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EQUITY DUBLIN ASSOCIATES AND  
SHSCC #2 LIMITED PARTNERSHIP,

Appellees,

v.

JOSEPH W. TESTA, TAX COMMISSIONER  
OF OHIO, BOARD OF EDUCATION OF THE  
COLUMBUS CITY SCHOOL DISTRICT,  
AND BOARD OF EDUCATION OF DUBLIN  
CITY SCHOOL DISTRICT

Appellants

Case No. 2014-0168

Appeal from Ohio Board of Tax Appeals

Case Nos. 2011-1792 and 2011-1795

### APPELLANT TAX COMMISSIONER'S REPLY BRIEF

- I. **Under this Court's holdings at ¶¶ 11-13 of *Athens County*, when a for-profit commercial owner/lessor leases real property to a community college, the real property tax exemption for "public colleges," set forth in R.C. 5709.07(A)(4) is inapplicable, as a matter of law.**

**Instead, as the specific statute enacted by the General Assembly directly relating to community colleges, R.C. 3354.15 is the exclusive statute under which the real property tax claimant may qualify for exemption.**

In their joint merit brief, the appellee for-profit commercial owners/lessors fail in their attempt to refute the applicability of this Court's controlling holdings in *Athens Cty. Aud. v. Wilkins*, 106 Ohio St. 3d 293, 2005-Ohio-4986 ("*Athens County*") at ¶¶ 11-13. In this regard, the appellees, Equity Dublin Associates ("EDA") and SHSCC#2 Limited Partnership ("SHSCC"), have had to "start from scratch." Remarkably, the Board of Tax Appeals ("BTA") decision

simply ignored this Court's holdings at ¶¶ 11-13 of *Athens County*, and thus made no attempt to distinguish those holdings factually or legally.<sup>1</sup>

Applying well-established precedent, the *Athens County* Court held that, where, as here, the General Assembly has enacted a specific statute directly relating to real property tax exemption for a particular kind of institution of higher learning, that specific statute is the *exclusive* one for determining real property tax exemption. *Id.* at ¶ 13, quoting with approval from *Rickenbacker Port Auth. v. Limbach*, 64 Ohio St. 3d 628, 631 (“a property, to be exempt, must qualify under the criteria of the statute specifically applicable to that property[.]”).<sup>2</sup>

In fact, in *Athens County*, the specific statutes enacted by the General Assembly directly relating to real property tax exemption for “technical college districts” and “community college districts,” i.e., R.C. 3357.14 and R.C. 3354.15, respectively, are *identical* in pertinent statutory language. See the Commissioner's opening merit brief at 11 (quoting the statutory language of these two provisions). In the appellee commercial owners' merit brief, they even tacitly concede this point.

EAD and SHSCC tacitly admit that R.C. 3357.14 (the specific real property tax exemption directly relating to technical college districts at issue in *Athens County*) is identical, in pertinent statutory language, to R.C. 3354.15 (the specific real property tax exemption directly

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<sup>1</sup> The BTA not only ignored this Court's decision in *Athens County*, the BTA likewise ignored its own decision in that case, which likewise so held and which this Court then affirmed. See, *Athens County Aud. v. Zaino [Wilkins]*, BTA No. 2002-A-1152 (March 19, 2004), *aff'd*, 2005-Ohio-4896, unreported, at 7-8, Appx. 7-8.

<sup>2</sup> In *Rickenbacker*, the Court held that “[t]he 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 thereof, the function of the judicial branch is limited to interpreting and applying those criteria.” *Rickenbacker* at 631 (quoting *Toledo Business & Professional Women's Retirement Living, Inc. v. Bd. of Tax Appeals*, 27 Ohio St.2d 255 (1971)).

relating to community college districts at issue here). Instead, EDA and SHSCC argue only that the “statutory *scheme*” for community colleges is different from that of “technical colleges.” See the appellees’ merit brief at 15. This is a “distinction without a difference” because that distinction ignores that the exemptions themselves are substantively identical.

As established by the plain meaning of its actual statutory language, R.C. 3354.15 is the specific real property tax exemption directly relating to community college districts. Just because, allegedly, the general statutory scheme of community colleges differs in some way from that of technical colleges does not somehow alter the nature and existence of R.C. 3354.15. As this Court held in *Athens County*, the specific real property tax exemptions directly relating to specific kinds of institutions set forth in R.C. Title 33, including R.C. 3354.15, are the exclusive statutes under which the commercial owners who lease their realty to those specific kinds of institutions of higher learning are required to qualify for real property tax exemption.

Finally, the appellee for-profit commercial owners attempt to distinguish the *Athens County* holdings at ¶¶ 11-13 on the asserted basis that the relationship that has existed between the appellees herein (as commercial owners/lessors), with CSCC (their community college district lessee), is a fundamentally closer relationship than the contractual relationship that existed between Hocking Technical College and the for-profit commercial owner in that case. The appellees argue that CSCC holds a greater real property interest than did Hocking Technical College. See the appellees’ merit brief at 16-18.

Unfortunately for the appellees herein, it would hardly be helpful to their argument if, in fact, the appellee commercial owners’ contractual relationship with CSCC provided CSCC with a greater real property interest than was the situation involved in *Athens County* (involving a contractual relationship between the Hocking Technical College and the for-profit commercial

owner therein). Rather, the closer the contractual relationship between CSCC and its commercial owners/lessors and the greater CSCC's interest in the reality, the more clearly R.C. 3354.15 is the exclusive statute under which the appellee commercial owners' exemption claim must be determined. In other words, the current case, even more clearly than in *Athens County's* factual scenario, constitutes a situation where the specific real property tax exemption in R.C. Title 33 applies (here, R.C. 3354.15), rather than the general "public colleges" exemption in R.C. 5709.07(A)(4).<sup>3</sup>

**II. The standards for departing from *stare decisis* set forth in *Galatis* that are a necessary predicate for overturning this Court's holdings at ¶¶ 11-13 of *Athens County* have not even been alleged, let alone established here.**

The commercial owner appellees' merit brief fails to suggest, even as an alternative argument, that this Court should overturn its holdings at ¶¶ 11-13 of *Athens County*. Perhaps this omission is understandable because for the Court to depart from *stare decisis* and overturn its *Athens County* precedent would entail a considerable showing, as this Court has detailed in a long line of decisions, including *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 2003-Ohio-5849; and *Ohio Apt. Assn. v. Levin*, 127 Ohio St. 3d 76, 2012-Ohio-4414.

Even if the commercial owner appellees were to have attempted to undertake that showing, however, they would have failed miserably, for the reasons set forth under Proposition of Law No. III of the Commissioner's opening merit brief. Indeed, the appellees' total silence regarding this point could not more plainly reveal that they had nothing favorable to say: the

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<sup>3</sup> The appellees also wrongly assert or imply that the holdings in ¶¶ 11-13 of *Athens County* are somehow predicated on a jurisdictional "standing" basis, but this is not the case; the Court determined that, as a substantive matter, the "public college" exemption in R.C. 5709.07(A)(4) was inapplicable.

criteria for overturning ¶¶ 11-13 of *Athens County*, as set forth in *Galatis* and *Ohio Apt. Assn.*, are completely missing here.

