ORIGINAL

IN THE SUPREME COURT OF OHIO

CITY OF CINCINNATI,	:	Case No. 2014-0531
	:	
Appellee,	:	On appeal from the
	:	Ohio Board of Tax Appeals
v.	:	
	:	BTA Case Nos. 2011-K-143 through -148
JOSEPH W. TESTA,	:	
TAX COMMISSIONER OF OHIO,	:	
	:	
Appellant.	:	
	:	

MERIT BRIEF OF APPELLEE, THE CITY OF CINCINNATI

TERRANCE A. NESTOR (0065840)
Interim City Solicitor

MARION E. HAYNES, III* (0080671)
**Counsel of Record*
Chief Counsel
CITY OF CINCINNATI
801 Plum Street, Room 214
Cincinnati, Ohio 45202
Telephone: (513) 352-4894
Facsimile: (513) 352-1515
marion.haynes@cincinnati-oh.gov

Attorneys for Appellee,
City of Cincinnati

MIKE DEWINE (0009181)
Ohio Attorney General

DANIEL W. FAUSEY* (0079928)
**Counsel of Record*
Assistant Attorney General
STATE OF OHIO
30 E. Broad Street, 25th Floor
Columbus, Ohio 43215
Telephone: (614) 995-9032
Facsimile: (866) 513-0356
daniel.fausey@ohioattorneygeneral.gov

Attorneys for Appellant,
Joseph W. Testa, Tax Commissioner of Ohio

WILLIAM M. BRISTOL (0074005)
Gary F. Franke Co., LPA
120 E. Fourth Street, Suite 1040
Cincinnati, Ohio 45202
Telephone: (513) 564-9222
Facsimile: (513) 569-9990
wmb@garyfrankelaw.com

Counsel for Appellant, Paul Macke

FILED
SEP 09 2014
CLERK OF COURT
SUPREME COURT OF OHIO

RECEIVED
SEP 09 2014
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

Page

I. STATEMENT OF THE CASE 1

II. STATEMENT OF THE FACTS 2

III. STANDARD OF REVIEW 6

IV. ARGUMENT 8

PROPOSITION OF LAW NO. I:

Tax exemption statutes should not be construed so strictly as to vitiate their intended purpose 8

PROPOSITION OF LAW NO. II:

A for-profit entity's operation of public property exclusively for a public purpose meets R.C. 5709.08's requirement that public property exempt from real property taxation be "used exclusively for a public purpose." 11

A. **Golf Management is a for-profit business that operates the City's golf course for the exclusive benefit of the public** 13

1. **Golf Management operates the City's golf courses under the direction and control of the Cincinnati Recreating Commission** 15

2. **The City's golf courses do not compete with private golf courses** 17

3. **The City's golf courses are not leased to Golf Management** 22

4. **The tax exempt status of the City's golf courses directly benefits the public** 24

B. **The nature of the City's relationship with Golf Management is not a controlling factor in the determination whether the City's golf courses are operated for the exclusive benefit of the public** 26

PROPOSITION OF LAW NO. III:

The tax exempt status of public property used exclusively for a public purpose is not destroyed when a for-profit entity operates public property and generates revenues or profits that are incidental to its operation of the public property 28

PROPOSITION OF LAW NO. IV:

A for-profit licensee with non-exclusive possession and control of public property is not the "functional equivalent of a lessee" whose non-exclusive possession and control causes the public property to lose its status as "public property used exclusively for a public purpose" pursuant to R.C. 5709.08 32

PROPOSITION OF LAW NO. V:

Public-private partnerships are a tool the state and its political subdivisions may employ to manage and operate public property without violating R.C. 5709.08's requirement that the property be used exclusively for a public purpose 35

V. CONCLUSION 39

VI. CERTIFICATE OF SERVICE 40

TABLE OF AUTHORITIES

Page

Allion v. City of Toledo, 99 Ohio St. 416, 124 N.E. 237 (1919).....37

Benjamin Rose Inst. v. Myers, 92 Ohio St. 252, 268, 110 N.E. 924 (1915) 9

Board of Park Comm'rs of City of Troy v. Board of Tax Appeals, 160 Ohio St. 451, 453, 116 N.E.2d 725 (1954).....10, 11, 13, 15, 18, 22

Brenner v. Spiegle, 116 Ohio St. 631, 157 N.E. 491 (1927).....32

Buckeye Power, Inc. v. Kosydar, 35 Ohio St.2d 137, 298 N.E.2d 610 (1973).....7

Carney v. Cleveland City School Dist. Public Library, 169 Ohio St. 65, 157 N.E.2d 311 (1959).....9

Carney v. Cleveland, 173 Ohio St. 56, 180 N.E.2d 14 (1962) 10, 11, 15, 22, 23, 34, 35

Carney v. Ohio Turnpike Comm., 167 Ohio St. 273, 147 N.E.2d 857 (1958) 29

Cincinnati Community Kollel v. Testa, 135 Ohio St.3d 219, 2013-Ohio-396, 985 N.E.2d 1236.....7

Cincinnati Golf Mgmt. v. Testa, 132 Ohio St.3d 299, 2012-Ohio-2846, 971 N.E.2d 929 .....27, 36

City of Cleveland v. Carney, 172 Ohio St. 189, 174 N.E.2d 254 (1961).....29

City of Parma Heights v. Wilkins, 105 Ohio St.3d 463, 2005-Ohio-2818, 828 N.E.2d 988 .....7, 10, 12, 13, 15, 22, 23, 24, 34, 35

Cleveland v. Board of Tax Appeals, 153 Ohio St. 97, 91 N.E.2d 480 (1950) 17

Cleveland v. Perk, 29 Ohio St.2d 161, 280 N.E.2d 653 (1972).....10, 18, 23, 34, 35

Columbus City School Dist. Bd. of Edn. v. Testa, 130 Ohio St.3d 344, 2011-Ohio-5534, 958 N.E.2d 557 7

Columbus City School Dist. Bd. of Edn. v. Zaino, 90 Ohio St.3d 496, 739 N.E.2d 783 (2001).....6

Columbus v. County of Delaware, 164 Ohio St. 605, 132 N.E.2d 747 (1956).....10, 18

Gahanna-Jefferson Local School Dist. Bd. of Edn. v. Zaino, 93 Ohio St.3d 231, 754

N.E.2d 789 (2001).....7

Graf v. Warren, 10 Ohio St.2d 32, 225 N.E.2d 262 (1967).....10

Hercules Galion Products, Inc. v. Bowers, 171 Ohio St. 176, 168 N.E.2d 404 (1960).....6

Highlights for Children, Inc. v. Collins, 50 Ohio St.2d 186, 364 N.E.2d 13 (1977).....7

In re Estate of Morgan v. Bowers, 173 Ohio St. 89, 180 N.E.2d 146 (1962).....8

Muskingum Watershed Conservancy Dist. v. Walton, 21 Ohio St.2d 240, 257 N.E.2d 392 (1970).....10, 11

Nat'l Distillers & Chem. Corp. v. Limbach, 71 Ohio St.3d 214, 643 N.E.2d 101 (1994).....7

Pitts v. Cincinnati Metropolitan Housing Authority, 160 Ohio St. 129, 113 N.E.2d 869 (1953).....33

Quigg v. Mullins, 6th Dist. Lucas No. L89314, 1991 Ohio App. LEXIS 1756, *12 (Apr. 19, 1991) 33

Ripple v. Mahoning Nat. Bank, 143 Ohio St. 614, 56 N.E.2d 289 (1944).....32, 33

Southern-Western City Schools Bd. of Edn. v. Kinney, 24 Ohio St.3d 184, 494 N.E.2d 1109 (1986) 10, 13, 28, 29, 30

State ex rel. Dispatch Printing Co. v. City of Columbus, 90 Ohio St.3d 39, 734 N.E.2d 797 (2000).....8

State Teachers Retirement Bd. v. Kinney, 68 Ohio St.2d 195, 429 N.E.2d 1069 (1981) 14

Stds. Testing Labs., Inc. v. Zaino, 100 Ohio St.3d 240, 2003-Ohio-5804, 797 N.E.2d 1278....7

Summerville v. City of Forest Park, 128 Ohio St.3d 221, 2010-Ohio-6280, 943 N.E.2d 522.....8

Toledo v. Jenkins, 143 Ohio St. 141, 54 N.E.2d 656 (1944) 10, 11, 28

White Cross Hospital Ass'n v. Board of Tax Appeals, 38 Ohio St.2d 199, 311 N.E.2d 862 (1974).....9

Whitehouse v. Tracy, 72 Ohio St.3d 178, 648 N.E.2d 503 (1995) 9, 13, 15, 22, 28

Witt Co. v. Hamilton Cty. Bd. of Revision, 61 Ohio St.3d 155, 573 N.E.2d 661 (1991).....7

Y.M.C.A. v. Lancaster County, 106 Neb. 105, 182 N.W. 593 (1921) 9

Zangerle v. State, 120 Ohio St. 139, 165 N.E. 709, 711 (1929) 8

ADDITIONAL AUTHORITIES

Cincinnati Administrative Code, Article XIV, Section 3 ..... 2, 38

Cincinnati Charter, Article VII, Section 14 ..... 2, 38

Cincinnati Charter, Article VIII, Section 3 ..... 2, 38

STATUTES

Page

R.C. 1.47 8

R.C. 1.49 8

R.C. 5301.01 34

R.C. 5709.08 ..... 1, 8, 9, 10, 14, 24, 36, 37

R.C. 5717.04 .....

