

ORIGINAL

In the Supreme Court of Ohio

Equity Dublin Associates and SHSCC #2	:	
Limited Partnership,	:	Case No. 2014-0168
	:	
Appellees,	:	
	:	On Appeal from the Ohio Board of Tax
v.	:	Appeals:
	:	Case Nos. 2011-Q-1792 and 2011-Q-1795
Joseph W. Testa, Tax Commissioner of	:	
Ohio, Board of Education of the Columbus	:	
City School District, and Board of Education	:	
of the Dublin City School District,	:	
	:	
Appellants.	:	

**MERIT BRIEF OF APPELLEES EQUITY DUBLIN ASSOCIATES AND
SHSCC#2 LIMITED PARTNERSHIP**

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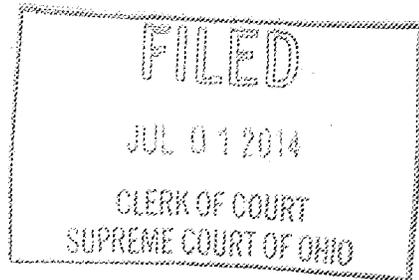


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I. STATEMENT OF THE CASE AND FACTS

The issue on appeal is whether real property leased by a state community college and used solely for educational purposes is exempt from taxation. Consistent with Ohio law and the judicial precedent set by this Court, the Ohio Board of Tax Appeals (“BTA”) reasonably and lawfully held that it is.

Appellees Equity Dublin Associates (“EDA”) and SHSCC #2 Limited Partnership (“SHSCC”), at all relevant times, leased a portion of their property to Columbus State Community College (“Columbus State”), a public state community college created under the authority of R.C. Chapter 3358. Columbus State used the subject property solely for educational purposes, such as classroom instruction, offices, lab space, and related school activities.

The BTA reasonably and lawfully determined that the buildings leased by Columbus State are entitled to exemption under R.C. 5709.07(A)(4) because they are “connected with” the community college. In so holding, the BTA relied on the precedent set by this Court and by the Tenth Appellate District. See *Cleveland State University v. Perk*, 26 Ohio St.2d 1, 268 N.E.2d 577 (1971); *Bexley Village, Ltd. v. Limbach*, 68 Ohio App.3d 306, 588 N.E.2d 246 (10th Dist. 1990).

For the reasons set forth herein, this Court should affirm the BTA’s decision as being reasonable and lawful.

A. THE LEASE AGREEMENTS

The facts pertinent to the issues on appeal are largely undisputed. Columbus State is a public state community college, as defined in R.C. Chapter 3358. In June 1996, SHSCC leased to Columbus State certain real property situated at 4445 through 4451 Professional Parkway in

Groveport, Ohio (the "Groveport Property"). Columbus State used the Groveport Property solely for educational purposes, such as classrooms, offices, lab space, and related school activities.

Under the initial SHSCC Lease Agreement, Columbus State leased approximately 12,000 square feet of building space and adjacent parking. The initial rent for the first ten years was set at \$11,000.00 per month. Section 12 of the SHSCC Lease Agreement contractually obligates Columbus State to pay all taxes and assessments levied on the Groveport Property. These facts are not dispute. (See Boards of Education Merit Brief at 1; Tax Commissioner's Merit Brief at 4-5).

In May 1990, EDA leased to Columbus State certain real property situated at 6190 Shamrock Court in Dublin, Ohio (the "Dublin Property"). Columbus State used the Dublin Property solely for educational purposes, such as classrooms, offices, lab space, and related school activities. Columbus State initially leased 7,920 square feet of space at the Dublin Property. Through various lease addenda, the rented space ultimately increased to approximately 13,545 square feet of the 116,000 square feet available at the Dublin Property. The initial rent was set at \$4,950.00 per month, and was increased in subsequent leases and addenda. These facts also are not in dispute. (See Boards of Education Merit Brief at 1; Tax Commissioner's Merit Brief at 4-5).

The only factual dispute surrounding the EDA Lease is Columbus State's obligation to pay taxes. As set forth by EDA in its briefs before the BTA, the EDA Lease expressly and unequivocally places upon Columbus State the obligation to pay all property taxes. The School Boards and the Tax Commissioner incorrectly assert that the EDA Lease contains no such obligation. While this disputed fact did not affect the BTA's legal determination, the BTA erroneously agreed with the School Boards and the Tax Commissioner on this factual issue.

In making their assertion, the School Boards and the Tax Commissioner (and ultimately the BTA) incorrectly rely upon Section 19.1 of the EDA Lease, which speaks to the taxes on tenant's (i.e. Columbus State's) own personal property and fixtures. (See Tax Commissioner's Merit Brief at 5; Statutory Transcript of BTA No. 2011-K-1792 at 29).

Yet the Schools Boards and Tax Commissioner completely ignore Article V of the EDA Lease, entitled "RENTAL ADJUSTMENT." (S.T., 2011-K-1792 at 28, 30¹). Under this Article, Columbus State is contractually obligated to pay an "Adjusted Annual Rent" to include Columbus State's pro rata share of real estate property taxes. (Id.). Thus, Columbus State is obligated to pay property taxes on the Dublin Property leased from EDA.

Specifically, Section 5.1(h) of the EDA lease defines the term "taxes" as follows:

(h) "**Taxes**" – Taxes and assessments, special or otherwise, including personal property taxes levied on equipment, fixtures, and appurtenances other than those owned by Tenant, and sewer charges, if any, including expenses incurred in connection with disputing or contesting the amounts thereof, levied or assessed for the year in question, whether the Base Year or a Comparison Year, or a partial year, upon or with respect to the Buildings and the land upon which it is located by any Federal, State or municipal government.

