

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
LAW AND ARGUMENT	4
<u>First Proposition of Law:</u>	
<i>Tax exemption statutes must be strictly construed, because exemptions are in derogation of the rights of all other taxpayers.</i>	4
<u>Second Proposition of Law:</u>	
<i>Where a for-profit entity enters into a “public-private partnership,” by operating a for-profit business on public property, in competition with other private entities in the area, that property is no longer “used exclusively for a public purpose,” per R.C. 5709.08.</i>	6
A. Golf Management possessed, occupied, managed, and operated the City’s courses to further its own private business operations.	6
1. The City’s purported “public purposes” do not overcome Golf Management’s private, for-profit occupation and operation of the courses.	6
2. The City did not “control” the actions of Golf Management in a manner that is meaningful for purposes of tax exemption.	9
B. The City’s courses directly competed with other local courses.	11
C. The benefits of tax exemption directly impact Golf Management, even if the City pays property taxes for its courses.	13
D. The City’s contention that R.C. 5709.08 should “specifically permit[] public-private partnerships” is a public policy argument better suited for the General Assembly.	14
<u>Third Proposition of Law:</u>	
<i>Where a for-profit entity operates a for-profit business on public property, with the intent to profit, the monies earned by that entity are not “incidental” to the property’s use, and thus that property is no longer used “exclusively for a public purpose,” as R.C. 5709.08 requires.</i>	15

Fourth Proposition of Law:

Where a for-profit entity retains full possessory rights and control of public property, as the functional equivalent of a lessee, that property no longer qualifies as “public property devoted exclusively to a public purpose,” per R.C. 5709.08. 18

CONCLUSION 20

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases

	<u>Page(s)</u>
<i>Anderson/Maltbie P'ship v. Levin</i> , 127 Ohio St.3d 178, 2010-Ohio-4904	1, 4, 5
<i>Bd. of Educ. of S.-W. City Schs. v. Kinney</i> , 24 Ohio St.3d 184 (1986)	17
<i>Benjamin Rose Inst. v. Myers</i> , 92 Ohio St. 252 (1915)	8, 15
<i>Board of Park Comm'rs of City of Troy v. Bd. of Tax Apps.</i> , 160 Ohio St. 451 (1954)	10, 15
<i>Carney v. Ohio Tpk. Comm'n</i> , 167 Ohio St. 273 (1958)	19
<i>City of Cleveland v. Bd. of Tax Apps.</i> , 153 Ohio St. 97 (1950)	<i>passim</i>
<i>City of Cleveland v. Perk</i> , 29 Ohio St.2d 161 (1972)	7, 11
<i>City of Parma Heights v. Wilkins</i> , 105 Ohio St.3d 463, 2005-Ohio-2818	6, 9, 11, 17
<i>City of Toledo v. Jenkins</i> , 143 Ohio St. 141 (1944)	14
<i>Denison Univ. v. Bd. of Tax Apps.</i> , 2 Ohio St.2d 17 (1965)	1
<i>Metro. Sec. Co. v. Warren State Bank</i> , 117 Ohio St. 69 (1927)	4
<i>Muskingum Watershed Conservancy Dist. v. Walton</i> , 21 Ohio St.2d 240 (1970)	8, 9
<i>State ex rel. Cydrus v. Ohio Pub. Emples. Ret. Sys.</i> , 127 Ohio St.3d 257, 2010-Ohio-5770	15
<i>Village of Whitehouse v. Tracy</i> , 72 Ohio St.3d 178 (1995)	11, 17, 18, 19, 20

Constitutional Provisions, Statutes, and Rules

	<u>Page(s)</u>
R.C. 5709.08	<i>passim</i>
R.C. 5709.084	2, 4
R.C. 5715.271	5

INTRODUCTION

Under well-settled law, this Court will strictly construe R.C. 5709.08 against a public property exemption for the City's golf courses, because statutes bestowing tax exemptions are in derogation of the equal rights of all other taxpayers, who must bear the cost of the exemption. *See* Merit Brief of Appellant, Joseph W. Testa, Tax Commissioner of Ohio ("Apt. Br."), at 10-13; *Anderson/Maltbie P'ship v. Levin*, 127 Ohio St.3d 178, 2010-Ohio-4904, ¶ 16. Here, the affected taxpayers include the original complainant, Paul Macke, whose family's Cincinnati-area golf courses are in proximity to and in competition with the City's courses, but do not enjoy the competitive advantage of tax exemption.