R.C. 5739.02(B)(1) 36

I. STATEMENT OF THE CASE

The Board of Tax Appeals ("BTA") properly reversed six decisions by the Ohio Tax Commissioner ("Tax Commissioner") to restore public golf courses owned by the City of Cincinnati ("City") to the tax list. In reaching its decision, the BTA correctly concluded that the City's golf courses qualify for exemption from real property taxation under the public purpose exception in R.C. 5709.08.

Appellant Tax Commissioner and Appellant Paul Macke (collectively "Appellants") argue that the BTA's decision should not be sustained because the City's golf courses are managed by Cincinnati Golf Management, Inc. ("Golf Management"), a for-profit entity that specializes in golf course management. According to the Appellants, public-private partnerships of this nature offend R.C. 5709.08's public purpose exception. They argue that for-profit management of public property violates R.C. 5709.08's requirement that public property be used exclusively for a public purpose.

The BTA rejected the Appellants' argument, and the Court must not adopt their narrow reasoning. As did the BTA, it is imperative that the Court distinguish between private property managers employed by government to achieve purely public goals and private actors permitted to occupy public property to engage in commercial enterprise for their own pecuniary gain.

The Court must also recognize that the Appellants advocate a destructive precedent that imperils public-private partnerships in Ohio and threatens government's ability to realize efficiencies by leveraging private sector expertise. Adoption of the Appellants' position would have the perverse result of diminishing the government's ability to provide better government services at lower costs. As applied to the City's golf courses, loss of the real estate tax exemption would necessarily lead to fewer courses of inferior quality, higher greens fees, and

increased taxes. Such an outcome would do nothing to protect the interests of the pubic as it would only limit the public's access to the game of golf.

Upon review of the administrative record, the law, and the BTA's decision, the City is confident that this Court will find that the BTA acted appropriately in recognizing the tax exempt status of the City's golf courses. The Court will also find that the City's position, and not the Appellants' position, best advances the interests of the public.

II. STATEMENT OF THE FACTS

The City owns seven public golf courses. (BTA Hearing Transcript ("Hr. Tr.") at 22-23.) The golf courses' operation is overseen by the Cincinnati Recreation Commission ("CRC"). (Hr. Tr. at 20-21.) The City's Charter grants the CRC oversight of all public funds levied for recreational purposes, and the CRC directs the use of these funds to ensure that the general public has access to recreational facilities and programs throughout Cincinnati including its golf courses and golf-related programs. Cincinnati Charter, Article VII, Section 14 and Article VIII, Section 3; Cincinnati Administrative Code, Article XIV, Section 3.

In the mid 1990s, the City's mayor and council considered ways in which the City might realize efficiencies in governmental function through partnerships with the private sector. (Hr. Tr. at 52-53.) This exercise led the City to consider private management of its golf courses. (Hr. Tr. at 53.) And, in 1998, the City contracted with a private management company for the management of its golf courses. (BTA Hearing Exhibit ("Hr. Ex.") A at 36.)

When the City's contract with its initial golf course manager expired in 2003, the City engaged Golf Management to manage its golf courses. (Hr. Tr. at 44; Hr. Ex. D at 594-633.) A

second contract in 2011 extended their relationship.[1] (Hr. Ex. D at 646-690.) Under the agreement, Golf Management provides the City with "normal supervisory, management and operational services associated with public golf courses in a municipal setting." (Hr. Ex. D at 661.) The services include staffing the City's golf courses; overseeing the operation of the golf courses' clubhouses, practice facilities, and golf programs; providing grounds maintenance; and performing certain back office functions. (Hr. Ex. D at 661-662.)

Golf Management's operations are tightly managed by the CRC. The CRC annually approves a business plan and budget for the City's golf courses, oversees the marketing of the golf courses, and retains the exclusive authority to approve the fee and charge structure for the golf courses with the exception of clubhouse merchandise and concessions. (Hr. Tr. at 36, 154-157; Hr. Ex. D at 667-668, 672, 676.) Golf Management must also abide by minimum standards for the golf courses' operation and maintenance. (Hr. Ex. D at 672-685.) To ensure that Golf Management abides by the CRC's standards, CRC representatives meet with Golf Management monthly to review performance issues, and the CRC has unlimited access to enter and inspect its golf courses at any time. (Hr. Tr. at 24, 36, 125, 209; Hr. Ex. D at 661.)

The CRC additionally retains the power of the purse. It requires Golf Management to deposit all funds received in connection with the golf courses' operation (excluding clubhouse merchandise and concession sales) in a CRC-controlled account, and Golf Management is only reimbursed for expenses approved by the CRC. (Hr. Tr. at 26, 163; Hr. Ex. D at 652, 669.)

---

[1] Golf Management managed all seven of the City's courses from 2003-2011. (Hr. Ex. D at 594-633.) The City was forced to close one of its courses as a result of the Tax Commissioner's decisions to return the City's golf courses to the tax list, and Golf Management's management obligations were reduced accordingly in its 2011 contract. (Hr. Tr. at 22-23; Hr. Ex. D at 646-690)

In return for its services, the City pays Golf Management a fixed management fee and an incentive fee for achieving desired revenue levels. (Hr. Tr. 164-165; Hr. Ex. D at 650-651.) The incentive fee has never been paid, however, because the City's golf courses have never met the revenue levels that trigger the additional payment. (Hr. Tr. at 165.) Golf Management is also permitted to retain revenues from the operation of clubhouse concessions and merchandise sales provided that it remits 20 percent and 10 percent of the revenues derived from each respective operation. (Hr. Ex. D at 650.)

The public and the City have realized many benefits from the City's relationship with Golf Management. Golf Management brings to bear extensive golf course management expertise that ensures the City's golf courses are well maintained and operated at a high level of efficiency. (Hr. Tr. at 192-193.) Furthermore, the City's relationship with Golf Management has in no way diminished the public's access to the game of golf. The City's golf courses still offer public programs that are not available in the private sector, and they still operate at times when the private sector would not operate. (Hr. Tr. at 153, 156.)

But the City's success in achieving its public mission has raised the ire of some private golf course operators who view the City's golf courses as competition. In particular, the City's success led Appellant Paul Macke, a local golf course owner, to file a complaint with the Tax Commissioner alleging that the tax exempt status of the City's golf courses provides the City with an unfair competitive advantage. (Hr. Tr. at 227-228; *see* BTA Abstract of Docket ("Ad."), Tax Commissioner's Final Determinations attached as Exhibits to Notices of Appeal filed by Appellant with the Ohio Board of Tax Appeals ("Tax Commissioner's Final Determinations").) Unfortunately, the Tax Commissioner agreed with Mr. Macke's arguments over the City's objection. (*See* Tax Commissioner's Final Determinations.)

The Tax Commissioner's decisions to return the City's golf courses to the tax list rested upon his conclusions that the City permits Golf Management to operate its golf courses with a "view to maximizing revenue" for the City and Golf Management, and that the City allows Golf Management operate its golf courses in competition with other private golf courses. (Tax Commissioner's Final Determinations at 4-5, 8.) He further concluded that Golf Management's profit motive and status as an independent contractor causes the City's golf courses to be ineligible for exemption. (Tax Commissioner's Final Determinations at 5-8.)

The City appealed the Tax Commissioner's decisions to the BTA. (Ad., Notices of Appeal filed by Appellant with the Ohio Board of Tax Appeals.) It argued that the Tax Commissioner erred in concluding that public property should lose its tax exempt status simply because a for-profit manager assists in the operation of the public property.

The BTA ordered an evidentiary hearing before an attorney examiner, and the examiner heard the testimony of Christopher Bigham, director of the Cincinnati Recreation Commission; Steve Pacella, Superintendent of Administrative Services for the Cincinnati Recreation Commission; Joseph Livingood, Senior Vice President for Billy Casper Golf, Inc.; and Appellant Paul Macke. (*See* Hr. Tr.) The parties were also permitted to make opening and closing arguments, introduce evidence, and conduct cross-examination. (*See* Hr. Tr.)

On the weight of the evidence in the administrative record and the evidence presented to the BTA's attorney examiner, the BTA concluded that City's golf courses qualify for R.C. 5709.08's tax exemption. (*See* Ad., BTA Decision and Order issued with the Ohio Board of Tax Appeals ("BTA Decision").)

The BTA determined that the City's golf courses are operated exclusively for a public purpose. (BTA Decision at 6.) It placed much weight on its factual findings that the City

exercises significant control over its golf courses; that the City does not lease its golf courses to Golf Management; and that the public benefits from the exemption of the City's golf courses. (BTA Decision at 4-6.) The BTA paid no credence to the Appellants' contentions that the golf courses are operated in competition with private golf courses and that Golf Management's status as an independent contractor is significant. (*See* BTA Decision.) It further concluded that incidental profits earned from Golf Management's operation of the golf courses' concession stands and merchandise sales are incidental to the operation of the golf courses and do not destroy exemption. (BTA Decision at 5.)

The Appellants have appealed the BTA's decision to this Court seeking an order to overturn it. The City offers the following argument in support of upholding the BTA's decision.

III. STANDARD OF REVIEW

It is important for the Court to consider the appropriate standard for reviewing the BTA's decision. The Court is not a "super" board of tax appeals with unrestrained ability to reverse the BTA. *Hercules Galion Products, Inc. v. Bowers*, 171 Ohio St. 176, 168 N.E.2d 404 (1960). Rather, it reviews the BTA's decisions to determine whether they are "reasonable and lawful." R.C. 5717.04; *Columbus City School. Dist. Bd. of Edn. v. Zaino*, 90 Ohio St.3d 496, 497, 739 N.E.2d 783 (2001).