(S.T., 2011-K-1792 at 28, 30) (emphasis added).

Under Section 5.2 of the EDA Lease Agreement, Columbus State's "Annual Base Rent" was adjusted by accounting for Columbus State's proportionate share of property taxes, thus resulting in an "Adjusted Annual Rent." (S.T., 2011-K-1792 at 30). This obligation for Columbus State to pay property taxes is reiterated in the Second Addendum to the EDA Lease. (S.T., 2011-K-1792 at 36).

¹ The BTA's compilation and numbering of the Statutory Transcript is slightly out of order. Page number 30 should directly follow page number 28.

Therefore, and contrary to the position taken by the School Boards and the Tax Commissioner, Columbus State was obligated to pay the real estate property taxes on the Dublin property.

B. PROCEDURAL BACKGROUND

On or about March 16, 2005, EDA and SHSCC individually filed Applications for Real Property Tax Exemption and Remission (the “Applications”). Columbus State joined in the Applications as a co-applicant.²

On May 23, 2011, the Tax Commissioner issued a Final Determination on each of the Applications, finding that the Dublin and Groveport Properties were not entitled to a tax exemption. In making his Final Determinations, Appellant Tax Commissioner reviewed the exemption requests under R.C. 3354.15 and R.C. 5709.07. In his Final Determinations, the Tax Commissioner devotes almost his entire discussion and analysis to R.C. 5709.07.

On or about July 20, 2011, EDA and SHSCC timely filed their respective Notices of Appeal and Memoranda in Support. EDA and SHSCC asserted as the bases for their respective appeals the tax exemption statutes R.C. 3354.15 and R.C. 5709.07(A)(4). Columbus State joined the appeal as a co-appellant. On August 21, 2013, the BTA dismissed Columbus State as a party to the appeal. Because both appeals are nearly identical, factually and legally, the BTA consolidated the two appeals, upon motion.

On December 31, 2013, the Board of Tax Appeals reversed the Tax Commissioner’s Final Determinations, reasonably and lawfully holding that EDA and SHSCC could claim real

² On or about April 14, 2004, Columbus State filed two Applications for Real Property Tax Exemption and Remission for the Dublin and Groveport Properties. On or around January 17, 2005, Columbus State withdrew its Applications in light of this Court’s decision in *Performing Arts Sch. of Metro. Toledo, Inc. v. Wilkins*, 104 Ohio St.3d 284, 2004-Ohio-6389, 819 N.E.2d 649 (holding that an application for tax exemption must be in the name of the legal title holder).

property tax exemptions, for the portions of their properties leased to Columbus State, under R.C. 5709.07(A)(4) because the properties were “connected with” Columbus State, as the statute requires.

On January 22, 2014, the Tax Commissioner moved the BTA to reconsider its decision, suggesting that the BTA “ignored a controlling holding” of this Court, *Athens County Auditor v. Wilkins*, 106 Ohio St.3d 293, 2005-Ohio-4986, 834 N.E.2d 804. On January 28, 2014, the BTA overruled the Tax Commissioner’s Motion, reasonably and lawfully holding that *Athens County Auditor* is inapposite to the facts of this case. An appeal to this Court ensued.

C. NATURE OF THE EXEMPTION STATUTE AT ISSUE

The relevant statute at issue before this Honorable Court is R.C. 5709.07(A)(4). This statute exempts from taxation “[p]ublic colleges and academies and all buildings connected with them.”

The School Boards and the Tax Commissioner repeatedly argue that the BTA erred in granting an exemption under R.C. 5709.07(A)(4) because the subject properties are owned by EDA and SHSCC, two for-profit commercial entities. This is not the controlling factor, however, as the statute expressly exempts all buildings connected with public colleges and academies. The parties do not dispute that the subject buildings are indeed connected with Columbus State. In addition, the Tax Commissioner and the School Boards ignore the fact that the tax exemption created by R.C. 5709.07 is an *in rem* obligation that attaches to the property and not the owner. See also *Benjamin Rose Institute v. Myers*, 92 Ohio St. 252, 266, 110 N.E. 924 (1915). The position taken by the School Boards and the Tax Commissioner is thus contrary to Ohio statute and controlling case law.

The Tenth Appellate District’s explanation of the applicable exemption statute in *Bexley*

Village Ltd. v. Limbach, 68 Ohio App.3d 306, 588 N.E.2d 246 (10th Dist.1990), and in reliance on this Court's holding in *Cleveland State Univ. v. Perk*, is instructive:

R.C. 5709.07 includes two separate and distinct clauses. First, public colleges and academies and all buildings connected therewith are exempt from taxation regardless of whether the property is used with a view towards profit. *Cleveland State Univ. v. Perk* (1971), 26 Ohio St.2d 1, ***; *Dennison Univ. v. Bd. of Tax Appeals* (1965), 2 Ohio St.2d 17, ***. Second, all lands connected with public institutions of learning are exempted from taxation if they are not used with a view towards profit.

Id. at 308.

This Court also had occasion to apply R.C. 5709.07(A)(4) in the context of privately owned buildings leased by a private entity to a public college. See *Cleveland State Univ. v. Perk*, 26 Ohio St.2d 1, 8, 268 N.E.2d 577 (1971). In *Cleveland State*, this Court held that “buildings located on the campus of a state university and used exclusively for classrooms and faculty offices are exempt from taxation, even though such buildings are not owned by the university, but are leased for a term of years, with provision for rental therefor, from a corporation for profit.” Id. at 8.

