.3d 186. Statutes granting exemptions from taxation must be strictly construed and the burden of establishing exemption is on the taxpayer. *Id.*; *Natl. Tube Co. v. Glander* (1952), 157 Ohio St. 407, at paragraph two of the syllabus; *White Cross Hosp. Assn. v. Bd. of Tax Appeals* (1974), 38 Ohio St.2d 199, 201; *Am. Soc. for Metals v. Limbach* (1991), 59 Ohio St.3d 38, 40. See, also, *Willys-Overland Motors, Inc. v. Evatt* (1943), 141 Ohio St. 402; and *Goldman v. Robert E. Bentley Post* (1952), 158 Ohio St. 205.

R.C. 5709.12(B) specifically provides that “[r]eal *** property belonging to institutions that is used exclusively for charitable purposes shall be exempt from taxation.” In *Highland Park Owners, Inc. v. Tracy* (1994), 71 Ohio St.3d 405, the court set forth the requirements imposed by R.C. 5709.12 for obtaining exemption:

“[T]o grant exemption under R.C. 5709.12, the arbiter must determine that (1) the property belongs to an institution,² and (2) the property is being used exclusively for charitable purposes. We have held that a private profit-making venture does not use property exclusively for charitable purposes. *Cullitan v. Cunningham Sanitarium* (1938), 134 Ohio St. 99 ***; *Cleveland Osteopathic Hosp. v. Zangerle* (1950), 153 Ohio St. 222 ***; *Lincoln Mem. Hosp., Inc. v. Warren* (1968), 13 Ohio St.2d 109 ***. Nevertheless, “any institution, irrespective of its charitable or non-charitable character, may take advantage of a tax exemption if it is making exclusive charitable use of its property.” *Episcopal Parish v. Kinney*, supra, 58 Ohio St.2d at 201 ***. As the BTA concluded, the applicant for exemption under R.C. 5709.12 need not be a charitable institution, but simply an institution.” *Id.* at 406-407. (Parallel citations omitted and emphasis sic.)

In addition, to qualify for exemption under the above statute, real property must not be used with a view to profit. See *Girl Scouts-Great Trail Council v. Levin*, 113 Ohio St.3d 24, 2007-Ohio-972; *Am. Soc. for Metals*, supra; *Lutheran Book Shop v. Bowers* (1955), 164 Ohio St. 359. See, also, *Seven Hills Schools*, supra; *Seven Hills Schools v. Tracy* (June 11, 1999), BTA No. 1997-M-1572, unreported; *Youngstown Area Jewish Fedn. v. Limbach* (June 30, 1992), BTA No. 1988-G-117, unreported; *Jewish*

² In *Highland Park Owners*, supra, at 407, the term “institution” was defined as “An establishment, especially one of eleemosynary or public character or one affecting a community. An established or organized society or corporation. It may be private in its character, designed for profit to those composing the organization, or public and charitable in its purposes, or educational (e.g. college or university).*** ”

Community Ctr. of Cleveland v. Limbach (June 30, 1992), BTA No. 1988-A-124, unreported; and *Dayton Art Inst. v. Limbach* (June 19, 1992), BTA No. 1986-A-521, unreported.

The commissioner, in his brief, does not dispute that the appellant is an institution or that the property is open for use by the public for recreational purposes. Appellee's brief at 2.

The commissioner argues that the recreational areas do not qualify for exemption under R.C. 5709.07 and that because the property is owned by a church, the appellant should be limited to seeking exemption under R.C. 5709.07.³

In the past, the Ohio Supreme Court had held that a religious institution could not seek exemption as a charitable institution under R.C. 5709.12. *Summit United Methodist Church v. Kinney* (1982), 2 Ohio St.3d 72. However, the court reversed its position and found that religious institutions are not excluded from R.C. 5709.12. *True Christianity Evangelism v. Zaino* (2001), 91 Ohio St.3d 117, 2001-Ohio-295.

In *True Christianity*, the court observed:

"In *Episcopal Parish v. Kinney* (1979), 568 Ohio St.2d 199, 201, ***, we adopted Justice Stern's concurring opinion in *White Cross Hosp. Assn. v. Bd. of Tax Appeals* (1974), 38 Ohio St.2d 199, 203, ***, wherein he stated that as regards R.C. 5709.12, 'any institution, irrespective of its charitable or noncharitable character, may take advantage of a tax exemption if it is making exclusive charitable use of its property.' (Emphasis *sic*) Thus, R.C.5709.12 is applicable to

³ R.C. 5709.07 exempts 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 use and occupancy.