The Appellants seemingly misunderstand the standard of review and the procedural posture of this matter. They argue that it is the City's burden to demonstrate its entitlement to exemption. (Appellant Tax Commissioner's Brief ("Ap. Br.") at 10.) But the City has already satisfied its burden as the BTA concluded in its decision.

The instant appeal is the Appellants' appeal, and the burden is on them. The Court has held that it will not substitute its judgment for that of the BTA on factual issues unless the BTA's

decision is unreasonable or unlawful. *Buckeye Power, Inc. v. Kosydar*, 35 Ohio St.2d 137, 141, 298 N.E.2d 610 (1973). Furthermore, the Court does not question the weight and credibility the BTA assigns to witnesses and evidence, and it will not overrule the BTA's factual conclusions when they are based on sufficient probative evidence in the record. *Cincinnati Community Kollel v. Testa*, 135 Ohio St.3d 219, 2013-Ohio-396, 985 N.E.2d 1236, ¶ 16; *City of Parma Heights v. Wilkins*, 105 Ohio St.3d 463, 2005-Ohio-2818, 828 N.E.2d 988, ¶ 9; *Stds. Testing Labs., Inc. v. Zaino*, 100 Ohio St.3d 240, 2003-Ohio-5804, 797 N.E.2d 1278, ¶ 11; *Natl Distillers & Chem. Corp. v. Limbach*, 71 Ohio St.3d 214, 217, 643 N.E.2d 101 (1994); *Witt Co. v. Hamilton Cty. Bd. of Revision*, 61 Ohio St.3d 155, 157, 573 N.E.2d 661 (1991). Indeed, if there is evidence that reasonably supports the factual conclusions reached by the BTA, the BTA's decision must stand. *Highlights for Children, Inc. v. Collins*, 50 Ohio St.2d 186, 187-188, 364 N.E.2d 13 (1977).

Review of the BTA's decision is *de novo* for questions of law that require the Court to construe and apply the language of a statute. *Columbus City School Dist. Bd. of Edn. v. Testa*, 130 Ohio St.3d 344, 2011-Ohio-5534, 958 N.E.2d 557, ¶ 12. And the Court may reverse a decision of the BTA that is based on an incorrect legal conclusion. *Gahanna-Jefferson Local School Dist. Bd. of Edn. v. Zaino*, 93 Ohio St.3d 231, 232, 754 N.E.2d 789 (2001).

This case does not require the Court to review significant legal questions, however. The BTA allowed the Court's existing precedent to guide its decision-making, and its decision relies on factual determinations the BTA reached following its review of the testimony and evidence contained in the administrative record. The BTA's decision does not purport to create new law, and the BTA properly refused the Appellants' demands to distinguish or expand the Court's prior decisions. The BTA's decision, which rests upon established law and its factual findings, is thus entitled to deference by the Court and the Court should leave it undisturbed.

IV. ARGUMENT

PROPOSITION OF LAW NO. I:

Tax exemption statutes should not be construed so strictly as to vitiate their intended purpose.

The Appellants argue for a rule of statutory construction that, if applied to R.C. 5709.08, would deprive the statute of its intended meaning. (Ap. Br. at 10.) In advocating a strict statutory construction, the Appellants neglect other well-established rules for construing the meaning of statutes.

Chief among the rules disregarded by the Appellants is the rule that statutes should not be so strictly construed that they lose their intended purpose. Certainly, the primary rule in statutory construction is to give effect to the legislature's intention. R.C. 1.47; R.C. 1.49; *Summerville v. City of Forest Park*, 128 Ohio St.3d 221, 2010-Ohio-6280, 943 N.E.2d 522, ¶ 19. And a natural corollary of this rule is the axiom of judicial interpretation that statutes be construed to avoid unreasonable or absurd consequences. *State ex rel. Dispatch Printing Co. v. City of Columbus*, 90 Ohio St.3d 39, 42, 734 N.E.2d 797 (2000).

These basic rules of statutory interpretation have often been cited in tax exemption cases as the counterweight to the strict construction rule advanced by the Appellants. The Court has held that, although tax exemption statutes are to be strictly construed against the party seeking an exemption, they should not receive an interpretation so narrow and literal as to defeat legislative intent. *Zangerle v. State*, 120 Ohio St. 139, 143, 165 N.E. 709 (1929). Interpretations of tax exemption statutes must instead be reasonable. *In re Estate of Morgan v. Bowers,* 173 Ohio St. 89, 93, 180 N.E.2d 146 (1962). "'The theory that the rule requiring strict construction of a tax exemption statute demands that the narrowest possible meaning should be given to words descriptive of the objects of it would establish too severe a standard.'" *Zangerle* at 144, quoting

Y.M.C.A. v. Lancaster County, 106 Neb. 105, 110-111, 182 N.W. 593 (1921); *see also Carney v. Cleveland City School Dist. Public Library*, 169 Ohio St. 65, 67, 157 N.E.2d 311 (1959).

Tax exemption statutes must also be construed with the understanding that they are enacted to benefit the general public. As the Appellants correctly point out, tax exemption statutes like R.C. 5709.08 are justified because the present benefit they provide the general public justifies the loss of tax revenue and because they seek to provide for the public good. *White Cross Hospital Assn v. Board of Tax Appeals*, 38 Ohio St.2d 199, 201, 311 N.E.2d 862 (1974); *Benjamin Rose Inst. v. Myers*, 92 Ohio St. 252, 268, 110 N.E. 924 (1915).

With these principals in mind, the BTA properly applied R.C. 5709.08 to find that the City's golf courses are entitled to exemption. It did not read R.C. 5709.08 so narrowly that the statute's intent to benefit the public was lost. And it distinguished between public-private relationships motivated by profit and those motivated by the public interest. As the BTA succinctly put it, the City's use of a private property manager for its golf courses "is not a situation where a private enterprise is occupying publicly-owned property and profiting thereby; instead, the fruit of [Golf Management's] labor is largely reaped by the City." (BTA Decision at 5.)

The BTA's decision is consistent with existing case law, including those cases cited by the Appellants. The Court has carefully distinguished those situations in which public property is used exclusively for the benefit of the public, and those situations in which public property is used in the pursuit of profits and commercial enterprise. It has held that the latter situation precludes exemption under R.C. 5709.08, even though the public may derive benefits from the property's use. *See Whitehouse v. Tracy*, 72 Ohio St.3d 178, 648 N.E.2d 503 (1995)(exempt—village-owned well-field farmed by private party); *South-Western City Schools Bd. of Edn. v.*

Kinney, 24 Ohio St.3d 184, 494 N.E.2d 1109 (1986)(exempt—municipally-owned golf course); *Muskingum Watershed Conservancy Dist. v. Walton*, 21 Ohio St.2d 240, 257 N.E.2d 392 (1970)(exempt—public land used for recreational purposes); *Graf v. Warren*, 10 Ohio St.2d 32, 225 N.E.2d 262 (1967)(exempt—municipally-owned parking facility); *Columbus v. County of Delaware*, 164 Ohio St. 605, 132 N.E.2d 747 (1956)(exempt—municipally-owned land used for reservoir); *Toledo v. Jenkins*, 143 Ohio St. 141, 54 N.E.2d 656 (1944)(exempt—municipally-owned airport); *Parma Heights*, 105 Ohio St.3d 463, 2005-Ohio-2818, 828 N.E.2d 988 (not exempt—municipally-owned skating rink leased to private operator for commercial enterprise); *Cleveland v. Perk*, 29 Ohio St.2d 161, 280 N.E.2d 653 (1972)(not exempt—parking lot and retails outlet portions of municipally-owned airport leased to private parties); *Carney v. Cleveland*, 173 Ohio St. 56, 180 N.E.2d 14 (1962)(not exempt—municipally-owned aircraft hangers leased to private operators for private purposes); *Bd. of Park Commrs of City of Troy v. Board of Tax Appeals*, 160 Ohio St. 451, 116 N.E.2d 725 (1954)(not exempt—municipally-owned sports arena leased to private operator).

The Appellants do not point to any cases, including those cited above, that would preclude privately-managed public property from qualifying for exemption. The only theme consistent in these cases is that public property cannot be employed with a view toward commercial enterprise or profit-making, regardless of whether the property is operated by a public or private entity.

The BTA therefore did not err in its application of R.C. 5709.08 when it distinguished between situations in which a private enterprise occupies public property for the purposes of earning a profit and those situations in which the public is benefited by an experienced for-profit private manager's operation of public property.

PROPOSITION OF LAW NO. II:

A for-profit entity's operation of public property exclusively for a public purpose meets R.C. 5709.08's requirement that public property exempt from real property taxation be "used exclusively for a public purpose."

The BTA correctly held that the City's use of a private for-profit manager to operate its golf courses does not destroy the golf courses' tax exempt status. Particularly, the BTA's factual determination that the City's golf courses are "used exclusively for a public purpose," notwithstanding the City's use of a private, for-profit golf course manager, is reasonable, lawful, and supported by sufficient probative evidence in the administrative record.

There are three prerequisites to qualify for exemption from real property taxation under 5709.08. The subject property (i) must be public property; (2) used for a public purpose; and (iii) used exclusively for a public purpose. *Carney*, 173 Ohio St. at 58, 180 N.E.2d 14, quoting *City of Troy*, 160 Ohio St. at 453, 116 N.E. 2d 725.