Most fundamentally, the General Assembly, following the Court's issuance of *Athens County* in 2006, has chosen *not* to substantively broaden the scope of any of the specific real property tax exemption statutes directly relating to specific kinds of institutions of higher learning covered by ¶¶ 11-13 of *Athens County*. The General Assembly has left all of these statutes completely in place, with no "corrective" amendments as a result of *Athens County*. Specifically, the General Assembly has not responded to *Athens County* by broadening the scope of any of the specific real property tax exemption statutes directly relating to specific kinds of institutions of higher learning in the following Revised Code Sections: R.C. 3354.17, 3349.17, 3354.15 and 3351.11.<sup>4</sup> These statutes are reproduced at Appx. 29-32.

This legislative blessing of the Court's *Athens County* holdings provides strong support for applying *stare decisis* here. *Maitland v. Ford Motor Co.*, 103 Ohio St. 3d 463, 2004-Ohio-5717, ¶ 26 ("legislative inaction in the face of long-standing interpretation suggests legislative intent to retain the existing law."); *General Electric Co. v. DeCourcy*, 60 Ohio St. 2d 68, 70 (1979).

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<sup>4</sup> As this Court held at ¶ 9 of *Athens County*: "None of these statutes [neither R.C. 3357.14 nor the "similar" exemption statutes for state and municipal colleges and universities, community college districts, and university branch districts under R.C. 3345.17, 3349.17, 3354.15, and 3355.11, respectively] exempt private landowners from paying property taxes on property located near, or even on, a college or university campus."

**III. The Commissioner’s legislative authorization in R.C. 5715.28 to issue informational guidance to other government officers does not authorize or enable the Commissioner to waive R.C. 5715.27(A)’s jurisdictional mandate requiring real property tax exemption applicants to set forth their claimed statutory grounds for exemption in their timely filed exemption applications.**

As detailed in the appellee Commissioner’s opening merit under Proposition of Law No. VI, as a matter of subject matter jurisdiction, Equity Dublin Associates and SHSCC#2 Limited Partnership failed to confer jurisdiction on the Commissioner, and subsequently on the BTA, to consider any claim to exemption under R.C. 5709.07(A)(4). Specifically, as real property tax exemption applicants, the appellee for-profit commercial property owners/lessors failed to set forth any R.C. 5709.07(A)(4) exemption claim in their timely filed real property tax exemption applications, as required on the application form the General Assembly has directed the Commissioner to prescribe pursuant to R.C. 5715.27(A).

In their response brief, the appellee commercial owners do not expressly deny any of the Commissioner’s analysis of R.C. 5715.27(A). They do not challenge the Commissioner’s conclusion that the requirement for real property tax applicants to set forth statutory grounds for exemption, by statute section, in their applications for exemption “runs to the core of procedural efficiency,” and, thus, constitutes a mandatory jurisdictional requirement. *Shinkle v. Ashtabula Cty. Bd. of Revision*, 135 Ohio St. 3d 227, 2013-Ohio-397, ¶¶ 17, 18; *CNG Dev. Co. v. Limbach*, 63 Ohio St. 3d 28, 31-32 (1992); *Akron Std. Div. of Eagle-Picher Industries, Inc. v. Lindley*, 11 Ohio St. 3d 10, 12 (1984).

Notably, the “procedural efficiency” fostered by a real property tax exemption applicant’s identification of the statutory grounds for exemption applies not only to the Tax Commissioner’s administration, but also the procedural efficiency of other public officers. The procedural efficiency of boards of education is, likewise substantially advanced because, pursuant to R.C.

5715.27(B) through (D), boards of education are conferred with statutory rights to participate in the Commissioner's review of real property tax claims relating to realty located within the taxing district. Similarly, the procedural efficiency of county auditors and county treasurers, who are charged with a panoply of duties and powers in the administration of the real property tax law is likewise substantially fostered by this requirement.

Instead, the appellees assert that R.C. 5715.28 provides the Commissioner with the authority to waive R.C. 5715.27(A)'s jurisdictional mandate requiring applicants to set forth the statutory grounds for exemption in their timely filed real property tax exemption applications. See the appellees' merit brief at 20-21. Unfortunately for appellees, however, that statute does nothing of the sort. R.C. 5715.28 neither expressly nor implicitly permits the Commissioner to waive any of the mandatory, jurisdictional requirements of R.C. 5715.27(A), nor to waive any other jurisdictional requirements imposed by the General Assembly as a prerequisite for real property tax exemption applicants to qualify for real property tax exemptions.

As a threshold observation, the appellees' reliance on R.C. 5715.28 "proves too much." The mandatory jurisdictional requirements pertaining to real property tax exemption applications are myriad. These mandatory requirements include not only the requirement for applicants to timely set forth the statutory basis for exemption in timely filed exemption applications, but also to comply with: (1) administrative standing requirements, pursuant to R.C. 5715.27(A); (2) the requirement to timely file the exemption applications themselves, pursuant to R.C. 5715.27(F); and (3) the requirement to attach to the exemption application a certification from the county treasurer that previous tax years' real property taxes and special assessments have been fully paid, pursuant to R.C. 5713.08.

This Court uniformly has held that the Commissioner cannot waive these mandatory requirements. See, e.g., *Cleveland Clinic Found. v. Wilkins*, 103 Ohio St. 3d 382, 2004-Ohio-5468, ¶¶ 1, 15; and *Strongsville Bd. of Edn. v. Wilkins*, 108 Ohio St. 3d 115, 2006-Ohio-248 (both dismissing the taxpayers' real property tax exemption claims because of their failure to meet R.C. 5713.08's certification of payment requirement, despite the fact that the appellee Commissioner had assumed jurisdiction over the exemption applications and issued final determinations thereon); and *Performing Arts School of Metro. Toledo, Inc. v. Wilkins*, 104 Ohio St. 3d 284, 2004-Ohio-6389 (dismissing *sua sponte*, a real property tax exemption application for failure of the applicant to meet R.C. 57315.27(A)'s statutory standing requirements, despite the Commissioner's assumption of jurisdiction over the exemption application and issuance of a final determination thereon).

Rather than silently negate the myriad of jurisdictional requirements imposed on real property tax exemption applicants, R.C. 5715.28 merely allows the Commissioner, as guided by the Attorney General's opinion, to issue written *informational, advisory* guidance to other governmental officers, concerning real property tax matters. R.C. 5715.28 states as follows:

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. Such opinion and the rules, orders, and instructions of the commissioner prescribed and issued in conformity therewith shall be binding upon all officers, who shall observe such rules and obey such orders and instructions, unless the same are reversed, annulled, or modified by a court of competent jurisdiction.

As the full text of R.C. 5715.28 shows, nowhere in that provision is there any waiver of any jurisdictional requirements imposed pursuant to R.C. 5715.27(A) or any waiver of any other jurisdictional requirements. Rather, the subject matter of R.C. 5715.28 is directed to the Tax

Commissioner's authority to inform other government officers regarding the Commissioner's interpretation and application of statutes affecting real property taxes. Indeed, if R.C. 5715.28 were somehow intended by the General Assembly to bind taxpayers to the Commissioner's issuance of guidance under that authority, the General Assembly would have so stated, by including taxpayers in the class of persons bound by the Commissioner's guidance. Instead, only "officers" are bound, and then only until a court of competent jurisdiction holds otherwise.