'any institution'; religious institutions are not excluded from the application of R.C. 5709.12." *Id.* at 118.

Similarly, the court in *First Baptist Church of Milford v. Wilkins*, 110 Ohio St.3d 496, 2006-Ohio-4966, held that under R.C. 5709.12 the religious institution may seek exemption if it is using the property exclusively for charitable purposes. *Id.* at ¶18.

It is important to note that while the appellant did not seek exemption for the recreational areas under R.C. 5709.07, previous claims for church-owned recreational areas have been denied under R.C. 5709.07 in the past. In *Faith Fellowship Ministries v. Limbach* (1987), 32 Ohio St.3d 432, 437, the court held that a building that housed a cafeteria, sleeping rooms, and gymnasium, separate from the church's sanctuary, were not used primarily for public worship and was merely supportive and incidental to public worship. In *Moraine Hts. Baptist Church v. Kinney* (1984), 12 Ohio St.3d 134, the court held that a youth camp, improved with lodging, cafeteria, chapel, swimming pool, basketball court, and recreational fields did not qualify for exemption under R.C. 5709.07 because it was not being used exclusively for public worship. This board has on many previous occasions reached the same result. *Zion Baptist Church v. Levin* (Sept. 16, 2008), BTA No. 2007-A-660, unreported; *Vandalia Church of the Nazarene v. Zaino* (Jan. 17, 2003), BTA No. 2001-N-883, unreported; *South Norwood Church of Christ v. Zaino* (Jan. 12, 2001), BTA No. 2000-P-487, unreported; *Somerset Presbyterian Church v. Tracy* (Feb. 25, 1994), BTA No. 1992-A-1502, unreported. See, also, *First Christian Church of Medina*, *supra*; *Islamic Assn. of Cincinnati v. Tracy* (Aug. 27, 1993), BTA No. 1991-X-1763,

unreported. The common thread in all these previous cases was that the primary purpose for the use of the land was for athletic-type activities, not worship. Such use is “at best, merely supportive of religious purposes” and therefore would not qualify for exemption. *Columbus Christian Center v. Zaino* (Apr. 19, 2002), BTA No. 2000-R-669, unreported, affirmed (Dec. 19, 2002), Franklin App. No. 02APH563, unreported.

The commissioner argues that appellant should be precluded from seeking exemption under R.C. 5709.12 for property that would not otherwise qualify under R.C. 5709.07.

In *Rickenbacker Port. Auth. v. Limbach* (1992), 64 Ohio St.3d 628, a port authority was denied exemption under R.C. 4582.46 (Tax Exemption for Port Authority Property) because the statute precluded the exemption of property subject to any lease of a term of a year or more. The land at issue owned by Rickenbacker was subject to a seventy-year lease. Before the court, Rickenbacker argued that the property was exempt under R.C. 5709.08 (exemption of government and public property) and R.C. 5709.121 (property used exclusively for charitable purpose), as property held for a public purpose. The court held that to allow the owner to seek exemption under R.C. 5709.08 and/or R.C. 5709.121 would effectively negate the limitation contained in R.C. 4582.46, which prohibits port authority property subject to a seventy-year lease to be exempt from taxation. The court in *Rickenbacker* cited to its previous holdings in *Toledo Business & Professional Women's Retirement Living, Inc. v. Bd. of Tax Appeals* (1971), 27 Ohio St.2d 255, and *Summit United Methodist*

Church v. Kinney (1982), 2 Ohio St.3d 72, which held “the General Assembly has exclusive power to choose the subjects, and to establish the criteria, for exemption from taxation. After the General Assembly has marked a specific use of property for exemption and has established the criteria therefore, the function of the judicial branch is limited to interpreting and applying those criteria.” *Rickenbacker*, supra at 631. The *Rickenbacker* court reasoned, as in its prior cases, that when the legislature creates specific criteria, and the taxpayer fails to meet said specific criteria, then the taxpayer may not seek exemption under general charitable use statutes.

The court recently affirmed the same concept in *Church of God in Northern Ohio v. Levin*, 124 Ohio St.3d 36, 2009-Ohio-5939. In that case, the church-owned property was used as the regional headquarters and offices. Taxpayer sought exemption under R.C. 5709.12, arguing that the charitable use of the property was “facilitating the proclamation of the Gospel of Jesus Christ and supporting public worship.” *Id.* at ¶3. The court reasoned that the character of the property’s use must be determined based upon the property’s primary use as administrative offices, not its secondary or ancillary use of supporting public worship.