There are no serious questions in this case whether the City's golf courses are public property or used for a public purpose. Real property owned and operated by a municipality in a manner that benefits the general public is public property used for a public purpose for the purposes of R.C. 5709.08. *Toledo*, 143 Ohio St. at 151, 54 N.E.2d 656. The City owns its golf courses, and they are held open to use by the general public. (Hr. Tr. at 21-23.) This case turns instead on the third criterion, which requires that the City's golf course be used exclusively for a public purpose.

The phrase "used exclusively for a public purpose" as used in R.C. 5709.08 has been construed to mean "land which is available to the public generally on the basis of equality and to the extent of its capacity, without charge." *Muskingum*, 21 Ohio St.2d at 242, 257 N.E.2d 392. It

is recognized, however, that some charges for the use of public property may be levied to defray the costs of its operation. *Id.* at 243.

The Appellants argue that the City's use of a private, for-profit golf course manager to manage its public golf courses somehow violates the requirement that the golf courses be used exclusively for a public purpose. (Ap. Br. at 14.) But the Appellants are wrong, and the BTA correctly rejected their unsupported argument in overturning the Tax Commissioner's decisions to return the City's golf courses to the tax list. In reaching its decision, the BTA appropriately focused on the actual use of the golf courses, not the identity of the golf courses' manager.

The BTA placed significant weight on *Parma Heights*, 105 Ohio St.3d 463, 2005-Ohio-2818, 828 N.E.2d 988, in which the Court relied upon a variety of factors to determine whether a municipally-owned ice rink leased to a private operator was used exclusively for a public purpose. (BTA Decision at 3-6.) The factors considered by the Court in *Parma Heights* include: (i) that the city owned the ice rink; (ii) that the private operator leased the ice rink; (iii) that the lease terms permitted the private operator the ability to "use and occupy" the rink; (iv) that the lease terms made the private operator solely responsible for the "operation and management" of the rink; (v) that the lease term obligated the private operator to pay all taxes on the property; (vi) that the private operator hoped to profit from the ice rink's operation; (vii) that the percentage of the private operator's income derived from the ice rink's operation; and (viii) that the ice rink employees were not city employees. *See id.*

The BTA's factual determination that the City's golf courses are used exclusively for a public purpose solidly rests upon many of the same factors cited in *Parma Heights* and the Court's other well-established precedent. Moreover, substantial probative evidence in the

administrative record supports the BTA's factual determination that the City's privately managed golf courses are operated exclusively for the benefit of the public.

A. Golf Management is a for-profit business that operates the City's golf courses for the exclusive benefit of the public.

Foremost among the factual considerations relied upon by the BTA in holding that the City's golf courses are used exclusively for a public purpose were the level of control the City retains and exercises over its golf courses, the City's motivation in operating its golf courses, the nature of the property interest granted to Golf Management in connection with its management of the golf courses, and who stands to benefit from the tax exemption. (BTA Decision at 4-6.) The BTA's review of these factors led it to the obvious conclusion that the City's golf courses are used exclusively for the benefit of the public.

The BTA's reliance on these factors is well founded. The Court has advised that "'[r]eal property belonging to the state or a political subdivision, shall be considered as used exclusively for public purposes by the state, or political subdivision, if it is made available under the direction or control of the state, or political subdivision for use in furtherance of or incidental to its public purposes and not with the view to profit.'" *Whitehouse*, 72 Ohio St.3d at 182, 648 N.E.2d 503, quoting *South-Western City Schools*, 24 Ohio St.3d at 187, 494 N.E.2d 1109. The Court has also considered whether the public property has been placed in competition with other private uses, the extent of the property interest granted to private entities occupying public property, and who stands to benefit from exemption. *City of Troy*, 160 Ohio St. at 453, 116 N.E.2d 725; *Parma Heights*, 105 Ohio St.3d 463, 2005-Ohio-2818, 828 N.E.2d, ¶ 14, ¶ 17, ¶ 21.

The Appellants argue that the BTA erred in not placing greater weight on the fact that the City's golf courses are operated by a private, for-profit manager, but the identity of a property manager is not a determinative factor in concluding whether public property is used exclusively

for a public use. (Ap. Br. at 15-17.) Indeed, the Court has determined that even governments may manage property in a manner that is not exclusively for a public purpose. *State Teachers Retirement Bd. v. Kinney*, 68 Ohio St.2d 195, 429 N.E.2d 1069 (1981) provides an example. Therein, a parking lot owned by a state agency but restricted to use by employees of a retirement board was not eligible for exemption under R.C. 5709.08 because it was not used exclusively for a public purpose. *Id.* at 198. Thus the use of the property doomed the government's exemption request, and the fact that the government managed the property did not change the case's outcome.

In finding that the City's golf courses are put to an exclusive public use, the BTA analyzed the relevant factors and appropriately discounted the Appellants' arguments. It reasonably found that the City's use of a private for-profit manager to operate its property does not change the City's motivations for operating its golf courses or the reality that its golf courses are actually operated for the exclusive benefit of the general public. (BTA Decision at 6.)

The record certainly leaves no doubt why the City engages in such a complicated and expensive endeavor. As this Court will find, the City's golf courses are operated in furtherance of its mission to provide recreational and cultural activities that enhance health and wellness and create a sense of community. (Hr. Tr. at 21.) This mission includes growing the game of golf. (Hr. Tr. at 23.)

Golf Management's professional operation of the City's golf courses helps the City realize this mission, and it brings the City closer to its goal of providing the youth and adults of the city with the broadest access possible to the game of golf. (Hr. Tr. at 123-124.) The City's relationship with Golf Management maximizes its ability to reinvest in its golf courses and serve its citizens, including youth, seniors, and disabled persons. (Hr. Tr. at 140.)

1. Golf Management operates the City's golf courses under the direction and control of the Cincinnati Recreation Commission.

Critical to the BTA's factual determination that the City's Golf Courses are used for the exclusive benefit of the public was its factual finding that the City retains significant control over the operation of its golf courses. (BTA Decision at 4-5.)

Control is a fundamental element for determining whether public property qualifies for exemption from real property taxation. Ownership alone is insufficient to show that public property exclusively for a public purpose. A governmental entity must be in control of the property to successfully claim exemption from taxation, and it must confine the property's use exclusively to a public purpose. *City of Troy*, 160 Ohio St. at 454, 116 N.E.2d 725.

In *Whitehouse,* the Court determined that private farming activities on public property did not defeat exemption because the governmental entity effectively retained full control over the use of the property. 72 Ohio St.3d at 182, 648 N.E.2d 503. The decision rested on the principal that one who possesses and controls property and occupies, manages, and controls property is often to be treated as the owner thereof. *Id.,* quoting *Carney*, 173 Ohio St. at 58, 180 N.E.2d 14.

Parma Heights, 105 Ohio St.3d 463, 2005-Ohio-2818, 828 N.E.2d 998, provides an instructive—albeit distinguishable—example of the control analysis. Therein, a private company was effectively granted complete control over the city's skating rink. *Id.* at 468. The company leased the property from the city, and language in the lease transferred full responsibility for the "operation and management" of the ice rink to the private company. *Id.* at 466. These facts supported the BTA's determination that the property was controlled and managed by a for-profit company operating the property with a view to a profit. *Id.* at 468.

Unlike the facts in *Parma Heights*, the administrative record demonstrates that the City's relationship with Golf Management has in no way diminished the City's control over its golf

courses. The CRC sets the golf courses' rates, budgets, appropriations, and hours and dates of operation; it approves contracts related to the golf courses' operations; and it employs a golf audit team that inspects the courses on a weekly basis. (Hr. Tr. at 36, 156-157.) It also sets the green fees. (Hr. Tr. at 131.) It approves all of Golf Management's marketing suggestions. (Hr. Tr. at 154-155.) It retains control and ownership of the golf courses to ensure that Golf Management's operation of the golf courses does not stray from the City's mission. (Hr. Tr. at 110.) And it has denied Golf Management the exclusive possession of the golf courses; CRC representatives may enter the golf courses at any time without providing notice to Golf Management or seeking its consent. (Hr. Tr. at 24, 125.)

The City's control of its golf courses is not illusory. The record is replete with examples in which the City refused to accept Golf Management's recommended course of action when doing so would not fulfill the City's public mission. Notably, CRC required Golf Management to operate an unsuccessful golf course during winter months because it furthered its mission to maximize the public's access to the game of golf. (Hr. Tr. at 156.) And it turned down Golf Management's request for a rate increase when it determined the increase would harm the City's public mission. (Hr. Tr. at 153.)

The Appellants arguments on this issue are irrelevant for determining whether the City controls its golf courses. They cite Golf Management's relationship with the City as typical of its relationships with other golf courses, and they note that Golf Management is compensated for the services it provides. (Ap. Br. at 15-16.) They further point to the City's use of Golf Management's expertise to realize efficiencies in its golf course operations as evidence that the City has relinquished control. (Ap. Br. at 17.) But none of these facts are dispositive of control,

and they certainly do not demonstrate that the BTA was unreasonable in reaching its factual findings on this issue.

The BTA properly concluded that the City controls its golf courses and employs them exclusively in furtherance of its public mission. The evidence and testimony in the administrative record highlight the reasonableness of the BTA's conclusion, and the Appellants have provided no good reason why it should not be sustained. The BTA's factual findings on this point are amply supported, and they should be sustained.