Here, it is a matter of undisputed fact that the Dublin and Groveport Properties leased by Columbus State are used exclusively for classrooms, offices, lab space, and related school activities, and that they are “connected with” the public college. The BTA thus correctly awarded a tax exemption, reasonably and lawfully applying R.C. 5709.07(A)(4).

D. ISSUE PRESENTED FOR REVIEW

The issue presented for review before this Court is whether the BTA acted reasonably and lawfully when it determined that EDA and SHSCC are entitled to a property tax exemption under R.C. 5709.07(A)(4).

II. STANDARD OF REVIEW

Jurisdiction for the Court to hear this appeal rests in R.C. 5717.04. Under R.C. 5717.04, this Court shall affirm the decision of the BTA if it is reasonable and lawful. Contrary to the Tax Commissioner's argument that tax exemption statutes are to be strictly construed,³ it is instructive to note that, in reviewing exemption statutes, this Court's "duty is limited to determination of whether the decision of the Board of Tax Appeals was unreasonable or unlawful." *Seven Hills Schools v. Kinney*, 28 Ohio St.3d 186, 186-187, 503 N.E.2d 163 (1986).

Failing to address the standard of review, the School Boards instead posit a public policy argument, impliedly suggesting that this Court should reverse the BTA unless the tax exemption will provide "a benefit to the public generally commensurate with the loss of tax revenue." (School Boards' Merit Brief at 2, citing *Philada Home Fund v. Board of Tax Appeals*, 5 Ohio St.2d 135, 138, 214 N.E.2d 431 (1966)). The School Boards then suggest that the requested tax exemption will provide no "present benefit to the general public" to justify the loss of tax revenue. (School Boards' Merit Brief at 3).

This argument is analogous to a double-sided coin. It only speaks to one side of the equation, and completely ignores the impact that the exemption will have on a publicly-funded, state community college.⁴ Indeed, Article VI of the Ohio Constitution speaks to the importance of providing opportunities for Ohioans to achieve higher education. See Oh. Const. Art. VI,

³ Within Proposition of Law No. IV in the Tax Commissioner's Merit Brief (p. 14), the Commissioner devotes much discussion to the statutory construction of tax exemption statutes, and yet makes no mention of this Court's standard of review when reviewing the BTA's decision concerning an exemption statute. The School Boards likewise do not discuss this Court's standard of review in their Merit Brief.

⁴ The School Boards' argument to the contrary notwithstanding, Columbus State – and not EDA or SHSCC – will face the impact of this Court's decision. It is a matter of industry practice that lessees are obligated to pay their share of the lessor's property tax obligations. The Lease Agreements at issue here are no different.

§§ 5-6. Similarly, Ohio law requires that the General Assembly “shall support a state community college by such sums of money and in such manner as it may provide.” R.C. 3358.09. Some of these very same students currently attending the Columbus and Dublin City Schools will likely attend Columbus State in the future. As such, it is difficult to comprehend the School Boards’ argument that the tax exemption at issue will provide no “present benefit to the general public.”

The bottom line here is that this Court must affirm the BTA’s decision because it is reasonable and lawful.

III. LAW AND ARGUMENT

Proposition of Law No. 1:

Under R.C. 5709.07(A)4) and its attendant case law, buildings connected with a public college are exempt from taxation, irrespective of ownership, and thus the BTA’s decision is reasonable and lawful.

Under R.C. 5709.07(A)(4), the following property shall be exempt from taxation: “Public colleges and academies and all buildings connected with them, and all lands connected with public institutions of learning, not used with a view to profit.”

Before the BTA, the parties agreed that the Dublin and Groveport Properties were used by Columbus State solely for educational purposes; and that these buildings were “connected with” a public college, Columbus State. Relying on the judicial precedent set by this Court and by the Tenth Appellate District, the BTA reasonably and lawfully held that the buildings located on the Dublin and Groveport properties are exempt from taxation under R.C. 5709.07(A)(4).

This exemption statute was specifically addressed by this Court in a nearly identical situation where the property was owned by a private for-profit entity and leased to a public

college. See *Cleveland State Univ. v. Perk*, 26 Ohio St.2d 1, 8, 268 N.E.2d 577 (1971). This precedent, on which the BTA relied in its decision, is dispositive of this appeal.

In *Cleveland State*, this Court held that property used solely for classrooms and faculty offices were buildings “connected with” a public college and entitled to a tax exemption under R.C. 5709.07(A)(4):

[B]uildings located on the campus of a state university and used exclusively for classrooms and faculty offices are exempt from taxation, even though such buildings are not owned by the university, but are leased for a term of years, with provision for rental therefor, from a corporation for profit.

Id. at 8.

Restating its prior precedent, this Court in *Cleveland State* reasoned that “it was the purpose [of the statute] to exempt all buildings that were with *reasonable certainty* used in furthering or carrying out the necessary objects and purposes of the college.” *Id.* at 7, citing *Denison University v. Board of Tax Appeals*, 2 Ohio St.2d 17, 21, 205 N.E.2d 896 (1965) (emphasis in original).

Cleveland State involved a public college’s rental of modular buildings from a private for-profit corporation. *Id.* at 1. Not unlike the instant case, and in accordance with standard practice, Cleveland State University obligated itself to reimburse the lessor for the payment of real estate taxes. *Id.* at ¶1 of syllabus.