The court in *Church of God* stated that the Ohio Constitution and statutes “have long distinguished between exempting public worship and exempting charitable use,” and held that “public worship does not fall within the definition of charity.” *Id.* at ¶32. The court further held:

“[I]f public worship constituted a charitable use, then the limited scope the legislature prescribed for the exemption of houses of public worship could be avoided simply by claiming exemption under the charitable-use statute rather

than the house-of-public-worship provision itself. Taken together, these circumstances would amount to a violation of the precept that we should construe statutes to give effect to all the enacted language. (Citations omitted). Indeed, we have recognized a general principle that a property owner may not evade the limitations imposed with respect to a specific tax exemption by claiming exemption under a broad reading of other exemption statutes. *Rickenbacker Port Auth. v. Limbach* (1992), 64 Ohio St.3d 628, 631-632, ***,”

Distinguishing the facts in *True Christianity*, the court in *Church of God* found that because the property was primarily used to support public worship, the taxpayer could not qualify for exemption under charitable use.⁴

In the same manner, appellant’s property is nearly 79 acres improved with a church. The commissioner has held that all but 22.11 acres (roughly 57 acres) are subject to exemption under R.C. 5709.07(A)(2) as a house of public worship and the ground attached to it that is necessary for its use and occupancy. The primary use of the appellant’s property is for public worship. The recreational fields and jogging path are ancillary to appellant’s primary use for public worship.

We are unable to adopt appellant’s premise that the subject property has two primary uses, one for public worship and the other charitable.

A review of the record in this case and the applicable law demonstrates that appellant’s primary use of the subject property fails to meet the second prong of the test set forth in *Highland Park Owners, Inc.*, supra, and thus the recreational areas and jogging path are not entitled to exemption from taxation.

⁴ The court further noted that its holding was limited insofar as a religious institution was not precluded from seeking exemption for charitable use in other contexts where the primary use of other property might constitute charitable use (e.g., a soup kitchen) under the holding of *True Christianity*, supra.

Split Listing Under R.C. 5713.04

The commissioner's determination to split list the property between taxable and exempt fails to state with specificity which acreage, among the three parcels, should be listed as taxable and exempt. Based upon a review of the record before us, it appears that the commissioner's determination to split list the property seemingly grants exemption to portions of the property not entitled to exemption under R.C. 5709.07.

In its application for exemption, appellant describes the property as three parcels: a) 2806681 (.69 acres), b) 2806683 (1.55 acres) and c) 2813492 (76.6563 acres). S.T. at 21. Appellant described the recreational areas as all of parcels 2806681 (.69 acres), 2806683 (1.55 acres) and 18.6795 acres of parcel 2813492. Appellant further described the church facility as 57.9768 acres of parcel 2813492.

Viewing an engineer's map submitted with appellant's application (Exs. 8, 14), the two smaller parcels (2806681 and 2086683) combine to form a small triangle which abuts the southwestern corner of the larger parcel, 2813492. Viewing the entire property, a church facility is situated in the middle of the property with parking lots virtually surrounding the church facility in a circular fashion. Between the northern side of the church facility and the entrance on Raber Road are two access drives, water retention basins, preserved wetland areas, and an oil well. The south side of the property abuts an interstate highway. Between the highway and the southern side of the facility are two baseball/softball diamonds, two rectangular recreation fields, area for a future recreation field (the engineers drew another baseball/softball

diamond in this area), a preserved wetland area, and a second oil well. The jogging path encircles the entire facility and recreational fields. One of the smaller parcels (2086683) is improved with the majority of one of the baseball/softball diamonds and portions of the jogging track. The other small parcel (2806681) is improved with a portion of the jogging path. The engineer has created borders around the "recreational area" of all three parcels and identified it to be 17.74 acres, all of parcel 2806683's 1.55 acres, all of parcel 2806681's .69 acres, and the remaining acreage situated on parcel 2813492. Based on the engineer's drawing, the entire recreational area totals 19.98 acres. The engineer has additionally identified the jogging trail to be 1.52 acres; however, it is clear that roughly half of the jogging trail is situated on areas designated as "recreational area" and the remainder is situated on other areas of the property that encircle the facility. The total area at issue computes to 21.5 acres based on the engineer's drawing. However, the record before this board is not clear as to whether the engineer's calculations of the "recreational area 17.74 ac." includes or excludes the smaller parcels' acreage or whether the engineer's calculations include/exclude portions of the jogging path that are situated within the recreational area. The record before this board does not contain any pertinent records from the Summit County Fiscal Officer (i.e., property record cards, tax maps) that would enable us to identify with precision the acreage of the parcels.