2. The City's golf courses do not compete with private golf courses.

Another important fact underpinning the BTA's decision was its implicit conclusion that the City does not compete with other private golf courses. (*See* BTA Decision.) The Appellants have consistently maintained that the City and Golf Management placed the City's golf course in direct competition with private golf courses, but the facts demonstrate that the City's motivation for operating its golf courses is driven by public considerations that are distinct from those of private actors.

The Court has considered competition as a factor in determining whether public property is put to an exclusive public use, but not for the antiquated reasons advocated by the Appellants' who place great reliance on *Cleveland v. Board of Tax Appeals*, 153 Ohio St. 97, 91 N.E.2d 480 (1950). (Ap. Br. at 18.) In *Cleveland*, the Court held that the Ohio Constitution does not permit exemption when property is used to carry on a private or proprietary function in competition with similar private enterprises. *Id.* at paragraph five of the syllabus.[2] But *Cleveland*'s

[2] It bears mentioning that R.C. Chapter 2744, Political Tort Liability, delineates those functions of a political subdivision considered a "governmental function" and those considered a "propriety function." R.C. 2744.01. Municipal golf courses are included among those functions considered to be a "governmental function." R.C. 2744.01(C)(2)(u)(v). This fact supports the

application to this case must be carefully considered in light of the Court's subsequent questioning of that decision.

As the Court explained in *Graf*, the Court's holding in *Cleveland* and other cases of its era holding that public purposes of a proprietary nature are not "public purposes" for tax exemption purposes have since been distinguished by the Court in *Columbus v. County of Delaware*, 164 Ohio St. 605, 132 N.E.2d 747 (1956). 10 Ohio St.2d at 36, 225 N.E.2d 262. In *Columbus*, the Court determined that a public purpose of a proprietary nature is still a public purpose within the meaning of R.C. 5709.08. 164 Ohio St. at paragraph three of the syllabus, 132 N.E.2d 747. The Court later reaffirmed this position in *Cleveland v. Perk*, another case on which the Appellants place great weight. 29 Ohio St.2d 161, 280 N.E.2d 653.

Regardless of *Cleveland*'s application, whether the City's golf courses are operated as propriety uses that compete with private enterprise was an appropriate factor for the BTA to consider in determining whether the City's golf courses are used exclusively for a public purpose. *See City of Troy*, 160 Ohio St. 451, 116 N.E.2d 725. And unsurprisingly, the administrative record did not support a factual finding by the BTA that the efficient management of the City's golf courses, made possible by the City's relationship with Golf Management, converts the City's public mission into private competition.

The City hired Golf Management in connection with a late-1990s push for "managed competition." (Hr. Tr. at 52-53.) As used by the City, this term means "a private party taking an activity that the government performs and operating it more efficiently. The private party, an expert in the industry, attempts to reduce fragmentation and issues that occur through government operation." (Hr. Tr. at 49.)

BTA's determination that the City's golf courses serve a public purpose and that they are not operated in a propriety manner in competition with other private golf courses.

This is exactly what Golf Management does. It provides the City with expert advice and operations management that are outside the City's normal capabilities. (Hr. Tr. at 30-31, 54-55, 128.) That Golf Management bases its advice and recommendations for the operation of the City's golf courses on data that considers private golf courses' operations is not evidence that the City is in competition with private courses. Golf Management's business analyses are merely for the purpose of gathering historical information to identify trends in the local golf industry. (Hr. Tr. at 102-103.) Furthermore, Golf Management's SWOT analyses are conducted to review whether the City is accomplishing its mission of growing the game of golf, and they are used to determine how it can best serve golfers. (Hr. Tr. at 127-129.)

The degree of control that the City exercises over its golf courses and Golf Management further highlights that the City's golf courses are not in competition with private enterprise. As previously discussed, the CRC exercises control over the golf courses' rates, greens fees, budgets, appropriations, marketing, programs, and hours and dates of operation. (Hr. Tr. at 36, 131, 154-157.) Once these directives are set, Golf Management cannot deviate from them without first obtaining the CRC's permission. (Hr. Tr. At 209.) The CRC also employs a golf superintendent and other employees to oversee the golf operations and ensure that Golf Management is managing the golf courses in accordance with its directives. (Hr. Tr. At 150-151.) The citizen-led Golf Advisory council provides another layer of public oversight over the golf courses' operations and programs. (Hr. Tr. 167-168.)

The City's exercise of its control underscores that its golf courses are operated in furtherance of a public mission, and not for competition. The CRC has refused Golf Management's request to increase rates when it found that the rate increases would harm the golf courses' public mission. (Hr. Tr. at 153.) It has also required Golf Management to operate an

unsuccessful course during winter months and to run clinics and programs that the private sector would not, all in furtherance of the City's public mission. (Hr. Tr. at 156, 207-208.) No private golf course operator seeking to maximize profits and out flank its competition would make similar decisions.

There is no evidence in the administrative record that any private golf operator in the Cincinnati market operates under this type of governmental control. If the City were looking to compete with the private sector, it would not interfere with the golf courses' operations and make decisions that are inconsistent with profit maximization. Testimony from Golf Management's representative explains this point. (Hr. Tr. at 207-208.)

> Q. Let me ask you this, Mr. Livingood. You testified earlier that you've worked at a number of privately operated golf courses. Your company manages, I think you said, 80 percent of the properties -- well, no, I don't know the percentage, but you manage a significant number of private golf courses along with municipal golf courses. In your perfect world, I guess, or if you had to run these seven golf courses or this book of golf courses like a privately operated golf course, like maybe Mr. Macke would run a golf course, what would you do differently, if anything?
>
> A. Well, I mean, you'd close some of them. You would close Avon. You would close Woodland. They're not money making assets. They're not -- they're -- they consume resources. Whereas Glenview, Neumann, Cali, and Reeves to a certain extent, are there, but you'd close them. You would also have to -- There's an enormous amount of time and labor that's spent working with the recreational centers, whether it's programming, adaptive golf clinic programs, all of the time spent in instruction and bringing kids into the game, the Tony Yates, the First Tee, it requires a lot of our staff and resources to go there and to support that. Which at some point there will be economic return because we're bringing people into the game which is healthy for everyone in the industry. It's about bringing folks in the game so they'll play everywhere and anywhere. It's not just about CRC golf courses, but if you get them in, they're able to play and become a part of that golfing community. The reality is it takes a lot of time and a lot of staff to go and do that, and so we're not able to -- to focus all of that energy and time on some of the other items.
>
> Q. If you were -- running this as a privately operated golf course, let's say like a golf course Mr. Macke would run, would you eliminate those programs then?
>
> A. Yeah. Would you either eliminate or significantly pare them down.

Q. And you said you would close some of the golf courses?

A. Yes.

Q. And the golf courses you would close would be, sounds like from what you're saying, the inner-city courses?

A. At first, yeah. Definitely.

(Hr. Tr. at 207-208.)

As further proof that the City's golf courses are not in competition with the private sector, the administrative record even envisions the actions the City would have taken had it intended to operate its golf courses in a proprietary manner in competition with private enterprise. In fact, it would have taken a much simpler route by leasing the golf courses to Golf Management and relinquishing control. This was clearly explained by Christopher Bigham, the director of the Cincinnati Recreation Commission, in response to the following question on direct examination:

> Q. Why did the Cincinnati Recreation Commission not just turn this over to [Golf Management] and lease the property to them?
>
> A. It's all about control. We wanted to make sure that we could approve the rates, approve the operation, approve exactly what went on there on a day-to-day basis, so that -- that's why -- there were basically three options: Is that we would self-operate; we would go to this model of having a service provider operate our six golf courses, or at the time seven; or it would be to lease it out, basically toss them the keys, and they would have all control.
>
> (Hr. Tr. at 34.)

But the City did not give Golf Management the keys its golf courses. It maintained all operational control, decision-making, and oversight of its golf operations.

The administrative record demonstrates that City does not compete with private golf courses, and its use of Golf Management to manage its properties is not evidence to the contrary. The City hired Golf Management to effectuate the CRC's public mission and carry out its directives, not to compete with other private golf courses. The evidence therefore supports the BTA's decision to reject the Appellants' argument that the City's golf courses are operated in

competition with private enterprise. That decision concerns an issue of fact, and the Court should uphold it.

3. The City's golf courses are not leased to Golf Management.

The BTA correctly recognized that the Golf Management's right to occupy the City's golf courses is in the nature of a license, not a lease, and its reliance on this fact in determining that the City's golf courses are operated exclusively for a public use was appropriate. (BTA Decision at 4.)

The Appellants assert that the absence of a lease between Golf Management and the City has no bearing on whether the City's golf courses qualify for exemption under R.C. 5709.08. (Ap. Br. at 29.) But the Court has often cited the presence or absence of a lease as a major factor in determining whether public property is under government control. *Parma Heights*, 105 Ohio St.3d 463, 2005-Ohio-2818, 828 N.E.2d, ¶ 21 (the BTA could rightly find that public property was not controlled and managed by the city while the lease with a private party was in effect); *Whitehouse*, 72 Ohio St.3d at 180, 648 N.E.2d 503 (the Court found it "significant" that no lease existed between the government and the private party.).

As the Court has explained, "[w]hen public property is leased to a private corporation, it is no longer public property under the control of a government unit. *City of Troy*, 160 Ohio St. at 454, 116 N.E.2d 725; *see also Carney*, 173 Ohio St. at 58, 180 N.E.2d 14 ("A generally recognized principal is that one who is in the possession and control of property and is occupying, managing and operating the same as lessee is often to be treated as the owner.").