Notably, R.C. 5715.28 has not been cited in any reported decision of this Court or any other court, and, to the undersigned counsel for the Commissioner's personal knowledge, in no Ohio BTA decisions or other unreported decisions of any tribunal. Yet, as noted, if R.C. 5715.28 truly were to grant the Commissioner the sweeping power to ignore the jurisdictional requirement at issue, as the appellees urge, it likewise would allow the Commissioner to disregard or waive a myriad of other jurisdictional requirements, effectively overturning a myriad of Ohio Supreme Court decisions holding that the Commissioner may not waive mandatory, subject matter jurisdictional requirements.

In addition to their misplaced reliance on R.C. 5715.28, the appellee commercial owners contend that R.C. 5715.27(A)'s jurisdictional requirements are "routinely" waived by the Commissioner, but this claim is both factually and legally erroneous.

*First*, as a factual matter, only in certain instances over the last several years, but not currently, has the Commissioner issued final determinations that include analysis rejecting statutory claims to real property tax exemption that were not set forth in the applicant's exemption application. Such practice has been only of relatively recent origin, and is not currently being used.

*Second*, as both a factual and legal matter, in such instances that the Commissioner has provided guidance on un-raised statutory grounds for real property tax exemption, the Commissioner has neither expressly nor impliedly waived R.C. 5715.27(A)'s jurisdictional requirements. Instead, the Commissioner has provided his conclusions concerning additional potentially applicable real property tax exemptions as an *advisory or informational matter*.

Indeed, in a case involving a community college district, the BTA recently expressly recognized that the Commissioner's final determinations may include subject matter that is purely informational or advisory, but that does not invoke the BTA's jurisdiction to review. *Warren County Montgomery County Community College District v. Testa*, BTA No. 2012-1167 (Nov. 27, 2013), unreported, Appx. 13-16 (hereafter "*Warren Cty. Community College*").

In *Warren Cty. Comm. College*, the BTA granted the Commissioner's motion to dismiss the community college district's notice of appeal because the allegations of error raised by the community college district in that appeal related to a matter over which the Commissioner was not conferred with jurisdiction. Namely, as an advisory matter, the Commissioner's final determination informed the community college district that the county auditor's imposition of a "recoupment charge" relating to the previous owner's claim to a "current agricultural use valuation" or "CAUV" was validly imposed. Additionally, the Commissioner advised that payment of that recoupment charge could be deferred if the community college district filed an affidavit of non-current use of the property. In granting the Commissioner's motion to dismiss, the BTA held the Commissioner's statements concerning the recoupment charge to be "informational in nature," and that the Commissioner lacked subject matter jurisdiction to consider that issue. *Id.* at 3-4.

For these reasons, R.C. 5715.28 does not somehow implicitly trump or negate any of the mandatory jurisdictional requirements applicable to the filing of real property tax exemption applications, including R.C. 5715.27(A)'s mandate requiring real property tax applicants to timely set forth their statutory grounds for exemption in their exemption applications. Indeed, if it were otherwise, this Court's own uniform, well-established precedent holding that the Commissioner may not waive subject matter jurisdictional requirements pertaining to real property tax exemption applications would be *sub silentio* overruled. This result would invalidate, among other recent decisions, *Performing Arts, Cleveland Clinic* and *Strongsville Bd. of Edn.*, *supra*. The General Assembly would not have provided such a hidden means to legislatively overrule this Court's established precedent.

**IV. Under the express prohibition in R.C. 5709.07(B), the R.C. 5709.07(A)(4) exemption is not available to a community college's leasehold estate.**

Even assuming *arguendo* that the R.C. 5709.07(A)(4) "public colleges" exemption is not barred under ¶¶ 11-13 of *Athens County*, and that R.C. 5715.27(A)'s jurisdictional requirement may be waived by the Commissioner, the General Assembly's "leasehold estate" bar in R.C. 5709.07(B) would directly apply to defeat a for-profit commercial owner/lessor's R.C. 5709.07(A)(4) exemption claim.

Since 1852, the public colleges exemption now codified as R.C. 5709.07(A)(4) expressly prohibited exemption for leasehold estates. This prohibiting language immediately followed the language exempting colleges, stating that "[t]his provision shall *not extend to leasehold estates*, of real property held under the authority of any college or university of learning of this state." 50 Ohio Laws 135, 137 (1852), attached as part of the appendix to the Commissioner's opening merit brief.

The current version of this prohibiting language, as first enacted in 1852, is set forth in R.C. 5709.07(B). Division (B) provides 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 (emphasis added).”

The prohibition in Division (B) applies to all of the exemptions set forth in R.C. 5709.07(A), including the exemption for public colleges under Division (A)(4), as well as for “public schoolhouses” in Division (A)(1), the “houses of public worship” exemption in Division (A)(2); and the “church retreat/camping” exemption in Division (A)(3).

Under its plain meaning, R.C. 5709.07(B) excludes exemption under R.C. 5709.07(A)(4) whenever, as here, a private owner *leases realty to* a college or university, and when a private entity *leases realty from* a college or university.

In response to the Commissioners’ and School Boards’ reliance on R.C. 5709.07(B), the appellee commercial owners/lessors rely almost exclusively on this Court’s decision in *Cleveland State Univ. v. Perk*, 26 Ohio St. 2d 1 (1971). Likewise, in seeking oral argument before the full Court, the appellee commercial owners rely heavily on *Cleveland State* as allegedly controlling precedent.

Yet, the appellees’ reliance on *Cleveland State* is misplaced, most obviously because this Court has expressly limited the applicability of *Cleveland State* to only the particular facts and statutory law at issue in that appeal. Specifically, in *Anderson/Maltbie Partnership v. Levin*, 127 Ohio St. 3d 178, 2010-Ohio-4904, the Court specifically limited its holding in *Cleveland State*, stating:

First, *Cleveland State* involved temporary modular structures installed on the university’s land. Both the reasoning and the syllabus law of that case restrict *Cleveland State*’s holding to that particular situation. *Id.* at ¶ 24.

By sharp contrast to *Cleveland State*, the present appeal does not involve re-locatable, temporary modular housing (that, as such, likely fails to meet the definition of “real property”) and it does not involve a state university. Instead, the subject realty is comprised of permanent buildings. Further, the institution of higher learning involved in this case is CSCC, a community college district. Thus, as noted, R.C. 3354.15 is the specific statutory exemption enacted by the General Assembly directly relating to such districts. As a consequence, under ¶¶ 11-13 of *Athens County*, R.C. 3354.15 is the exclusive statutory exemption statute applicable here.

But even more fundamentally, *Cleveland State* does not provide any basis for this Court to ignore R.C. 5709.07(B)’s express bar against the exemption of “leasehold estates” because the *Cleveland State* decision simply did not address the applicability of R.C. 5709.07(B). By contrast, this Court has applied R.C. 5709.07(B) in its post-*Cleveland State* decision in *Case W. Res. Univ. v. Wilkins*, 105 Ohio St. 3d 276, 2005-Ohio-1649, ¶¶ 47-48.

As a more recent Ohio Supreme Court case directly addressing and applying the plain meaning of Division (B), *Case Western Reserve* is the controlling precedent, not *Cleveland State*. In *Case W. Reserve*, the Ohio Supreme Court recognized that R.C. 5709.07(B) defeats exemption for leasehold estates. There, Case Western Reserve University leased property to an entity called the House Corporation and the Court expressly recognized R.C. 5709.07(B), as follows:

Colleges and academies have been granted an extremely broad exemption by R.C. 5709.07. However, the General Assembly placed limits on that exemption by providing that it **does not extend to leasehold estates** or real property held under authority of a college or university.