In the case at hand, the BTA granted a tax exemption, noting that this Court in *Cleveland State* “specifically rejected the argument that the property must be *owned* and used by the public college to be entitled to exemption.” (BTA Decision and Order at 8). There is nothing unreasonable or unlawful about the BTA’s decision, particularly in light of its reliance on this Court’s binding precedent. As briefed extensively by the Tax Commissioner, the doctrine of *stare decisis* requires adherence to *Cleveland State Univ. v. Perk*.

In its decision, the BTA also relied upon precedent from the Tenth Appellate District that reached the same conclusion as this Court did in *Cleveland State Univ.*, supra. See *Bexley Village, Ltd. v. Limbach*, 68 Ohio App.3d 306, 311, 588 N.E.2d 246 (10th Dist. 1990). In *Bexley Village*, the Tenth District followed this Court's holding in *Cleveland State*:

R.C. 5709.07 includes two separate and distinct clauses. First, public colleges and academies and all buildings connected therewith are exempt from taxation regardless of whether the property is used with a view towards profit. *Cleveland State Univ. v. Perk* (1971), 26 Ohio St.2d 1, 6-7, 55 O.O.2d 1, 3-4, 268 N.E.2d 577, 580-581; *Denison Univ. v. Bd. of Tax Appeals* (1965), 2 Ohio St.2d 17, 31 O.O.2d 10, 205 N.E.2d 896, paragraph two of the syllabus. Second, all lands connected with public institutions of learning are exempted from taxation if they are not used with a view towards profit.

Id. at 308.

Bexley Village went on to hold that “unity of ownership and use is not required to satisfy the ‘connected with’ element of R.C. 5709.07. Since the property was used in furtherance of the university’s educational purpose, it is connected with the university within the meaning of the statute.” Id. at 310.

In addition, it is instructive to note that the tax exemption created by R.C. 5709.07 is an *in rem* obligation that attaches to the property and not the owner. See also *Benjamin Rose Institute v. Myers*, 92 Ohio St. 252, 266, 110 N.E. 924 (1915). This is evidenced by the unequivocal language employed by the legislature in the enactment of R.C. 5709.07:

The following property shall be exempt from taxation...

R.C. 5709.07(A) (emphasis added).

This case demands the same result as this Court’s holding in *Cleveland State* and in light of the Tenth District’s holding in *Bexley Village*. The BTA’s decision, which follows this well settled precedent, is neither unreasonable nor unlawful, and should therefore be affirmed by this Court.

Proposition of Law No. 2:

An exemption is available under R.C. 5709.07(A)4, irrespective of any opportunities for exemption under R.C. 3354.15, and thus the BTA's decision is reasonable and lawful.

The Tax Commissioner and the School Boards seek to have it both ways here. On the one hand, they argue that EDA and SHSCC are not entitled to a tax exemption under R.C. 3354.15 because that statute specifically provides that a community college "shall not be required to pay any taxes or assessments upon any real or personal property..."

Notwithstanding the common practice whereby lessees are typically contractually obligated to pay their share of property taxes, the Commissioner and School Boards argue that for-profit enterprises such as EDA and SHSCC cannot seek exemption under R.C. 3354.15 because that statute is directed specifically to community colleges; and that Columbus State "voluntarily" assumed the tax obligation by way of the Lease Agreements. In essence, the Commissioner and School Boards argue that private entities can never seek tax exemptions under R.C. 3354.15, on the premise that this statute is directed at community colleges.

Then, in the same vein, the Tax Commissioner and School Boards argue that EDA and SHSCC may not seek an exemption under R.C. 5709.07(A)(4) because that statute is more "general" than R.C. 3354.15; and that EDA and SHSCC can only seek an exemption under R.C. 3354.15, which is specific to community colleges.

The Tax Commissioner and the School Boards cite to this Court's holding in *Rickenbacker Port Authority v. Limbach*, 64 Ohio St.3d 628, 632, 597 N.E.2d 494 (1992), for the general proposition that an applicant cannot escape certain limitations imposed in a specific tax exemption statute by seeking a tax exemption under a more general, broader exemption statute. The problem with the Commissioner's and School Boards' argument, however, is that they do

not apply this authority with an even hand. The cases they cite, including *Rickenbacker*, are markedly different from the instant case. In the cases relied upon by the Commissioner and School Boards, the applicant had available at its disposal at least one exemption statute (the more specific statute) under which to seek a tax exemption. In the instant case, however, the Tax Commissioner and the School Boards argue that EDA and SHSCC cannot seek a tax exemption under any statute, including the specific statute geared towards community colleges.

This circular reasoning is flawed and is difficult to follow. To succinctly summarize the position of the Tax Commissioner and the School Boards, (i) R.C. 3354.15 is unavailable to EDA and SHSCC because it is specific to community colleges, which EDA and SHSCC are not; and (ii) R.C. 5709.07(A)(4) is unavailable to EDA and SHSCC because it is too general, so the tax exemption must be sought under R.C. 3354.15, which is a more specific statute. Yet the Commissioner and School Boards have already proclaimed that R.C. 3354.15 is not available to EDA or SHSCC because of its specificity to only community colleges.

It thus begs the question of which exemption statute would be applicable in this case. The Tax Commissioner and the School Boards would have this Court hold that neither statute applies to the case at hand, such that the Dublin and Groveport Properties can never be the subjects of a request for tax exemption so long as they are owned by private enterprises, even though the properties are used solely for educational purposes.