In *Parma Heights*, the city leased a municipally-owned ice rink to a private entity. 105 Ohio St.3d 463, 2005-Ohio-2818, 828 N.E.2d, ¶ 13. All incidents of ownership in the city's ice rink were transferred from the municipality to a private entity under a lease that included the

obligation to pay all real estate taxes. *Id.* at ¶ 14. The Court upheld the BTA's determination that the property lost its identity as public property because it was leased to a private entity. *Id.* at ¶¶ 17-18. It further held that because the lessee assumed all responsibility for the real estate taxes, a real property tax exemption would run to the benefit of the private-party lessee rather than the municipality for which it is intended. *Id.* at ¶ 17.

Similarly, in *Perk*, portions of the Cleveland airport were leased for a lounge bar, drugstore, newsstand, barbershop, gift shop, and insurance counters. 29 Ohio St.2d at 162, 280 N.E.2d 653. The municipality also leased areas in the terminal and adjacent grounds for car rental facilities and a parking lot. *Id.* As in *Parma Heights*, the municipality granted a property right to private entities to operate and maintain public property for a private profit. The Court held that the portion of the airport leased to a private entity "loses its identity as public property and its use cannot be said to be exclusively for a public purpose." *Id.* at 166. To support its holding, the Court cited several other cases where public property had been leased to private entities and had lost its real property tax exemption. *Id.* at 166.

Carney also involved leases of airport property at the Cleveland airport to private entities. 173 Ohio St. 56, 180 N.E.2d 14. The Court held that that because a "lessee is often to be treated as the owner" of property, leased municipal property ceases to be public property. *Id.* at 58. Like in *Parma Heights* and *Perk*, *supra*, the key fact in *Carney* is that the municipal property was leased to a private entity and, as a result, lost its identity as public property.

Unlike in those cases, the City does not lease its golf courses to Golf Management, and Golf Management does not have exclusive possession of the City's golf courses. (Hr. Tr. at 24-25, 125, 162-163, 195.) The City can enter upon the golf courses at any time without the consent or permission of Golf Management. (Hr. Tr. at 24.) Furthermore, Golf Management does not

have any obligation to pay real estate taxes on the golf courses, and a real property tax exemption would not benefit Golf Management in any way. (Hr. Tr. at 25, 33, 125, 206.)

None of the facts that defeated exemption in *Parma Heights, Perk,* or *Carney, supra*, are present in this case. The BTA rightly considered the nature of Golf Management's interest in the property in reaching its conclusion that the City's golf courses are entitled to exemption. The absence of a lease between the City and Golf Management was an appropriate factual consideration in reaching its decision, and its reliance on this factor is firmly supported by the law.

4. The tax exempt status of the City's golf courses directly benefits the public.

The BTA reached the correct result in determining that the City is the sole beneficiary of exemption under R.C. 5709.08, and it was justified in rejecting the Appellants' argument that Golf Management stands to gain from the tax exempt status of the City's golf courses. (BTA Decision at 6; Ap. Br. at 24.) The BTA's factual determination on this point further supports its ultimate conclusion that the City's golf courses are operated exclusively for a public purpose.

The Court placed much emphasis on this factor in *Parma Heights*, 105 Ohio St.3d 463, 2005-Ohio-2818, 828 N.E.2d, ¶ 17. Noting that the purpose of R.C. 5709.08 was to benefit government bodies and not private entities, the Court afforded weight to the fact that the private company was responsible for paying real estate taxes under its lease with the city and therefore only it stood to gain from exemption. *Id.* The Court reasoned this was not an outcome for which the exemption was created. *Id.* at ¶ 14.

There is little doubt in this case that the City will benefit from the tax exempt status of its golf courses. The City is ultimately responsible for paying the real estate taxes levied against the properties. (Hr. Tr. at 25.) The City therefore benefits from the real property tax exemption, not

Golf Management. (Hr. Tr. at 33.) Furthermore, lifting the exemption will increases costs on the golfing public, not Golf Management. (Hr. Tr. at 37.) A real estate tax exemption therefore assists the City in providing its citizens access to golf at the lowest possible cost.

Additionally, termination of the City's golf courses tax exempt status has done real damage to the City's ability to provide the public with access to the game of golf. This fact is undeniable. The City has been forced to close its traditional youth and senior golf course on the City's west side as a direct result of the Tax Commissioner's decision to return the City's golf courses to the tax list. (Hr. Tr. at 22-23.) Moreover, the condition of its remaining courses has deteriorated because funds previously available for their upkeep and maintenance are now used to pay the real estate taxes. (Hr. Tr. at 31-32.)

The Appellants arguments on the question of who benefits from the City's tax exemption are nonsensical. They contend that Golf Management directly benefits from the tax exempt status of the City's golf courses, but their arguments do not support their position. (Ap. Br. at 24.)

The Appellants point out that Golf Management's compensation was reduced when the City closed its west side golf course, and they note that the City's recent request for proposals to manage its golf courses asks bidders to account for the new real estate tax liabilities resulting from the loss of the City's real estate tax exemption. (Ap. Br. at 24-25.) But these facts do not support a finding that Golf Management directly benefits from the golf courses' tax exemption status.

It would be unreasonable for the City to expect Golf Management to accept the same management fee to manage fewer golf courses. Moreover, there is no evidence that Golf Management's compensation was disproportionately reduced in relation to its management of

the six golf courses that lost their exemption, a fact that would be consistent with the argument that Golf Management's compensation is based upon the golf courses' tax exempt status.

It is just as unreasonable to suggest, as do the Appellants, that the City should not advise a prospective provider of golf course management services to account for the impact of new real estate tax liabilities. Real estate taxes are a real cost that historically have not burdened the City's golf course operations. If the City is held to be responsible for them, anyone operating the City's golf courses must account for real estate taxes when budgeting for the golf courses' operation.

The administrative record is clear that the public is the only beneficiary of tax exemption in the case of the City's golf courses, and the Appellants red herrings do nothing to change that conclusion. The BTA has again correctly based its factual determination on the strength of the testimony and evidence before it, and the Court should leave its factual findings on this issue undisturbed.

B. The nature of the City's relationship with Golf Management is not a controlling factor in the determination whether the City's golf courses are operated for the exclusive benefit of the public.

The Appellants ask the Court to place too much weight on the City's legal relationship with Golf Management. (Ap. Br. at 21.) The Board appropriately discounted this argument when it recognized that the City's exercises a significant degree of control over its golf courses, regardless of Golf Management's status as an independent contractor. (BTA Decision at 4-5.) The Court should likewise discount the Appellants' arguments and uphold the BTA's decision.

The Appellants charge that the BTA erred in finding that the City exercises "significant authority" over its golf courses because Golf Management is an independent contractor and not

an agent of the City. They claim that the Court "has already recognized the clear separation between Golf Management and the City." (Ap. Br. at 23.) The Appellants overstate their case.

In *Cincinnati Golf Mgmt. v. Testa*, the Court considered whether a purchase agent relationship existed between Golf Management and the City. 132 Ohio St.3d 299, 2012-Ohio-2846, 971 N.E.2d 929. The issue before the Court was whether purchases made by Golf Management for which it was subsequently reimbursed by the City were exempt from sales and use taxes under R.C. 5739.02(B)(1), which exempts sales to the state or a political subdivision from the payment of sales and use taxes. *Id.* at ¶ 1.

But the Court did not recognize a "clear separation between Golf Management and the City" in regards to whether the City exercised significant control over the operation of its golf courses. *Id.* at ¶¶ 20-23. Indeed, the Court explicitly limited its analysis to whether Golf Management was an agent of the City for the narrow purpose of binding the City to contracts. *Id.* And it expressly declined to apply a control test to determine the extent of the City's authority over the remaining aspects of Golf Management's operation. *Id.* *Cincinnati Golf Mgmt.* therefore has little dispositive value in this matter, and it certainly does not preclude the BTA's factual finding—based on the administrative record before it in *this* case—that the City exercises significant control over its golf courses.

In addition to the Appellants' attempt to oversell the impact of *Cincinnati Golf Mgmt.*, the Court should observe that the Appellants' have not cited any cases to support the proposition that a private manager employed by the City to operate public property must serve as its agent.

For the reasons already discussed, the Court will find there is ample evidence in the administrative record to support the BTA's conclusion that the City exercises significant control over its golf courses. The Court should not follow the Appellants reasoning that Golf

Management's independent contractor status somehow precludes the BTA's finding on this subject as neither facts nor the law supports their position.

PROPOSITION OF LAW NO. III:

The tax exempt status of public property used exclusively for a public purpose is not destroyed when a for-profit entity operates public property and generates revenues or profits that are incidental to its operation of the public property.

The Appellants contend that the BTA erred to the extent it found Golf Management's profits from clubhouse sales of food, beverage, and merchandise are incidental to the operation of the City's golf courses and do not preclude exemption. (Ap. Br. at 25; BTA Decision at 5.) But incidental profits generated from a for-profit entity's operation of a public property do not automatically cause the public property to lose its tax exempt status. This issue was a question of fact for the BTA to determine, and the BTA's factual determinations on the matter should be afforded deference.

Tax exemption of public property is not destroyed because a private entity has the potential to derive profits from the operation of a very minor portion of the total property. *South-Western City Schools*, 24 Ohio St. at 187, 494 N.E.2d 1109. Public property may retain its exclusive public purpose and identity even though a private entity with private profit motives reaps an incidental or ancillary profit from their use of public property. *Whitehouse*, 72 Ohio St.3d at 180-182, 648 N.E.2d 503. When the private use of the land is sufficiently incidental, the land may be characterized as "used exclusively for a public purpose." *Id.* at 181.