(Emphasis added.) *Case W. Res.* at ¶48.

Similarly, in *Denison Univ. v. Bd. of Tax Appeals*, 173 Ohio St. 429, 437 (1962) the Court commented on the language now under R.C. 5709.07(B) stating, “[i]t will be noted that

according to the express provisions of [R.C. 5709.07(B)] \*\*\*, the entire section is expressly made inapplicable ‘to leasehold estate or real property held under the authority of a college or university of learning in this state.’” *Denison Univ.*, 173 Ohio St. at 437 (exemption was denied under the charitable use statute because R.C. 5709.07 was not raised in the appellant’s notice of appeal).

Further, the General Assembly’s 2005 amendments to R.C. 5709.07(A)(4) and (B) confirm that R.C. 5709.07(B) is an express statutory bar precluding exemption for property leased to a college or university, subject only to the express exceptions to that prohibition contained therein. Am. Sub. H.B. No. 66, 151 Ohio Laws, Part III, 4398 (effective June 30, 2005), attached to the appendix of the Commissioner’s opening merit brief and to this reply brief at Appx. 17-26. Specifically, the General Assembly amended R.C. 5709.07(B) and R.C. 5709.07(A)(4) to provide only a very limited exception to R.C. 5709.07(B)’s express bar of “leasehold estate” from the R.C. 5709.07(A)(4) exemption.

This *limited* exception to the general operation of R.C. 5709.07(B)’s exemption prohibition for “leasehold estates” applies only to certain land and buildings used by *state universities* but controlled by *non-profit* entities exempt from federal income taxation under Section 501(c)(3) of the Internal Revenue Code. See current R.C. 5709.07(A)(4)(a)-(c) and (B) as amended. This limited exception does not apply here because the appellees are commercial owners/lessors, *not* non-profit entities exempt from federal income tax under I.R.C. Section 501(c)(3) and the lessee is a “community college district,” not a state university.

The appellee commercial owners’ position that the leased realty in this case is exempt, by contrast, would improperly render the General Assembly’s June 30, 2005 amendments to R.C. 5709.07(A)(4) and (B) entirely meaningless. See *Church of God in N. Ohio, Inc. v. Levin*, 124

Ohio St. 3d 36, 2009-Ohio-5939, ¶ 30 (“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), citing R.C. 1.47(B). Under EDA’s and SHSCC’s erroneous view, *all* commercial buildings owned by private landowners but leased to colleges or universities could qualify for exemption under R.C. 5709.07(A)(4), not just those meeting the specific and limited requirements in current R.C. 5709.07(A)(4)(a)-(c) and (B). But here, R.C. 5709.07(B) bars exemption for the subject property under R.C. 5709.07(A)(4) because the subject property is leased to a community college district, CSCC.

As additional guidance, the Legislative Services Commission final analysis of the 2005 amendment to R.C. 5709.07 supports the plain meaning of R.C. 5709.07(B). *Meeks v. Papdopoulos*, 62 Ohio St. 2d 187 (1980). In describing the changes made to R.C. 5709.07(A)(4) and (B) through H.B. No. 66, the LSC analysis states in part:

The act provides that the leasing of space in housing-related facilities is not considered to be an activity with a view to profit; thus, the leases are exempt from real property taxation. ***As noted above, leasehold estate or real property held under the authority of a college or university generally is subject to taxation.*** The act exempts this property from taxation if it satisfies all the conditions described above. \*\*\* Notwithstanding the possibility that buildings and lands may qualify for a real property exemption under another section of the Revised Code \*\*\* specifically applicable to such buildings and land, the above-described buildings and lands are nonetheless entitled to the new exemption.

Ohio Legislative Service Commission Final Bill Analysis of Am Sub. H.B. 66, at 600-601, at [http://www.legislature.state.oh.us/analysis.cfm?ID=126\\_HB\\_66&ACT=As%20Enrolled&hf=analysis126/05-hb66-126.htm](http://www.legislature.state.oh.us/analysis.cfm?ID=126_HB_66&ACT=As%20Enrolled&hf=analysis126/05-hb66-126.htm) (last accessed May 28, 2014), Appx. 35-40.

For all of these reasons, even assuming arguendo that the R.C. 5709.07(A)(4) exemption were not properly barred both jurisdictionally and by application of this Court’s holdings in ¶¶

11-13 of *Athens County*, R.C. 5709.07(B)'s express statutory prohibition against the exemption of "leasehold estates" would bar exemption here.

Further, in the following section of this reply brief we set forth a further factual reason for rejecting the R.C. 5709.07(A)(4) exemption claim brought by the appellees herein: namely, the lease contract between EDA (as commercial owner/lessor) and CSCC (as community college district lessee), imposed the obligation to pay the real property taxes on EDA, not CSCC.

**V. The EDA lease did not impose on CSCC, as lessee, the contractual obligation to pay real property taxes.**

Appellees erroneously claim that, under the respective lease agreements, Columbus State Community College was obligated to pay the real property taxes. See the appellees merit brief at 2. This statement is absolutely false and in direct contravention to the findings of fact made by the Board of Tax Appeals as it relates to the EDA lease. As the BTA determined, and as a review of the lease at issue herein reveals, Columbus State was NOT responsible for payment of real property taxes under the terms of its lease agreement with EDA. Specifically, the BTA determined:

However, the commissioner, in his brief, notes that, although appellants assert in their initial brief that, under both lease agreements, CSCC was contractually obligated to pay real property taxes on the subject properties, only the lease with SCSS imposes such an obligation; the EDA lease only obligates CSCC to pay taxes pertaining to its own fixtures, furniture and other personal property. Commissioner Brief at 3-4. Our review of the leases included in the statutory transcript confirm this representation. (BTA decision p. 5, footnote 5)

As this Court stated in *HealthSouth Corp. v. Testa* (2012), 132 Ohio St. 3d 55, 2012-Ohio-1871, ¶10:

We must affirm the BTA's findings of fact if they are supported by reliable and probative evidence, and we afford deference to the BTA's determination of the

credibility of witnesses and its weighing of the evidence subject only to an abuse-of-discretion review on appeal. R.C. 5717.04; *Olentangy Local Schools Bd. of Edn. v. Delaware Cty. Bd. of Revision*, 125 Ohio St.3d 103, 2010 Ohio 1040, 926 N.E.2d 302, ¶ 15. The function of weighing evidence and determining credibility belongs to the BTA, and therefore our review of that aspect of its findings is, as already noted, highly deferential. See *Highlights for Children, Inc. v. Collins*, 50 Ohio St.2d 186, 187-188, 364 N.E.2d 13 (1977).

In this case, as the record clearly establishes and the BTA appropriately determined, Columbus State Community College was *not* contractually obligated to pay real property taxes on the portion of the property it leased from EDA. Appellees are clearly misstating the facts when they assert otherwise.

In fact, in their merit brief, the appellees fundamentally misread the applicable lease provisions. The provision of the EDA lease that appellees erroneously rely on is the definition of “taxes” as set forth in Section 5.1(h) for purposes of determining adjustments to the Annual Base Rent amount in Sections 5.1 and 5.2. See the appellees’ merit brief at 2-3. The appellees are completely wrong about the operation of the adjustments to the base rent for several reasons.