This result makes no sense, and flies in the face of this Court's holding in *Cleveland State Univ. v. Perk*. The BTA agrees. In its decision, the BTA addressed this glaring inconsistency, opining that the Tax Commissioner's position is "curious in light of the commissioner's lengthy consideration of exemption under R.C. 5709.07(A)(4)." (BTA Decision at 6).

The BTA then addressed the merits of this argument and held that because “EDA and SHSCC are clearly not community college districts, they are not entitled to an exemption under R.C. 3354.15.” This now brings us full circle. Under the position espoused by the Tax Commissioner and the School Boards, EDA and SHSCC cannot seek exemption under R.C. 3354.15 or under R.C. 5709.07(A)(4). The BTA reasonably and lawfully disagrees.

In its decision overruling the Tax Commissioner’s Motion for Reconsideration, the BTA noted that R.C. 3354.15 is “not applicable at all to the properties at issue in this matter, which are owned by private, for-profit corporations.” The BTA thus held that EDA and SHSCC can instead seek an exemption under R.C. 5709.07(A)(4).⁵

Again, the Tax Commissioner and the School Boards cannot have it both ways. If EDA and SHSCC lack the requisite standing to pursue a tax exemption under R.C. 3354.15, then certainly they can request a tax exemption under R.C. 5709.07, which is an *in rem* statute concerning a tax obligation on the subject property.

Accordingly, in the context of the exclusionary argument raised by the Tax Commissioner and the School Boards, the BTA’s decision is reasonable and lawful, and should be affirmed.

Proposition of Law No. 3:

This Court’s decision in *Athens County Auditor v. Wilkins* is inapposite and does not bar EDA and SHSCC from receiving a tax exemption under R.C. 5709.07(A)(4).

In support of their arguments, the Tax Commissioner and the School Boards rely primarily on this Court’s holding in *Athens County Auditor v. Wilkins*, 106 Ohio St.3d 293,

⁵ The BTA further explained that this Court’s decision in *Athens County Auditor v. Wilkins*, 106 Ohio St.3d 293, 2005-Ohio-4986, 834 N.E.2d 804 is inapposite to the instant case. The applicability of *Athens County* is discussed more fully in Proposition of Law No. 3 below.

2005-Ohio-4986, 834 N.E.2d 804. The instant case, however, is easily distinguishable; *Athens County* involved the statutory scheme for technical colleges, and also dealt with a completely different set of facts.

In *Athens County*, the applicant, a private for-profit enterprise, owned two dormitories adjacent to Hocking Technical College. *Athens County*, 2005-Ohio-4986 at ¶¶1-2. The college had no tax obligation with respect to the properties. *Id.* at ¶2. The college did not use the dormitories; rather, the dormitories were used by the college's students. *Id.* at ¶¶3-4. The students lived in the dormitories and paid rent. *Id.* at ¶4. The college did not lease any portion of the dormitories, and instead entered into a contract with the property owner, whereby the college agreed to market the dormitories in student-housing information. *Id.* at ¶3. The college, although not using the property, did perform an administrative function concerning the properties. *Id.* at ¶¶3-4. The college set dormitory rules; coordinated room assignments and moving dates; collected rent payments for remitting to the property owner; and performed some marketing. *Id.* at ¶¶3-4. In exchange for these administrative services, the college was paid an \$8,000 annual marketing fee. *Id.* at ¶4.

The property owner sought tax exemptions under R.C. 3357.14 (specific only to technical colleges) and under R.C. 5709.07(A)(4). This Court affirmed the BTA's decision, as being reasonable and lawful, denying tax exemptions under both statutes.

Under R.C. 3357.14, “[a] technical college district shall not be required to pay any taxes or assessments upon any real or personal property acquired, owned, or used by it...” This Court affirmed the BTA's decision, refusing the exemption, on the basis that the dormitories were not “used by” the college. *Athens County*, 2005-Ohio-4986 at ¶¶10, 12. Rather, it was the students

that used the dormitories, which were operated by a private enterprise through a paid agreement with the college. Id. at ¶10.

After analyzing the request for tax exemption under R.C. 3357.14, and applying that exemption statute, this Court stated that “[w]hile we agree that R.C. 3357.14 is the only appropriate statutory provision under which to consider [the property owner’s] application for exemption, like the BTA, we will address [the property owner’s] argument regarding the applicability of R.C. 5709.07(A).” Id. at ¶13.

The Tax Commissioner and the School Boards place much emphasis on this statement. It should be noted, however, that *Athens County* involved a review of the statutory scheme for technical colleges, R.C. 3357.01, et seq. At no place in its holding did this Court extend that case to state community colleges.

Moreover, technical colleges operate under an entirely different statutory scheme than do state community colleges. A technical college may eventually be replaced by a state community college, at which time the rules will change. See R.C. 3358.02(A). By way of one example, technical colleges may pursue the adoption of a tax levy. R.C. 3357.11. A state community college cannot pursue a tax levy. See R.C. 3358.02(D). This alone shows the difference in funding mechanisms between technical colleges and state community colleges.

Technical colleges are governed by a different statutory scheme. While the tax exemption statute for technical colleges is similar – but not identical – to the tax exemption statute for state community colleges, technical colleges are governed by a different set of rules. Therefore, even if *Athens County* stands for the proposition asserted by the Tax Commissioner and the School Boards, that case is inapposite because it does not involve or consider the statutory scheme legislated for state community colleges.