The Court has held this to be true even when, unlike in this case, the public property is leased to the for-profit entities. For example, in *Toledo*, private leases of portions of airport property were deemed incidental to the operation of the Toledo airport. 143 Ohio St. at 152, 54

N.E.2d 656. The property did not lose its identity as an integral part of the municipal airport operations and forfeit its exemption. *Id.*

Likewise, in *City of Cleveland v. Carney*, the Court characterized profits realized from the operation of private parking facilities connected to a public auditorium and exhibit hall as "only a small incidental part of the overall use, insufficient to destroy the tax-exempt character of a facility which in the main is used exclusively for a public purpose." 172 Ohio St. 189, 196, 174 N.E.2d 254 (1961).

And in *Carney v. Ohio Turnpike Comm.*, the operation of toll road service plazas leased to for-profit corporations and used to sell food, drink, gasoline, and oil to motorists were deemed concomitants of the turnpike operation, and their operation did not change the controlling fact that the turnpike is owned by the public and devoted essentially to an exclusive public use. 167 Ohio St. 273, 276, 147 N.E.2d 857 (1958).

The Appellants' argument concerning this issue is no doubt familiar to the Court. The Court considered the same circumstances in *Kinney*, 24 Ohio St.3d 184, 494 N.E.2d 1109. The city of Columbus owned a golf course that included a clubhouse with a pro-shop and snack shop. *Id.* at 186. The pro-shop was operated by the club pro who supplemented his income by selling merchandise, and the snack shop was leased to a private concessionaire in return for a portion of the snack shop's gross sales. *Id.* at 187. The Court determined that the BTA could have found that the operation of the pro-shop and snack shop, though operated with a view to a profit by private actors, was trivial and inconsequential to the golf course's operation. *Id.* Accordingly, without substantial evidence to the contrary, the Court affirmed the BTA's decision upholding the golf course's tax exemption as reasonable and lawful. *Id.*

The situation presented by this case is not unlike the situation presented in *Kinney*. Any potential for Golf Management to make a profit from its operation of the City's golf courses arises from its sale of food, beverage, and merchandise in the golf courses' clubhouses. (Hr. Tr. at 26 and 199.) The sales are ancillary and incidental to the golf operations and take place in a portion of the clubhouses that typically comprises around one hundred square feet. (Hr. Tr. at 27 and 127.) The clubhouses, in turn, make up an insignificant portion of the total area of the golf course properties, occupying an area approximately the size of one or two greens. (Hr. Tr. at 126.)

The sale of food, beverages, and merchandise are a minor function that naturally follows the operation of the City's golf courses. Any potential profits derived from these sales are unquestionably incidental and ancillary to the overall revenues from the golf operations—which the City reinvests in the courses. (Hr. Tr. at 25-26, 198.) It cannot be said that the primary motivation of the City's continued ownership and operation of its golf courses is for a private party to realize profits from the sale of food, beverages, or golf balls.

The BTA considered that Golf Management may derive profits from its sale of food, beverages, and merchandise in the golf courses' clubhouses. (BTA Decision at 5.) It reviewed the golf courses' financials and it found that Golf Management's potential profits, which do not exceed five percent of the revenues earned from the golf courses' operations, to be minor and incidental to the golf courses' operation. (BTA Decision at 5.)

The Appellants claim that the BTA improperly compared Golf Management's profits from clubhouse operations to overall golf course revenues, that it neglected to consider Golf Management's management fee, and that it placed no emphasis on the golf courses' improving financial health during Golf Management's tenure. (Ap. Br. at 27.) All of this evidence was

before the BTA, however, and the BTA appropriately applied its discretion when it placed little weight on these facts.

The BTA's decision to compare profits derived from Golf Management's clubhouse operations to golf course revenues is rational and entitled to deference. Comparing Golf Management's relatively small profit potential to the revenues generated from the operation of the golf courses appropriately measures the scale and extent of Golf Management's profit-making potential. It is a sensible calculation for determining whether a given amount is incidental to the amounts generated by all golf course operations.

Further, the BTA's finding that Golf Management's profits are no more than five percent of the revenues generated by the City's golf courses is sufficient to support its conclusion that any profit-making by Golf Management is incidental to the operation of golf courses, which are predominantly used for playing golf and not as a retail business.

The BTA was also correct in excluding Golf Management's management fee and the golf courses' financial health from its calculations. Golf Management's fee is a fixed compensation it receives in return for its provision of management services. (Hr. Tr. at 126.) The fee is not a "profit" based upon Golf Management's ability to maximum revenues and minimize costs. (Hr. Tr. at 126-127.) Golf Management is paid its management fee whether its services are exceptional or average. (Hr. Tr. at 126-127.)

Considering the improving financial health and efficient management of the City's golf courses in determining whether Golf Management profits are incidental to the golf courses' operation also has no rational basis. The Appellants ask the Court to believe that the City's golf courses are operated as a loss leader as part of a Golf Management scheme to drive the sale of hotdogs, hamburgers, and golf balls. (Ap. Br. at 27-28.) The idea is absurd on its face.

Moreover, whether traffic to the City's golf courses increases because their efficient operation promotes lower greens fees does not change whether profits realized from a concession stand are incidental. Instead, it is reasonable to assume that growth in clubhouse sales would remain proportional to other golf course revenues and therefore remain proportionally incidental.

The administrative record demonstrates that any profits realized by Golf Management are ancillary and incidental to the operation of the City's golf courses, and the Appellants' arguments do not change this fact. Because there is a reasoned basis for the BTA's factual findings regarding the incidental nature of Golf Management's profits, the Court should defer to the BTA and its decision should be upheld.

PROPOSITION OF LAW NO. IV:

A for-profit licensee with non-exclusive possession and control of public property is not the "functional equivalent of a lessee" whose non-exclusive possession and control causes the public property to lose its status as "public property used exclusively for a public purpose" pursuant to R.C. 5709.08.

The Appellants' argument that a person that "retains full possessory rights and control" of public property is the "functional equivalent of a lessee" is simply not supported by the law or the facts. (Ap. Br. at 29.) Indeed, the Appellants' argument directly contradicts Ohio's well-settled law regarding licensees and leases.

Licenses and leases each represent two very distinct legal concepts with significant differences. A lease is a contract for the lessee's possession and profit of land in recompense of rent or increase to the lessor, and it includes the conveyance of an estate in the land. *Ripple v. Mahoning Natl. Bank*, 143 Ohio St. 614, 619, 56 N.E.2d 289, 291 (1944). Leases have also been described as a conveyance by the owner of an estate to another of a portion of the owner's interest for a term less than its own. *Brenner v. Spiegle*, 116 Ohio St. 631, 634-35, 157 N.E. 491 (1927). Conversely, a license grants authority to perform specific acts on another's land without

passing any ownership interest in the land. *Ripple at 619*. In sum, "'[w]hile a license to do an act upon land involves the exclusive occupation of the land by the licensee, so far as is necessary to do the act, and no further, a lease gives the right of possession of the land, and the exclusive occupation of it for all purposes not prohibited by its terms.'" *Pitts v. Cincinnati Metropolitan Housing Authority*, 160 Ohio St. 129, 138, 113 N.E.2d 869 (1953), quoting 32 American Jurisprudence 31, Section 5.

Contracting parties may create confusion in setting forth the rights created between them, but the distinction between a license and lease remains. They are not, and by law could never be, functional equivalents. "'Whether an instrument is a license or a lease depends generally on the manifest intent of the parties gleaned from a consideration of its entire contents. Even though a contract purports to be a 'license,' if it is strictly within the definition of a lease, it will be construed as such, and not as a license.'" *Id.*

"The factors which distinguish a lease or a tenancy from a license are whether the user has possession and control of the property, whether occupation was exclusive in the user, whether there was an agreement to pay rent, whether the right of possession is limited to a specific act or series of acts, and whether the lessor or the owner has the right to bring in or exclude others." (Citations omitted.) *Quigg v. Mullins*, 6th Dist. Lucas No. L89314, 1991 Ohio App. LEXIS 1756, *12 (Apr. 19, 1991).

Should the Court be willing to entertain the Appellants' proposition of law despite the overwhelming legal precedent to the contrary, the Court should not find that Golf Management is the "functional equivalent of a lessee" whose limited rights to possession and control of the City's golf courses cause them to lose their status as "public property used exclusively for a public purpose."

The Appellants argue that there is no functional difference between Golf Management and a traditional lessee. In doing so, they hope to take advantage of precedent in which this Court has determined that a lease of public property to a private entity, in addition to other factors, has defeated the public property tax exemption. But in cases like *Parma Heights, Perk,* and *Carney, supra*, the lease of public property to a private entity transferred all incidents of property ownership. The private entities received exclusive possession of the property and were responsible for the payment of real property taxes, among other things. Those cases therefore support the proposition that significant transfers of ownership rights in public property to a private entity may cause the property to lose its identity as public property, but they do not support the proposition a licensee is the "functional equivalent of a lessee" for determining the tax exempt status of public property.

There is also no evidence to support the Appellants' flawed argument. Golf Management's non-exclusive right to occupy the City's golf courses as a manager bears no similarities to a leasehold interest—the transfer of a real property right or some indicia of ownership. So the Appellants' assertion that Golf Management is "functionally" leasing the courses is completely unsupported.