The City reminds this Court that the exemption should not be so strictly construed as to defeat the General Assembly's intent. *See* Merit Brief of Appellee, The City of Cincinnati ("Ape. Br."), at 8-10. The Commissioner agrees with that proposition. But, the City has offered no evidence or authority to show that the General Assembly intended to exempt golf courses that are occupied and operated by for-profit businesses. Instead, the General Assembly's manifest intention is that when public property is used and occupied by a private, for-profit enterprise, that property is not entitled to tax exemption.

This has been the law of Ohio for at least 60 years. When a public entity enters into competition with the marketplace at large in a "public-private partnership business" – as the City did here with Cincinnati Golf Management, Inc. ("Golf Management") – that property's public character is destroyed, and exemption is no longer justified. *See City of Cleveland v. Bd. of Tax Apps.*, 153 Ohio St. 97, 111 (1950), *overruled on other grounds*, *Denison Univ. v. Bd. of Tax Apps.*, 2 Ohio St.2d 17 (1965). In the intervening decades, the General Assembly has done nothing to change R.C. 5709.08 that alters this state of the law. In contrast, the General

Assembly *did* enact a statute, for example, exempting convention centers owned by certain cities, “regardless of whether the property is leased to or otherwise operated or managed by a person other than the city.” R.C. 5709.084. No similarly such exemption exists for city-owned, privately operated golf courses.

Still, the City argues, this Court should be lenient with the law, as the public benefits from “an experienced for-profit private manager’s operation of public property.” *See* Ape. Br. at 9-10. But, this hides that the “experienced for-profit private manager” (*i.e.*, Golf Management) is *in the business of operating municipal golf courses*. At the time of entering into operation of the City’s seven courses, Golf Management also managed (for profit) no fewer than 11 other municipally-owned courses. *See* Statutory Transcript (“S.T.”) for Case No. 2011-148, at 109. Thus, the consequence of lenience to the City is to subsidize a private business’s operations. Indeed, allowing exemption here would subsidize not only Golf Management, but the entire industry of private companies who engage in municipal facilities management.

The Commissioner previously demonstrated how Golf Management’s efforts resulted in earnings of **multiple millions of dollars** and, in turn, how the Ohio Board of Tax Appeals (“BTA” or “Board”) erred in concluding that Golf Management’s profits were “incidental” to the City’s golf course operations. In response, the City makes no effort to challenge the Commissioner’s characterization of Golf Management’s financial performance – and instead simply urges this Court to defer to the Board’s determination. Although it should not matter whether, and by how much, Golf Management “profited” from operation of the courses, the evidence in this case establishes that Golf Management played a central role in the City’s golf course operations, and the contractual compensation structure was designed to reflect this reality. The Board erred in concluding otherwise.

Further, the City has not demonstrated any “public purpose” furthered by Golf Management’s operation of the courses. There is nothing inherently “public” about the operation of fee-based golf courses. The City provides no evidence that its courses meet any particular public need or provide any particular public good that is not also available from privately-owned courses, such as those of Mr. Macke’s family. The City does not explain how its courses provide a benefit to the public – distinct from the benefits provided by private, taxpaying golf course owners – that “justifies the loss of tax revenue.” *See* Ape. Br. at 9. Instead, the evidence establishes the contrary – that the City viewed its courses as revenue-generating “assets” and sought out private operation in order to maximize their profit-making potential. *See* BTA Hearing Transcript (“Hr. Tr.”), at 53-56, Commissioner’s Hearing Exhibit (“Ex.”) A, at 11. In this context, the private, for-profit operation and occupancy of these courses eliminates the possibility of public purpose exemption.

The Court should decline any request by the City to judicially expand the scope of R.C. 5709.08. If the City believes that an economic benefit will result, then it is free to engage Golf Management as it pleases. But, one consequence of doing so is that the property will no longer qualify for the “exclusive public use” exemption under R.C. 5709.08. Ultimately, to the extent that the City raises public policy concerns about its ability to engage in public-private partnerships, those concerns are better heard by the General Assembly, and not this Court.

As discussed more below, and in the Commissioner’s initial brief, the City does not qualify for exemption under R.C. 5709.08. Thus, this Court must reverse the Board’s decision.

LAW AND ARGUMENT

First Proposition of Law:

Tax exemption statutes must be strictly construed, because exemptions are in derogation of the rights of all other taxpayers.

This Court must strictly construe R.C. 5709.08 against exemption for the City's courses, for statutes creating tax exemptions are in "derogation of equal rights." *See* Apt. Br. at 10-13; *Anderson/Maltbie*, 2010-Ohio-4904, ¶ 16. The City contends that "statutes should not be so strictly construed that they lose their intended purpose." *See* Ape. Br. at 8. The Commissioner agrees with that well-settled proposition. Yet, the City presents no evidence or authority indicating that the General Assembly intended the result that the City seeks *here*: to exempt golf courses occupied and operated by a for-profit business, in competition with local enterprises.