*First*, there is no showing in the evidentiary record of this case that any real property taxes, in actual fact, had any adverse impact on the annual rental price paid by the lessee, CSCC. The evidentiary record is devoid of any evidence that the “annual base rent” amount was ever modified for any annual period -- for any reason. So, the appellees’ merit brief’s claim that the base rental amounts were, in fact, modified upward by reason of real property tax payments is unsupported factually.

Indeed, quite to the contrary, the appellees waived their right to an evidentiary hearing, and, in briefing thereafter, did not even attempt to suggest that, regarding the EDA lease, the provisions relating to the adjustments to the base rent were relevant.

*Second*, changes to the Annual Base Rent by reason of real property taxes are *contingent*:

only in the event that the annual real property tax amounts *increase* from the previous annual period, and are not offset by net decreases in other operating expenses incurred by the owner/lessor during that annual period, would there be any potential increase in the base rent amount. See, Section 5.2 of the lease “Computation of Adjustment.” If the real property taxes decrease or stay the same, the Annual Base Rent will not be adjusted upward, and, thus, the payment of real property taxes do not alter the annual rent paid by the lessee.

*Third*, even an increase in the amount of real property taxes has only a *limited* potential upward effect on the Annual Base Rent. If there is an increase in the annual amount of real property taxes, only the increase in the amount of taxes would be considered as one of the computational factors in adjusting the Annual Base Rent amount. The previously paid annual amount of taxes would not be factored in to the computation. And, as noted, to the extent that other operating expenses incurred by the owner/lessor decreased, any increase in the annual amount of base rent would be offset.

*Fourth and most fundamentally*, under the rental adjustment provisions of the lease, granting a real property tax exemption in this case *would inure to the benefit of the owner/lessor* -- the lessee (CSCC) would not be able to receive any downward adjustment to the annual base rental amount by reason of any such exemption. This is so because under the terms of the agreement, the base rent amount will never be decreased; it is a “floor” value contractually. See, Section 5.1(b), providing, in part that, “in no event,” shall the rent paid by the lessee be less than the Annual Base Rent.

When, as here, the property is used for private pecuniary gain, there is no present benefit to the general public that justifies shifting the tax burden to other taxpayers. This Court will not allow a public body to act as a “commercial landlord,” and wield the exemption as “a

competitive advantage” over the nonexempt. *Columbus City Sch. Dist. Bd. of Edn. v. Testa*, 2011-Ohio-5534, 130 Ohio St. 3d 344, ¶ 33.

*Finally*, the provisions of the EDA lease relating to the annual base rent and the adjustments thereto, i.e., Sections 5.1 and 5.2, are entirely consistent with the lease provisions that the Board identified in its decision as controlling, namely Sections 19.1 and 19.2. Indeed, not only are Sections 19.1 and 19.2 crystal clear that EDA, as the owner/lessor, is contractually responsible for real property taxes, Sections 5.1 and 5.2 confirm that understanding by providing very limited circumstances under which annual increases in the amount of real property taxes from the initial lease period could have a limited effect on the annual base rental amounts paid by the lessee.

**VI. The Appellees’ assertion in their Proposition of Law No. 4 that they are entitled to real property tax exemption under the “community college district” exemption in R.C. 3354.15 is barred jurisdictionally under *Polaris* because the appellees did not file a protective cross-appeal on this issue, and substantively under the *Athens County* decision.**

In its decision and order below, the BTA rejected the appellee commercial owners/lessors’ claim to any R. C. 3354.15 exemption claim, holding that this Court’s decision in *Athens County* was controlling regarding that claim. See the BTA’s *Decision and Order* at 7-8.

The appellees did not file a cross-claim on that issue, and are, therefore, jurisdictionally barred from invoking this Court’s jurisdiction to review and reverse the BTA’s decision denying the appellees’ R.C. 3354.15 exemption claim. *Polaris Amphitheater Concerts, Inc. v. Delaware Cty. Bd. of Revision*, 118 Ohio St. 3d 330, 2008-Ohio-2454, 889 N.E.2d 103, ¶ 13–15.

As *Polaris* explains, “Our cases do not permit us to rectify an alleged error of the BTA unless that error was set forth in a proper notice of appeal, even if the alleged error aggrieved the

party only because of the success of another party's appeal.” Id. at ¶ 14. Because appellees EDA and SHSCC did not file a protective cross-appeal alleging that the BTA erred by failing to exempt the subject realty under the “community college” exemption in R.C. 3354.15, the appellees failed to invoke the jurisdiction of this Court to consider that issue.

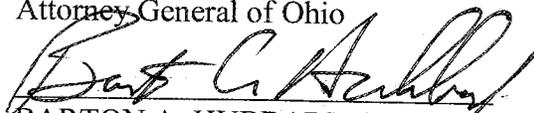
Furthermore, the appellees claim would fail substantively under the express holdings in *Athens County* in which this Court held that private ownership of the realty defeats an R.C. 3354.15 exemption claim. See the detailed discussion of this established principle under Proposition of Law No. I of the Commissioner’s opening merit brief.

## VII. CONCLUSION

For the above reasons and those set forth in the Commissioner’s opening merit brief, the Court should reverse the BTA’s partial grant of exemption pursuant to R.C. 5709.07(A)(4) and uphold the Commissioner’s final determinations denying any exemption claim for the subject realty to the appellee for-profit commercial owners/lessors.

Respectfully submitted,

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**OHIO BOARD OF TAX APPEALS**

Athens County Auditor, )  
 )  
 Appellant, ) CASE NO. 2002-A-1152  
 )  
 vs. ) (REAL PROPERTY TAX  
 ) EXEMPTION)  
 )  
 Thomas M. Zaino, Tax Commissioner )  
 of Ohio and Lee & L'Heureaux ) DECISION AND ORDER  
 Properties, )  
 ) Affirmed on Appeal Oct. 5, 2005 Ohio Supreme Ct.  
 Appellees. )

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Entered March 19, 2004

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

This cause and matter came on to be considered by the Board of Tax Appeals upon a notice of appeal filed herein by the above-named appellant from a final

In the instant matter, appellant appeals from the Tax Commissioner's final determination which states:

"This matter concerns an application for the exemption of real property from taxation. The applicant requests exemption for tax year 2001, and remission of taxes, penalties and interest for tax year 2000, for property used as a dormitory.

"In response to the recommendation of the attorney examiner, dated June 13, 2002, the applicant submitted written objections, which have been considered by this office. On review of the applicant's objections, the Tax Commissioner finds that the applicant is a technical college, and that exemption is more properly considered under the statute specific to such an entity. *Rickenbacker Port Auth. v. Limbach* (1992), 64 Oh[i]o St.3d 628.

"R.C. 3357.14 provides that '[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'. [sic]

"Based upon information available to the Tax Commissioner, the Tax Commissioner finds that the subject property is used by the applicant as a college dormitory and is exempt from taxation under R.C. technical college purpose.

"The Tax Commissioner orders that the real property described above be entered upon the list of property in the county which is exempt from taxation for tax year 2001, and that taxes, penalties and interest for tax year 2000 be remitted.

"The Tax Commissioner further orders that all taxes, penalties and interest paid for these tax years be remitted in the manner provided by R.C. 5715.22." S.T. at 1.