Golf Management may occupy the City's golf courses for purposes of managing them under the terms of the Management Agreement, but it does not lease them. There is no evidence that the City has ever conveyed any estate or ownership interest to Golf Management. Furthermore, under R.C. 5301.01, the Ohio Statute of Frauds, any lease of real property would have to be in writing, and there is no evidence of any written lease. In addition, Golf Management is not responsible for the payment of any real estate taxes under its agreement with the City. (Hr. Tr. at 25, 125.)

Golf Management's right to enter upon the City's golf courses and operate them unquestionably functions as a license. Golf Management is only permitted to occupy the golf courses for the purpose of fulfilling its contractual obligations to the City. (Hr. Tr. at 24-25, 125, 142, 162-163, 195.) It also lacks exclusive possession of the City's golf courses. (Hr. Tr. at 24-25, 125, 142, 162-163, 195.) Moreover, CRC representatives can enter upon the golf courses, their clubhouses, or any other portions of the golf course properties at any time. (Hr. Tr. at 24.)

Unlike the leased property in *Parma Heights, Perk,* and *Carney, supra*, the City's golf courses are not leased to anyone and retain their identity as public property, and no property interest has been conveyed to Golf Management that renders it the "functional equivalent of lessee." Golf Management holds a license for the limited purpose of managing the City's golf courses, and this fact should not serve as a basis for denying the City's public property tax exemption.

The BTA appropriately rejected the Appellants arguments in reaching the correct factual conclusion that the City's golf courses are not leased to Golf Management. (BTA Decision at 4.) The BTA's determination is firmly supported by the law and the administrative record. Thus, the Court should affirm it.

PROPOSITION OF LAW NO. V:

Public-private partnerships are a tool the state and its political subdivisions may employ to manage and operate public property without violating R.C. 5709.08's requirement that the property be used exclusively for a public purpose.

The Court should conclusively determine as a matter of law that R.C. 5709.08 specifically permits public-private partnerships as a vehicle that the state and its political subdivisions may employ to operate public property for an exclusively public use without endangering the public property's real property tax exemption. The absence of a clear decree by this Court on this issue creates significant uncertainty around the economic assumptions that

governments may make when entering contractual relationships that concern the management and operation of public property. Without certainty on this issue, governments are left to the whims of the Tax Commissioner as the official arbiter of what constitutes exclusive public uses of public property, and they face the prospect of dedicating significant resources to a years' long appeals process in order to overcome poorly reasoned decisions. The Court should end the confusion engendered by this void in authority and provide greater clarify for governments throughout the State of Ohio.

The Court rejected a similar overture by the City in *Cincinnati Golf Mgmt.*, 132 Ohio St.3d 299, 2012-Ohio-2846, 971 N.E.2d 929. The City asked the Court to recognize that "managed competition promotes efficient government" and that use of a private contractor "should not result in a new tax." *Id.* at 307. The Court declined to adopt the City's proposition, however, holding instead that it must strictly construe tax exemption statutes and avoid expanding a statute's meaning to incorporate the Court's own policy preferences. *Id.* at 307-308.

But the statute and circumstances presented in this case are very different from those the Court considered in *Cincinnati Golf Mgmt.* At issue here is the portion of R.C. 5709.08 that provides public property must be "used exclusively for a public purpose" to qualify for exemption from real property taxation. This compares to the portion of R.C. 5739.02(B)(1) considered in *Cincinnati Golf Mgmt.* which provides "[s]ales to the state or any of its political subdivisions" are exempt from sales and use taxes. While the Court may be limited in considering policy questions when considering to whom a sale is made, it is unavoidable that the Court must consider policy questions in determining what qualifies as exclusive public uses. Public uses are based directly upon public policy directives after all.

As it often does, the Court should afford significant deference to state and local policy makers on the question of what uses constitute public uses, and the Court should extend the same deference to state and local policy makers' choices regarding the manner in which they carry out their public uses. *Allion* v. *City of Toledo*, 99 Ohio St. 416, 420, 124 N.E. 237 (1919)("Unless there is a clear and palpable abuse of power the court will not substitute its judgment for legislative discretion. The local authorities acquainted with local conditions are presumed to know what the needs of the community demand."). Therefore, the Court should endorse state and local governments' use of private managers to manage public property as a tool that does not violate R.C. 5709.08's requirement that public property be used exclusively for public purposes.

There are good reasons for allowing the City, the state, and other political subdivisions to use private companies to manage their properties without endangering the properties' tax exempt status. Private companies may have expertise and capacity that brings efficiency to government operations. Public management may or may not be costly and inefficient. The best path forward will frequently depend upon the particular circumstances of each situation. Thus, the decision to use public or private management should be left to state and local policy makers who are best positioned to consider each unique set of facts and determine the highest and best means of achieving public goals. The wisdom of these public policy decisions should not be second-guessed by the Tax Commissioner, the BTA, or the Court.

Without appropriate deference to the decisions of public policy makers, cost savings generated through public-private partnerships that rely upon private management of public property may never accrue, especially when the consequence of these relationships is a tax on otherwise exempt property. The Court must consider that the number of government operations and property impacted are vast. Governments, including the state, currently use private

companies for functions as diverse as golf, parks, pools, parking, maintenance, security, and a host of other taxpayer funded services. Cost savings generated through these public-private relationships will be lost to taxation if the Appellants' hard-line position is adopted and governments are limited in their ability to take advantage of public-private partnerships.

In this case, there is no question that the operation of the City's golf courses is a public mission. The people of Cincinnati have made golf a public priority. Cincinnati's citizens, through the Cincinnati Charter, have established the CRC and consented to taxation to provide for recreational opportunities in the city. Cincinnati Charter, Article VII, Section 14 and Article VIII, Section 3. The City Council has specifically authorized the CRC to establish and operate the City's golf courses. Cincinnati Administrative Code, Article XIV, Section 3. And the citizens of Cincinnati have formed an advisory board to make recommendations to the CRC to ensure that the City's golf courses operate with citizen input. (Hr. Tr. at 167-168.)

The discretion to choose which means of managing the City's golf courses constitutes an exclusive public use should similarly be left to the people of Cincinnati and their representatives. Here, they have decided that employing a private manager to operate the City's golf courses is in the best interest of the public. The issue was considered upon the direction of the City's mayor and council. (Hr. Tr. at 52-53.) Then, after considering leasing the City's golf courses to an outside operator or keeping operations internal, the CRC reasonably concluded that hiring a private manager but retaining control over the golf courses would best serve the City's interests and maximize its ability to grow the game of golf. (Hr. Tr. at 34, 52-53.)

The City and its citizens should not be denied what they have determined is a valuable method for administering the City's property and achieving its public goals. They should not be forced to choose between efficient management of public property and property tax exemption.

Subjecting the City to taxation for providing an efficient public service directly undermines the ability of the City and its citizens to exercise their discretion and choose the most efficient means of managing and operating their public property.

The Court should recognize, as have the BTA, the people of Cincinnati, and their representatives, that private management of public property may constitute an exclusively public use of public property when properly structured.

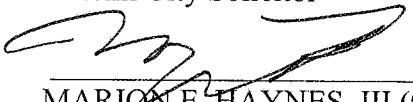
V. CONCLUSION

The BTA's reversal of the Tax Commissioner's decisions to restore the City's golf courses to the tax list and its conclusion that the City's golf courses are entitled to exemption from real property taxation pursuant to R.C. 5709.08 are reasonable and lawful. The City's golf courses are public property exclusively used for the benefit of the public, and the City's use of a private, for-profit golf course manager does not change this fact. The BTA appropriately rejected the Appellants' arguments to the contrary and so too should this Court.

In addition to affording the BTA appropriate deference, the Court should consider the devastating impact of adopting the Appellants' position. It would drastically alter the economic incentives of public-private partnerships and would thereby cripple the ability of the state and its political subdivisions to recognize operational efficiencies by leveraging private expertise and know-how. Construing and applying R.C. 5709.08 in a manner that deprives the government of its ability to provide superior service at a reduced cost to taxpayers and the general public is patently antithetical to the statute's purpose. The Court should avoid this outcome.

Respectfully submitted,

TERRANCE A. NESTOR (0065840)
Interim City Solicitor



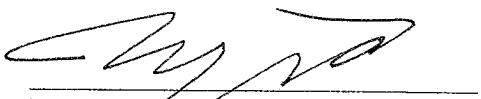
MARION E. HAYNES, III (0080671)
Counsel of Record
Chief Counsel
CITY OF CINCINNATI
Room 214, City Hall
801 Plum Street
Cincinnati, Ohio 45202
Telephone: (513) 352-4894
Facsimile: (513) 352-1515
marion.haynes@cincinnati-oh.gov
Attorneys for Appellee City of Cincinnati

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Brief of the Appellants has been sent this 9th day of September 2014 by ordinary U.S. Mail to:

DANIEL W. FAUSEY
Counsel of Record
Assistant Attorney General
STATE OF OHIO
30 E. Broad Street, 25th Floor
Columbus, Ohio 43215
Daniel.fausey@ohioattorneygeneral.gov

WILLIAM M. BRISTOL
Gary F. Franke Co., LPA
120 E. Fourth Street, Suite 1040
Cincinnati, Ohio 45202
Tel: (513) 564-9222
Fax: (513) 569-9990
wmb@garyfrankelaw.com



MARION E. HAYNES, III
Chief Counsel

{143542}