Indeed, the General Assembly's intent in exempting property under R.C. 5709.08 was – and continues to be – to deny exemption "when a city undertakes an enterprise which is proprietary in its nature, and thereby enters into competition with similar enterprises privately operated." *See Cleveland*, 153 Ohio St. at 111. Despite having amended R.C. 5709.08 since its enactment more than 60 years ago, the General Assembly's original intent remains unchanged. Amplifying this point, the General Assembly in 2010 enacted R.C. 5709.084, exempting convention centers owned by cities, "regardless of whether the property is leased to or otherwise operated or managed by a person other than the city." Where the General Assembly "use[s] certain language in the one [statute] and wholly different language in the other, it will rather be presumed that different results were intended." *Metro. Sec. Co. v. Warren State Bank*, 117 Ohio St. 69, 76 (1927). That R.C. 5709.084 includes such language clearly indicates that R.C. 5709.08 (which remains without any such language) should be construed differently.

The City contends that tax exemption statutes “are enacted to benefit the general public,” and that here, “the public is benefited by an experienced for-profit private manager’s operation of public property.” *See* Ape. Br. at 9-10. However, this ignores that the “experienced for-profit private manager” – *i.e.*, Golf Management – is in the *very business of operating municipal golf courses*. Before taking on the City’s courses, Golf Management already managed, for-profit, at least 11 other municipally-owned golf courses. *See* S.T., Case No. 2011-148, at 109. In fact, today, of the approximately 150 courses that Golf Management operates nationwide, approximately 30 to 40 percent are municipal courses. Hr. Tr. at 193. The City fails to acknowledge that exemption here would subsidize a substantial portion of Golf Management’s private business. In fact, exemption would subsidize the entire industry of private companies who engage, for profit, in the business of municipal facilities management.

The City also purports to distinguish between situations where “public property is used exclusively for the benefit of the public” versus “in the pursuit of profits and commercial enterprise.” *See* Ape. Br. at 9-10. In so doing, the City contends that the Commissioner points to no cases “that would preclude privately-managed public property from qualifying for exemption.” *Id.* at 10. That is beside the point; the Commissioner has never argued that “privately-managed public property” should be precluded, as a matter of law, from exemption. In any event, where a public entity enters into competition with the marketplace at large in a “public-private partnership business” – as the City did here – the public character of that property is destroyed, removing justification for exemption. *See Cleveland*, 153 Ohio St. at 111.

Accordingly, the City fails to demonstrate why such a liberal construction of R.C. 5709.08 is appropriate, or that it can overcome the heavy burden of proving entitlement to exemption. *See* R.C. 5715.271; *Anderson/Maltbie*, 2010-Ohio-4904, ¶ 16.

Second Proposition of Law:

Where a for-profit entity enters into a “public-private partnership,” by operating a for-profit business on public property, in competition with other private entities in the area, that property is no longer “used exclusively for a public purpose,” per R.C. 5709.08.

A. Golf Management possessed, occupied, managed, and operated the City’s courses to further its own private business operations.

1. The City’s purported “public purposes” do not overcome Golf Management’s private, for-profit occupation and operation of the courses.

Golf Management’s operation of the City’s courses negates the requirement of R.C. 5709.08 that property must be “used exclusively for a public purpose” to gain a real property tax exemption. *See* Apt. Br. at 14-25; *City of Parma Heights v. Wilkins*, 105 Ohio St.3d 463, 2005-Ohio-2818, ¶ 11. In an attempt to avoid the clear impact of *Parma Heights*, the City tries to change the analysis – by directing this Court’s focus *away* from the private, for-profit operation of the property, and *toward* the City’s newly minted “public purposes.” But this avenue has long been foreclosed by law, and it is untenable as a matter of fact.

In *Parma Heights*, the Court rejected a “public purpose” argument similar to what the City presents here as an exclusive public use (*i.e.*, “providing a better ice-skating facility for the benefit of area residents”). 2005-Ohio-2818, ¶ 15. This Court disagreed, holding that the Board had concluded that there was, in fact, a profit motive behind the municipality’s actions. *Id.* ¶¶ 15-16. Moreover, this Court explained that the contractor’s role was more than “incidental” to the operation of the property – the contractor had “the right to use and occupy the property, and . . . its own employees play[ed] a central – not an incidental – role in the operation of the city’s ice rink.” *Id.* ¶ 17. The Court added that “[t]he city’s ongoing effort to secure that tax exemption for the [contractor] . . . undercuts the city’s claim that the lease served solely a public purpose that benefited only the city and its residents.” *Id.*

Similarly, in this case, the City claims that its courses “provide recreational and cultural activities that enhance health and wellness and create a sense of community.” *See id.* at 14; *see also* Brief of Amicus Curiae City of Mason (“Mason Br.”), at 6-9 (courses “are open-air recreational premises that are essential to the health, comfort, and pleasure of the citizenry”).