In her notice of appeal from the foregoing decision of the Tax Commissioner, the Athens County Auditor ("Auditor") specified the following errors:

applied for the exemption of one parcel of real property it owns in Nelsonville, Athens County, Ohio, approximately one mile from the Hocking Technical College (“Hocking Tech”) campus. L&L sought its exemption pursuant to the provisions of R.C. 5709.07(A)(4), which exempts from taxation “[P]ublic 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.”

L&L purchased the subject property in January 1998, approximately 20 acres out of a larger 56-acre parcel. Now located on the subject parcel are two residential/dormitory buildings housing Hocking Tech students, the first built in 1998 and the second in 1999. The subject land and buildings were purchased and built and are owned and maintained by L&L. Hocking Tech students are housed in the buildings, subject to two agreements between Hocking Tech and L&L under which Hocking Tech agrees to advertise L&L’s housing and advise students of its availability as well as remit monies paid as rent to Hocking Tech to L&L. The income and expense statements submitted by L&L indicate rental income of approximately \$544,000-\$571,000 for calendar years 2000 through 2002. Exs. 5-7. L&L must reimburse Hocking Tech for any expenses incurred by its housing office’s personnel in administering L&L’s housing. In addition, L&L pays Hocking Tech \$8,000 per year for its services under the agreements, e.g., advertisement, promotion, and management of the housing. The agreements between L&L and Hocking Tech clearly establish that Hocking Tech has no ownership interest in the subject real property. Exs. 1, 3, 4. In

Next, we will consider whether L&L should have been granted the exemption pursuant to the provisions of R.C. 3357.14. That section provides in pertinent part that:

“\*\*\* 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 pursuant to sections 3357.01 to 3357.19, inclusive, of the Revised Code \*\*\*.”

We agree with both the auditor and the Tax Commissioner that L&L’s application for exemption is most properly considered under the foregoing statute. If L&L seeks exemption from taxation on the basis of its relationship with Hocking Tech, then it more appropriately must seek exemption pursuant to R.C. 3357.14. Specifically, the Supreme Court, in *Rickenbacker Port Auth. v. Limbach* (1992), 64 Ohio St.3d 628, stated “\*\*\* we essentially held in *Toledo Retirement [Toledo Business & Professional Women’s Retirement Living, Inc. v. Bd. of Tax Appeals* (1971), 27 Ohio St.2d 255] that a property, to be exempt, must qualify under the criteria of the statute specifically applicable to that property. See, also, *Summit United Methodist Church v. Kinney* (1982), 2 Ohio St.3d 72, \*\*\* (primarily religious institution could not qualify for exemption under statute exempting property belonging to ‘charitable’ institution.)” In the instant matter, we are considering Hocking Tech, which is recognized and designated as a “technical college,” and, as such, the exemption of property belonging to or associated with such college must be considered pursuant to R.C. 3357.14.

L&L argues that the foregoing “statute permits exemption for property that is ‘owned, acquired, or used by’ a technical college.” L&L Brief at 14. We

collecting rents from L&L's housing and forwarding the rents to L&L, providing a supervisor and resident assistants for each of the subject buildings, providing programming services to the student tenants as Hocking Tech deems appropriate, and providing security services to the buildings, if desired. S.T. at 37-43.

L&L claims that :

“[t]he College has the contractual right to manage the property as student residence halls, and in fact it manages the property as student residence halls. L&LP has given up control and has nothing to do with the operation and management of the halls, other than maintenance. (Tr. 39,55). Four witnesses provided over 200 pages of detailed testimony regarding the College's extensive and exclusive use of the property. The College essentially designed the buildings so as to further its educational goals. The College selects the students who reside in the halls; it enters into lease agreements with the students; it collects rent from the students and pursues collection remedies against them. The college essentially determines the rents that will be charged so that the rents are manageable by its students, most of whom receive financial aid. The College selects, hires and pays the staff who are responsible for the daily management and operation of the halls. Many educational programs are planned and conducted for students in the halls by the College in order to further its educational purposes.” L&L Brief at 15.

While there is testimony in support of Hocking Tech's relationship to the subject property, its so-called “use” of the property is not borne out by the written agreements between the parties. While L&L may have chosen not to exercise all of its rights on a consistent basis under its agreements with Hocking Tech, there has been no evidence offered to indicate that it has “given up” its rights under said agreements or amended the agreements in such a manner as to permanently relinquish the rights and

clearly testified that it would like to make a profit as the result of its ownership of the subject property, even though it operated at a loss for several years. H.R. at 52, 63, 67.

This board has considered similar questions before. In *Cleveland Student Housing Association v. Tracy* (May 19, 1995), BTA No. 1993-P-1182, unreported, we affirmed the Tax Commissioner's denial of exemption to a private entity that sought exemption for its residential student housing complex, pursuant to the provisions of R.C. 5709.07(A)(4). Located in close proximity to Case Western Reserve University, the housing was advertised as a student-run cooperative for students from Cleveland State University, Cleveland Institute of Music and Cleveland Institute of Art, as well as Case Western. This board found no "connection" between the subject property and any of the listed institutions sufficient to permit its exemption from taxation. Specifically, we found that there was no legal relationship between the applicant for exemption and the university [Case Western]; "the university has no ownership, leasehold, or other legal relationship, whatsoever, with Appellant or its property." *Id.* at 1. We note that just as in the instant case, the applicant argued the applicability of several cases, namely *Cleveland State University v. Perk* (1971), 26 Ohio St.2d 1, *Denison University v. Board of Tax Appeals* (1965), 2 Ohio St.2d 17, and *Bexley Village v. Limbach* (1990), 68 Ohio App.3d 306. Just as we distinguished said cases in *Cleveland Student Housing*, we must also distinguish them in the instant matter for the same proposition, i.e., in the cited cases, the university in question had an ownership and/or leasehold interest of some kind in the property under consideration; it had the right to possess, control, operate and manage the property and was obligated to pay the real property taxes



will remain 'principally undeveloped,' the owner must file DTE Form 115 with the County Auditor to determine whether the land otherwise qualifies."

In its notice of appeal, appellant does not make any argument with regard to the commissioner's grant of exemption. Instead, appellant specifically states that it appeals the commissioner's finding that the subject parcel is subject to CAUV recoupment. Appellant further stated:

"Appellant argued, and the Tax Commission[er] agreed, that by virtue of the intended use of the property by the Appellant the property was tax exempt pursuant to Ohio Revised Code Section 3354.15 and 5709.07.

"However, Appellant also argued that the subject parcel should be exempt from the recoupment charge for the Current Agricultural Use Valuation (CAUV) previously associated with the property. The Tax Commissioner failed to address this issue and instead claiming[sic] that Appellant should proceed with the filing of a DTE Form 115, which does not exist in the Department of Taxation's records.

"The Tax Commissioner should have determined that Appellant was not required to pay any CAUV recoupment pursuant to Ohio Revised Code Section 5713.34 because Ohio Revised Code Section 3354.15 expressly states that a Community College District shall not be required 'to pay any taxes or assessments upon any real or personal property acquired, owned, used by it pursuant to provisions of Section 3354.01 to 3354.18, inclusive...' (Emphasis in original.)