In addition, a closer look at the *Athens County* decision reveals a significant distinction from the situation in play here. The Tax Commissioner and the School Boards argue that EDA and SHSCC cannot even seek a tax exemption under R.C. 3354.15. Put another way, they essentially argue that, as a threshold matter, EDA and SHSCC lack standing to pursue a tax exemption request under R.C. 3354.15 because that statute is only available specifically to community colleges. *Athens County* is thus distinguishable because this Court in *Athens County* (as did the BTA) did undertake a review and analysis of the exemption request under R.C. 3357.14, as opposed to deciding the matter on grounds of standing. Consequently, this Court in *Athens County* found that the exemption request did not satisfy the statutory requirement that the property be “used by” the college, hence no exemption was granted under R.C. 3357.14. These are two distinct and separate concepts.

While the same end result was achieved in both the instant case and in *Athens County*, as pertaining to the “specific” statute at issue in each, one could argue that the BTA’s reasoning in support of its refusal to grant an exemption under the “specific” statute in *Athens County* is not consistent with this case. What is vitally important, however, is that this Court’s review is limited to a determination of whether the BTA’s decision was reasonable and lawful.

In the case at hand, the BTA determined that R.C. 3354.15 has no application whatsoever to EDA and SHSCC. Consequently, the Tax Commissioner’s and the School Board’s exclusionary theory likewise has no application, the reason being that there is no statute more specific than R.C. 5709.07(A)(4) that could be applied to the instant case. The BTA’s decision should be affirmed as being reasonable and lawful.

After refusing the tax exemption under R.C. 3357.14 in *Athens County*, this Court then shifted its analysis to R.C. 5709.07(A)(4). Relying on its prior decision in *Cleveland State Univ.*

v. Perk, this Court refused the tax exemption under R.C. 5709.07(A)(4) on the basis that the college was not contractually obligated to pay the taxes on the subject property. *Athens County*, 2005-Ohio-4986 at ¶¶21-22. Citing prior opinions, this Court reasoned that “the exemption must benefit the public college itself, not a separate private entity.” *Id.* at ¶22.

This Court reconciled its *Athens County* decision with *Cleveland State* on the basis that the college in *Cleveland State* was contractually obligated to pay the property taxes, and so the college, rather than the private owner, became the true beneficiary of the tax exemption. *Id.* at ¶19.

The Tax Commissioner and the School Boards argue, on the other hand, that *Athens County* is dispositive because the subject realty was owned by for-profit, commercial owners, who bear the exclusive responsibility for paying Ohio real property taxes on property they own and rent to others. To the contrary, the ownership of property is immaterial, as this Court and the BTA have consistently granted tax exemptions for buildings connected with public colleges and academies, without requiring unity of ownership. R.C. 5709.07(A)(4). See *Cleveland State University v. Perk*, 26 Ohio St.2d 1, 268 N.E.2d 577 (1971); *Bexley Village, Ltd. v. Limbach*, 68 Ohio App.3d 306, 588 N.E.2d 246 (10th Dist. 1990).

In *Athens County Auditor*, the applicant’s relationship with the public college was merely that the college provided some administrative and marketing support to the private operator of a dormitory. *Athens County Auditor* at ¶22. The college did not lease the property at issue from the applicant, and the college had no obligation to pay property taxes. *Id.* Here, Columbus State leases the properties at issue from EDA and SHSCC, for education instruction, and is obligated to pay property taxes assessed upon each of the properties at issue.

The instant case is thus analogous to *Cleveland State* and distinguishable from *Athens County*. Columbus State is contractually obligated to pay the property taxes on the Dublin and Groveport properties for the space leased by Columbus State. Therefore, any tax exemption on the subject properties inures to the benefit of Columbus State; the college is thus the beneficiary of the exemption. This result is in accord with this Court's decisions in *Athens County* and *Cleveland State*.

Proposition of Law No. 4:

To the extent this Court holds that R.C. 3354.15 is the more specific statute applicable to this case and should be applied to the exclusion of R.C. 5709.07(A)(4), then EDA and SHSCC are entitled to tax exemptions under R.C. 3354.15.

EDA and SHSCC maintain that, in sum, the BTA's decision is reasonable and lawful, which is all that is required for affirmance. On the other hand, if this Court determines that R.C. 3354.15 should be applied to the exclusion of R.C. 5709.07(A)(4) (as argued by the Tax Commissioner and the School Boards), then EDA and SHSCC are entitled to tax exemptions under R.C. 3354.15.

Notwithstanding that *Athens County* is inapposite in the first instance, the Tax Commissioner's and the School Board's reliance on that case, as it relates to R.C. 3354.15, is largely misplaced. Under R.C. 3354.15, "[a] community college district shall not be required to pay any taxes or assessments upon any real or personal property acquired, owned, or used by it." This statute is made applicable to state community colleges by way of R.C. 3358.10.

The Tax Commissioner and the School Boards erroneously rely on *Athens County* for the proposition that a "for-profit company cannot claim a vicarious exemption for property owned by it." The issue in *Athens County* is not the ownership of the subject property; rather, the determinative issue in that case is the use of the property.

As noted above, this Court in *Athens County* refused the tax exemption because the dormitories were not “used by” the technical college; rather, the property was used by the students. *Athens County*, 2005-Ohio-4986 at ¶10. This Court thus held that “because R.C. 3357.14 grants a tax exemption only to ‘technical college districts,’ and because L & L’s property is not ‘used by’ the college within the meaning of the statute, L & L is prohibited from receiving a tax exemption pursuant to R.C. 3357.14.” *Id.* at ¶12.