Within the property are two small areas with an oil well on each. The commissioner's final determination states that the two oil wells had previously been assigned separate parcel numbers by the Summit County Fiscal Officer; however, one

of which was "deactivated" for tax year 2000, and the commissioner further states "both are now defunct." S.T. at 1. By separate letter sent to this board by counsel for the appellant, the parties have agreed that the oil wells occupy 1.4424 acres.

Appellant's counsel represents in his brief that the totality of the recreational area and jogging path constitutes 18.6795 acres.⁵ The commissioner did not take issue with appellant's representation; therefore, we will treat the recreational areas as 18.6795 acres.

We note that the commissioner's final determination, as well as the recommendation of the commissioner's agent concerning the specific parcels of the property exempted as "houses used exclusively for public worship" under R.C. 5709.07, is inconsistent with the record before him. The commissioner split-listed the property pursuant to R.C. 5713.04 and determined:

"Property exempt from taxation:

"All property not specifically described below as taxable.

"The Tax Commissioner orders that the real property for parcel numbers 2806681 and 2806683 not placed upon the tax list below be entered upon the list of property in the county which is exempt from taxation for tax year 2002, and that taxes, penalties and interest for the tax years 2001, 2002 and subsequent years be remitted.

"The Commissioner further orders that the real property for parcel number 2813492 not placed on the tax list below also be entered upon the list of the property in the county which is exempt from taxation for tax year 2002 and that taxes, penalties and interest for tax year 2002 and subsequent years be remitted.

⁵ Counsel argues that the parties had mistakenly identified the recreational area and jogging path as 22.11 acres. Appellant's brief at 19.

“Property to remain on the tax list:

“Approximately 22.11 acres designated by the applicant as the location of various recreation areas, as well as those portions of the property designated as the location of the oil/gas wells.” S.T. at 3.

The commissioner’s order fails to adequately specify what acreage on which parcels is taxable or exempt. The commissioner erroneously treats each of the three parcels as containing both taxable and exempt components. Although the commissioner’s order decrees “all property not specifically described below as taxable,” he then describes that all three parcels are exempt, excepting the 22.11 acres used for recreation and oil wells. Adding to the uncertainty, the commissioner fails to specify how said 22.11 acres are situated on the three parcels.⁶ The engineer’s map included with the application for exemption clearly portrays that the two smaller parcels, 2806681 (.69 acres) and 2806683 (1.55 acres), are removed from the church facility and parking areas. Further, these two smaller parcels contain no other improvements other than a portion of a softball field and the jogging path. Exs. 8 and 14.

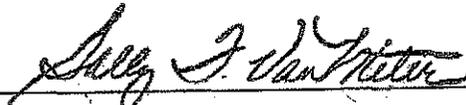
The commissioner’s determination is in error, insofar that the exempted public worship area of the subject property is limited to the larger 76.6563-acre parcel

⁶ The underlying recommendation of the commissioner’s agent examiner, dated November 17, 2005, vaguely described the exempted area as “[t]he church building, parking areas, access roads and 30 acres of land” and further found that the “balance of the property” should remain on the tax list. S.T. at 19.

identified as parcel 2813492. Neither of the smaller parcels (2806681 and 2806683) is entitled to exemption.

This board finds the Tax Commissioner's determination that the recreational areas located on the property are not entitled to exemption under R.C. 5709.12 is correct. This board further modifies the Tax Commissioner's final determination and orders that: parcels 2806681 and 2806683 remain on the tax list; 16.4395 acres of parcel 2813492 remain on the tax list; and 58.7744 acres of parcel 2813492 be placed on the exempt tax list.⁷

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


Sally F. Van Meter, Board Secretary

⁷ Beginning with the representation that 18.6795 acres account for the taxable recreational areas across all three parcels, the recreational areas are reduced by the amounts of the smaller taxable parcels (.69 acres and 1.55 acres) to arrive at 16.4395 acres of parcel 2813492 devoted to the recreational areas. Parcel 2813492's 76.6563 acres are first reduced by 1.4424 acres for the oil wells and further reduced by 16.4395 acres for the taxable recreational areas to result in 58.7744 acres exempt from taxation under R.C. 5709.07.