Upon review of the record before us, the commissioner's motion is well taken. The only issue before the commissioner in the underlying proceedings was the exemption of the subject property, which he granted. Although the final determination also contained language regarding the possibility of recoupment of CAUV benefits

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(4) Public colleges and academies and all buildings connected with them, and all lands connected with public institutions of learning, not used with a view to profit, including those buildings and lands that satisfy all of the following:

(a) The buildings are used for housing for full-time students or housing-related facilities for students, faculty, or employees of a state university, or for other purposes related to the state university's educational purpose, and the lands are underneath the buildings or are used for common space, walkways, and green spaces for the state university's students, faculty, or employees. As used in this division, "housing-related facilities" includes both parking facilities related to the buildings and common buildings made available to students, faculty, or employees of a state university. The leasing of space in housing-related facilities shall not be considered an activity with a view to profit for purposes of division (A)(4) of this section.

(b) The buildings and lands are supervised or otherwise under the control, directly or indirectly, of an organization that is exempt from federal income taxation under section 501(c)(3) of the Internal Revenue Code of 1986, 100 Stat. 2085, 26 U.S.C. 1, as amended, and the state university has entered into a qualifying joint use agreement with the organization that entitles the students, faculty, or employees of the state university to use the lands or buildings;

(c) The state university has agreed, under the terms of the qualifying joint use agreement with the organization described in division (A)(4)(b) of this section, that the state university, to the extent applicable under the agreement, will make payments to the organization in amounts sufficient to maintain agreed-upon debt service coverage ratios on bonds related to the lands or buildings.

(B) This section shall not extend to leasehold estates or real property held under the authority of a college or university of learning in this state; but leaseholds, or other estates or property, real or personal, the rents, issues, profits, and income of which is given to a municipal corporation, school district, or subdistrict in this state exclusively for the use, endowment, or support of schools for the free education of youth without charge shall be exempt from taxation as long as such property, or the rents, issues, profits, or income of the property is used and exclusively applied for the support of free education by such municipal corporation, district, or subdistrict. Division (B) of this section shall not apply with respect to buildings and lands that satisfy all of the requirements specified in divisions (A)(4)(a) to (c) of this section.

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

(C)(1) If a home for the aged described in division (B)(1) of section 5701.13 of the Revised Code is operated in conjunction with or at the same site as independent living facilities, the exemption granted in division (B) of this section shall include kitchen, dining room, clinic, entry ways, maintenance and storage areas, and land necessary for access commonly used by both residents of the home for the aged and residents of the independent living facilities. Other facilities commonly used by both residents of the home for the aged and residents of independent living units shall be exempt from taxation only if the other facilities are used primarily by the residents of the home for the aged. Vacant land currently unused by the home, and independent living facilities and the lands connected with them are not exempt from taxation. Except as provided in division (A)(1) of section 5709.121 of the Revised Code, property of a home leased for nonresidential purposes is not exempt from taxation.

(2) Independent living facilities are exempt from taxation if they are operated in conjunction with or at the same site as a home for the aged described in division (B)(2) of section 5701.13 of the Revised Code; operated by a corporation, association, or trust described in division (B)(1)(b) of that section; operated exclusively for the benefit of members of the corporation, association, or trust who are retired, aged, or infirm; and provided to those members without charge in consideration of their service, without compensation, to a charitable, religious, fraternal, or educational institution. For the purposes of division (C)(2) of this section, "compensation" does not include furnishing room and board, clothing.

levied if such property had not been exempt from taxation.

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

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

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

Upon transferring the title to another person, the organization shall file with the county auditor an affidavit affirming that the title was transferred to a qualified low-income family or that the title was not transferred to a qualified low-income family, as the case may be; if the title was transferred to a qualified low-income family, the affidavit shall identify the transferee by name. If the organization transfers title to the property to anyone other than a qualified low-income family, the exemption, if it has not previously expired, shall terminate, and the property shall be restored to the tax list for the year following the year of the transfer and a charge shall be levied against the property in an amount equal to the amount of additional taxes

for lease or resale to others.

(B)(1) Property described in division (A)(1)(a) of this section shall continue to be considered as used exclusively for charitable or public purposes even if the property is conveyed through one conveyance or a series of conveyances to an entity that is not a charitable or educational institution and is not the state or a political subdivision, provided that all of the following conditions apply with respect to that property:

(a) The property has been listed as exempt on the county auditor's tax list and duplicate for the county in which it is located for the ten tax years immediately preceding the year in which the property is conveyed through one conveyance or a series of conveyances;

(b) The owner to which the property is conveyed through one conveyance or a series of conveyances leases the property through one lease or a series of leases to the entity that owned or occupied the property for the ten tax years immediately preceding the year in which the property is conveyed or an affiliate of such prior owner or occupant;

(c) The property includes improvements that are at least fifty years old;

(d) The property is being renovated in connection with a claim for historic preservation tax credits available under federal law;

(e) The property continues to be used for the purposes described in division (A)(1)(a) of this section after its conveyance; and

(f) The property is certified by the United States secretary of the interior as a "certified historic structure" or certified as part of a certified historic structure.

(2) Notwithstanding section 5715.27 of the Revised Code, an application for exemption from taxation of property described in division (B)(1) of this section may be filed by either the owner of the property or its occupant.

Sec. 5709.40. (A) As used in this section:

(1) "Blighted area" and "impacted city" have the same meanings as in section 1728.01 of the Revised Code.

(2) "Business day" means a day of the week excluding Saturday, Sunday, and a legal holiday as defined under section 1.14 of the Revised Code.

(3) "Housing renovation" means a project carried out for residential purposes.

(4) "Improvement" means the increase in the assessed value of any real property that would first appear on the tax list and duplicate of real and public utility property after the effective date of an ordinance adopted under this section were it not for the exemption granted by that ordinance.

## **5715.27 Application for exemption - rights of board of education - complaint against exemption.**

(A)

(1) Except as provided in division (A)(2) of this section and in section 3735.67 of the Revised Code, the 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.

(2) If the property that is the subject of the application for exemption is any of the following, the application shall be filed with the county auditor of the county in which the property is listed for taxation:

(a) A public road or highway;

(b) Property belonging to the federal government of the United States;

(c) Additions or other improvements to an existing building or structure that belongs to the state or a political subdivision, as defined in section 5713.081 of the Revised Code, and that is exempted from taxation as property used exclusively for a public purpose;

(d) Property of the boards of trustees and of the housing commissions of the state universities, the northeastern Ohio universities college of medicine, and of the state to be exempted under section 3345.17 of the Revised Code.

(B) The board of education of any school district may request the tax commissioner or county auditor to provide it with notification of applications for exemption from taxation for property located within that district. If so requested, the commissioner or auditor shall send to the board on a monthly basis reports that contain sufficient information to enable the board to identify each property that is the subject of an exemption application, including, but not limited to, the name of the property owner or applicant, the address of the property, and the auditor's parcel number. The commissioner or auditor shall mail the reports by the fifteenth day of the month following the end of the month in which the commissioner or auditor receives the applications for exemption.

(C) A board of education that has requested notification under division (B) of this section may, with respect to any application for exemption of property located in the district and included in the commissioner's or auditor's most recent report provided under that division, file a statement with the commissioner or auditor and with the applicant indicating its intent to submit evidence and participate in any hearing on the application. The statements shall be filed prior to the first day of the third month following the end of the month in which that application was docketed by the commissioner or auditor. A statement filed in compliance with this division entitles the district to submit evidence and to participate in any hearing on the property and makes the district a party for purposes of sections 5717.02 to 5717.04 of the Revised Code in any appeal of the commissioner's or auditor's decision to the board of tax appeals.