In the case at bar, the BTA did not conduct a review of R.C. 3354.15 because it determined that R.C. 3354.15 is not applicable in the first instance. In turn, because that statute was not available for EDA’s and SHSCC’s exemption request, the BTA turned to R.C. 5709.07(A)(4), under which the BTA held that EDA and SHSCC do qualify for a tax exemption. The BTA’s decision is reasonable and lawful.

If this Court instead holds that R.C. 3354.15 is applicable to the case at hand, then the Court should remand to the BTA for a review of that statute (since it was not considered below) or otherwise conduct its own review on appeal, which would lead to the inescapable conclusion that EDA and SHSCC are entitled to a tax exemption under R.C. 3354.15.

Proposition of Law No. 5:

It is immaterial that EDA and SHSCC did not claim an exemption specifically under R.C. 5709.07 on their initial form application for exemption.

The Tax Commissioner and the School Boards make much of the fact that EDA and SHSCC did not specifically write down R.C. 5709.07 on the one-page application form submitted to the Tax Commissioner back in 2005. This is a peculiar position for the Tax Commissioner to now assert, given that it was the Tax Commissioner’s office in the first place that devoted an exhaustive analysis of R.C. 5709.07(A)(4) in reviewing the application for tax exemption. Nevertheless, this argument lacks merit.

The standing requirements for filing an application for exemption are contained in R.C. 5715.27(A)(1), which provides, in pertinent part, as follows:

[T]he owner, a vendee in possession under a purchase agreement or a land contract, the beneficiary of a trust, or a lessee for an initial term of not less than thirty years of any property may file an application with the tax commissioner, on forms prescribed by the commissioner, requesting that such property be exempted from taxation and that taxes, interest, and penalties be remitted as provided in division (C) of section 5713.08 of the Revised Code.

Then, the “commissioner or auditor shall consider such application or complaint in accordance with procedures established by the commissioner.” R.C. 5715.27(F). The Tax Commissioner “shall decide all questions that arise as to the construction of any statute affecting the assessment, levy, or collection of real property taxes, in accordance with the advice and opinion of the attorney general.” R.C. 5715.28 (emphasis added). The General Assembly has thus granted the Tax Commissioner the power to decide all questions concerning the construction of any statute affecting the assessment or levy of real property taxes. This statute does not limit the Tax Commissioner’s authority to review only those statutes specifically raised by persons challenging the assessment of taxes.

As further support for the Tax Commissioner’s latitude in determining tax assessments, the Commissioner “shall prescribe such general and uniform rules and issue such orders and instructions, not inconsistent with law, as he deems necessary, as to the exercise of the powers and the discharge of the duties of all officers which relate to the assessment of property and the levy and collection of taxes.” R.C. 5715.29.

It goes without saying that the Tax Commissioner had jurisdiction – and exercised the discretion granted to him by the legislature – to review the exemption application under any statute which the Commissioner deems may affect the tax assessment, under rules prescribed by

the Commissioner. Again, the Tax Commissioner's current position is curious, in light of the Commissioner's lengthy review and discussion of R.C. 5709.07 in his Final Determinations.

When appealing a final determination of the Tax Commissioner to the BTA, the notice of appeal "shall contain a short and plain statement of the claimed errors." R.C. 5717.02(C). EDA and SHSCC did just that in filing their Notice of Appeal, requesting review under R.C. 3354.15 and R.C. 5709.07(A)(4). Notably, EDA and SHSCC did not raise as errors the Tax Commissioner's decisions under R.C. 5709.07(A)(1). The BTA thus did not review the Commissioner's decision in that regard. (BTA Decision at 4). Without question, the Tax Commissioner and the BTA (and ultimately this Court) had/have jurisdiction to review the subject exemption application under R.C. 5709.07(A)(4).

The Tax Commissioner's proposition of law (No. VI) is wholly misleading. The Commissioner claims that when a real property tax exemption applicant fails to timely identify a particular statutory basis for exemption in its real property tax exemption application, the application fails to invoke the Commissioner's jurisdiction, and subsequently the jurisdiction of the BTA. This argument is specious because, as explained above, the Tax Commissioner routinely considers applicants for other applicable exemptions beyond what is listed in the box on the form application. The Tax Commissioner has the authority, by statute, to consider any statute affecting a tax assessment or levy. See R.C. 5715.28.

The case cited by the Tax Commissioner, *NBC-USA Housing, Inc.-Five v. Levin*, 125 Ohio St.3d 394, 2010-Ohio-1553, ¶10, does not stand for the Commissioner's proposition. Rather, in *NBC-USA Housing*, the applicant failed to claim the particular statutory basis for the exemption it sought in both its initial form application and in its notice of appeal to the BTA. In the instant case, EDA and SHSCC did identify R.C. 5709.04(A)(4) in their notices of appeal to

the BTA. As such, the BTA, and this Court, have jurisdiction to consider R.C. 5709.07(A)(4) in reviewing the application for exemption. Conversely, EDA and SHSCC did not assert as errors the Tax Commissioner's determination under R.C. 5709.07(A)(1). Consequently, that statute was not reviewed by the BTA.

Proposition of Law No. 6:

The tax exemption contained in R.C. 5709.07(A)(4) is available to a community college's leasehold estate in real property.

R.C. 5709.07(B) reads as follows:

This section shall not extend to leasehold estates or real property held under the authority of a college or university of learning in this state.