(D) The commissioner or auditor shall not hold a hearing on or grant an application for exemption for

### **3349.17 Exemption from taxation.**

All property, personal, real, or mixed, located within the county in which a university, college, or other educational institution of any municipal corporation is located, given to or received by the board of directors of such a municipal university, college, or other educational institution, the rents, issues, profits, and income of which are used exclusively for the use, endowment, or support of such institution, shall be exempted from taxation so long as such property or the rents, issues, profits, or income thereof is used for and exclusively applied to the endowment or support of such institution.

Effective Date: 10-01-1953

### **3345.17 Property exempt from taxation.**

All property, personal, real, or mixed of the boards of trustees and of the housing commissions of the state universities, the northeast Ohio medical university, and of the state held for the use and benefit of any such institution, which is used for the support of such institution, is exempt from taxation so long as such property is used for the support of such university .

Amended by 129th General Assembly File No.18, HB 139, §1, eff. 4/29/2011.

Effective Date: 11-23-1973; 05-06-2005; 07-01-2006

## **5713.08 County auditor to make list of exempted property - contents of list - duties of tax commissioner.**

(A) The county auditor shall make a list of all real and personal property in the auditor's county that is exempted from taxation. Such list shall show the name of the owner, the value of the property exempted, and a statement in brief form of the ground on which such exemption has been granted. It shall be corrected annually by adding thereto the items of property which have been exempted during the year, and by striking therefrom the items which in the opinion of the auditor have lost their right of exemption and which have been reentered on the taxable list, but no property shall be struck from the exempt property list solely because the property has been conveyed to a single member limited liability company with a nonprofit purpose from its nonprofit member or because the property has been conveyed by a single member limited liability company with a nonprofit purpose to its nonprofit member. No additions shall be made to such exempt lists and no additional items of property shall be exempted from taxation without the consent of the tax commissioner as is provided for in section 5715.27 of the Revised Code or without the consent of the housing officer under section 3735.67 of the Revised Code, except for property exempted by the auditor under that section or qualifying agricultural real property, as defined in section 5709.28 of the Revised Code, that is enrolled in an agriculture security area that is exempt under that section. The commissioner may revise at any time the list in every county so that no property is improperly or illegally exempted from taxation. The auditor shall follow the orders of the commissioner given under this section. An abstract of such list shall be filed annually with the commissioner, on a form approved by the commissioner, and a copy thereof shall be kept on file in the office of each auditor for public inspection.

An application for exemption of property shall include a certificate executed by the county treasurer certifying one of the following:

(1) That all taxes, interest, and penalties levied and assessed against the property sought to be exempted have been paid in full for all of the tax years preceding the tax year for which the application for exemption is filed, except for such taxes, interest, and penalties that may be remitted under division (C) of this section;

(2) That the applicant has entered into a valid delinquent tax contract with the county treasurer pursuant to division (A) of section 323.31 of the Revised Code to pay all of the delinquent taxes, interest, and penalties charged against the property, except for such taxes, interest, and penalties that may be remitted under division (C) of this section. If the auditor receives notice under section 323.31 of the Revised Code that such a written delinquent tax contract has become void, the auditor shall strike such property from the list of exempted property and reenter such property on the taxable list. If property is removed from the exempt list because a written delinquent tax contract has become void, current taxes shall first be extended against that property on the general tax list and duplicate of real and public utility property for the tax year in which the auditor receives the notice required by division (A) of section 323.31 of the Revised Code that the delinquent tax contract has become void or, if that notice is not timely made, for the tax year in which falls the latest date by which the treasurer is required by such section to give such notice. A county auditor shall not remove from any tax list and duplicate the amount of any unpaid delinquent taxes, assessments, interest, or penalties owed on property that is placed on the exempt list pursuant to this division.

(3) That a tax certificate has been issued under section 5721.32 or 5721.33 of the Revised Code with respect to the property that is the subject of the application, and the tax certificate is outstanding.

Appendix Page 33



*Final Analysis*

*Jennifer A. Parker,  
Ralph D. Clark,  
and other LSC staff*

*Legislative Service Commission*

**Am. Sub. H.B. 66\***  
126th General Assembly  
(As Passed by the General Assembly)

**Reps. Calvert, Flowers, Martin, McGregor, Peterson, Schlichter, Webster, Aslanides, Blasdel, Coley, Collier, Combs, DeWine, Dolan, C. Evans, D. Evans, Hagan, Kearns, Kilbane, Law, T. Patton, Seaver, Setzer, Wagoner, White, Widowfield, Husted**

**Sens. Amstutz, Goodman, Clancy, Carey, Jacobson, Harris**

**Effective date: June 30, 2005; certain provisions effective September 29, 2005; certain provisions effective on other dates; certain items vetoed**

This final analysis is arranged by state agency, beginning with the Adjutant General and continuing in alphabetical order. Items that do not directly involve an agency are located under the agency that has regulatory authority over the item or that otherwise deals with the subject matter of the item. The analysis includes a Local Government category and a Retirement Systems category. It concludes with a Miscellaneous category.

Within each category, a summary of the items appears first (in the form of dot points), followed by a discussion of their content and operation.

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*Real property tax exemption for certain buildings and lands used by a state university*

(R.C. 5709.07; Section 553.02.03)

Continuing law provides that 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, are exempt from real property taxation, but leasehold estates or real property held under the authority of a college or university of learning do not qualify for the exemption.

The act creates a real property tax exemption for buildings and lands that satisfy all of the following:

(1) The buildings are used for housing for full-time students or for housing-related facilities for students, faculty, or employees of a state university, or for other purposes related to the state university's educational purpose, and the lands are underneath the buildings or are used for common space, walkways, and green spaces for students, faculty, or employees of the state university. "Housing-related facilities" includes both parking facilities related to the buildings and common buildings made available to students, faculty, or employees of a state university.

(2) The buildings and land are supervised or otherwise under the control, directly or indirectly, of a 501(c)(3) charitable organization<sup>266</sup> with which the state university has entered into a "qualifying joint use agreement" that entitles the university's students, faculty, or employees to use the lands or buildings. A "qualifying joint use agreement" is an agreement that satisfies all of the following: (a) the agreement was entered into before June 30, 2004, (b) the agreement is between a state university and a 501(c)(3) charitable organization, and (c) the state university that is party to the agreement reported to the Board of Regents that the university maintained a headcount of at least 25,000 students on its main campus during the academic school year that began in calendar year 2003 and ended in calendar year 2004.<sup>267</sup>

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<sup>266</sup> *Corporations, community chests, funds, or foundations, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, to foster national or international amateur sports competition, or for the prevention of cruelty to children or animals.*

<sup>267</sup> *Under continuing law, every state university and college that receives state aid is required to file annual reports with the Board of Regents (R.C. 3345.05 (not in the act)).*



**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Appellant Tax Commissioner's Reply Brief were served upon Matthew Anderson, Luper, Neidenthal & Logan, 50 W. Broad Street, Suite 1200, Columbus, Ohio 43215, counsel for Appellants, and Kimberly Allison, Rich & Gillis Law Group, LLC, 6400 Riverside Drive, Suite D, Dublin, Ohio 43017, counsel for Appellee Boards of Education, by U.S. regular mail this 21st day of July, 2014.

A handwritten signature in black ink, appearing to read "Barton Hubbard", is written over a horizontal line.

Barton Hubbard  
Assistant Attorney General