Addressing the Tax Commissioner's and the School Boards' argument that R.C. 5709.07(B) precludes EDA and SHSCC from obtaining a tax exemption under R.C. 5709.07(A)(4), the BTA reasonably and lawfully held that R.C. 5709.07(B) does not apply here because "leased property has been found to be exempt when it[s] use qualified under R.C.5709.07(A)(4)." (See Order Denying Motion for Reconsideration at 2, citing *Cleveland State Univ.*, *supra*, and *Bexley Village Ltd*, *supra*). The BTA then points out that some provisions in R.C. 5709.07 preclude a tax exemption of property "leased or otherwise used with a view to profit," whereas other provisions, such as R.C. 5709.07(A)(4), do not contain the word "leased." (Id.). It must be presumed, therefore, that the legislature intended to omit the word "leased" from some of the provisions of this statute. The BTA's decision must be affirmed unless it is unreasonable and unlawful.

The Tax Commissioner notes that a literal reading of the subject statutory provision seems to render as inapplicable the entire exemption section. See also *Case W. Reserve Univ. v. Wilkins*, 105 Ohio St.3d 276, 2005-Ohio-1649, 825 N.E.2d 146, ¶47. On the other hand, courts

must be mindful that when construing a statute, the language of the statute itself determines the legislative intent. *Columbus City Sch. Dist. Bd. of Educ. v. Wilkins*, 101 Ohio St. 3d 112, 2004-Ohio-296, 802 N.E.2d 637, ¶26. Courts read statutory words and phrases in context and interpret them according to grammar rules and common usage. *State ex rel. Cincinnati Bell Tel. Co. v. PUC*, 105 Ohio St. 3d 177, 2005-Ohio-1150, 824 N.E.2d 68, ¶31.

Assuming that R.C. 5709.07(B) contains a scrivener error, as argued by the Tax Commissioner, the Tax Commissioner's argument nonetheless lacks merit because R.C. 5709.07(B) would be inapplicable to property leased to (i.e. by) a college or university. This could not be clearer from the phrase "held under the authority of a college." The plain and ordinary meaning of this phrase is that the college owns the property (i.e. the property is held under the authority of a college). Therefore, as read by the Tax Commissioner, this subsection bars tax exemptions for property leased from a college or university of learning in this state; it would not bar exemptions for property leased to (or by) a college. Indeed, this Court's decision in *Case W. Res. Univ.* bears this out. See *Case W. Res. Univ. v. Wilkins*, 2005-Ohio-1649, ¶47.

In *Case W. Res.*, the property in question was owned by the university and leased from the university to a private corporation that housed sorority members. *Id.* at ¶1. This Court stated that "R.C. 5709.07(B) precludes an exemption in this case because the House Corporation is holding real property 'under the authority of a college or university of learning in this state.'" *Id.* at ¶47. The determinative factor in *Case W. Res. Univ.* was that the university (and not a private enterprise) owned the property, and thus the property was held "under the authority of a college or university of learning." *Id.* Notwithstanding the Tax Commissioner's reliance thereon, that case actually supports the position held by EDA and SHSCC – and not the Commissioner's position.

While it is true (as the Tax Commissioner states in Proposition of Law No. IV) that statutes imposing taxes and public burdens of that nature are to be strictly construed, “where there is ambiguity which raises a doubt as to the legislative intent, that doubt must be resolved in favor of the subject or citizen on whom the burden is sought to be imposed.” *Gray v. Toledo*, 80 Ohio St. 445, 448, 89 N.E. 12 (1909). Further, it is well settled that “the provisions of a statute are to be construed in connection with all laws in *pari materia*, and especially with reference to the system of legislation of which they form a part, and so that all the provisions may, if possible, have operation according to their plain import. It is to be presumed that a code of statutes relating to one subject, was governed by one spirit and policy, and intended to be consistent and harmonious, in its several parts.” *City of Cincinnati v. Connor*, 55 Ohio St. 82, 89, 44 N.E. 582 (1896).

Even with the littlest doubt as to the legislative intent of R.C. 5709.07(B), this Court requires that any doubt be resolved in favor of the subject on whom the burden is sought to be imposed (here, Columbus State). Instructively, and as the BTA held, both this Court and the Tenth Appellate District have awarded tax exemptions to leased property under R.C. 5709.07(A)(4). See e.g. *Cleveland State University v. Perk*, 26 Ohio St.2d 1, 268 N.E.2d 577 (1971) (finding modular buildings leased by a university from a for-profit corporation exempt); *Bexley Village, Ltd. v. Limbach*, 68 Ohio App.3d 306, 588 N.E.2d 246 (10th Dist. 1990) (finding vacant land leased by a university from a for-profit corporation exempt).

As noted by the Tax Commissioner, this Court is bound by its prior decisions through the doctrine of *stare decisis*.⁶ The BTA accordingly held that R.C. 5709.07(B) does not prohibit a tax exemption under these circumstances. The BTA's decision was thus reasonable and lawful, and must be affirmed.

IV. CONCLUSION

For the foregoing reasons, this Court should affirm the BTA's decision granting the tax exemption to EDA and SHSCC, as the BTA's decision is both reasonable and lawful.

Respectfully submitted,



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⁶ Understanding that this Court's decision in *Cleveland State Univ. v. Perk*, supra, is fatal to the Tax Commissioner's argument, the Commissioner states that this Court "failed to consider the R.C. 5709.07(B) prohibition and thus is simply inapposite concerning the meaning and application of the Division (B) prohibition." Notwithstanding the Tax Commissioner's lengthy discussion on the doctrine of *stare decisis*, the Commissioner now impliedly suggests that this Court's decision in *Cleveland State Univ.* should be reversed.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of Appellees Equity Dublin Associates and SHSCC#2 Limited Partnership was served by regular U.S. mail on this 1st day of July, 2014, upon the following:

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