Notably, as discussed in the Commissioner’s initial brief, *any* entity (private or public) could equally make such a claim. *See* Apt. Br. at 19; *e.g.*, *City of Cleveland v. Perk*, 29 Ohio St.2d 161, 166 (1972) (“[S]erving the public is the aim and object of enterprise, be it public or private.”). The City has made no efforts to demonstrate that its courses fulfill a public need or provide a public good other than what private golf courses in the community already provide.

More importantly, the evidence here points to another purpose for the City, one that the City attempts to disclaim: profit maximization. As discussed in the Commissioner’s initial brief, the City has recognized the goal of “maximiz[ing] cash flows . . . and handl[ing] [the courses] as valuable assets,” with a corollary goal of “reinvestment for our golf courses.” *See* Apt. Br. at 20.

Moreover, insofar as the City has a public purpose in mind for the use of the property, it cannot be said to be the *exclusive* use, given the City’s stated profit motive and Golf Management’s use and occupation for its own business purposes. To be “used exclusively for a public purpose” under R.C. 5709.08, it is not enough that property is merely “used for a public benefit,” as this Court explained “that *some* public purpose may be served is not sufficient to constitute an *exclusive* public use.” *Cleveland*, 153 Ohio St. at 107 (emphasis added).

When “private enterprise is given the opportunity to occupy public property in part and make a profit, even though in doing so it serves not only the public, but the public interest and a public purpose,” that property cannot be said to be qualify for exemption under R.C. 5709.08. *Perk*, 29 Ohio St.2d at 166. The City’s characterizations of the golf operations’ net earnings as

“reinvestments” instead of profits, *see, e.g.*, Ape. Br. at 14, does not change the final outcome. Where, as here, one operates property commercially, and with a profit motive, then exemption depends on the *use of the property*, not the *use of income derived* from that operation. *See Benjamin Rose Inst. v. Myers*, 92 Ohio St. 252, 264-66 (1915); Apt. Br. at 20.

Tellingly, the City points to no evidence that its and Golf Management’s motivations are one in the same. To the contrary, the evidence in this case demonstrates that Golf Management took on the City’s courses to further its own private business operations, as opposed to accepting that task out of goodwill. Golf Management is *in the business of municipal golf course management*. In addition to the seven municipal courses in this appeal, Golf Management handled at least 11 other municipal courses during this time frame. *See S.T.*, Case No 2011-148, at 109-16; *see also* Hr. Tr. at 193 (municipal courses comprise 30 to 40 percent of Golf Management’s business). Golf Management performs its contract with the City just as it does with any other municipality, per its business model. Golf Management managed all its courses (whether public or private) in largely the same manner, pursuant to a management agreement with each course’s owner, and with similar compensation, in the form of management fees, revenue shares, and incentive bonuses. *See* Apt. Br. at 16-18. In fact, Golf Management enjoys essentially the same relationship with the City as it did with any other golf course owner. *Id.*

To support its argument, the City cites *Muskingum Watershed Conservancy Dist. v. Walton*, 21 Ohio St.2d 240, 242 (1970). *See* Ape. Br. at 11. Yet, that decision does not help the City’s case – and, ultimately, it fully supports the Commissioner’s position.

First, the City grossly oversimplifies the “used exclusively” requirement of R.C. 5709.08 by attempting to use *Muskingum* to say that requirement equates merely to public availability and accessibility. The property in *Muskingum* was a public park, “open in its entirety to the public,

without charge and virtually without regulation, for hunting, hiking, or any other recreational activity desired by the user.” 21 Ohio St.2d at 241. In contrast, here, the City’s courses had a singular use (*i.e.*, golf) and was only available to those who paid a greens fee that was competitively determined. *See* Apt. Br. at 18.

Second, contrary to the City’s suggestion, *Muskingum* does *not* stand for the proposition that “some charges for the use of public property may be levied to defray the costs of its operation.” *See* Ape. Br. at 11-12. The City’s selective citation fails to adequately convey the dicta in *Muskingum*, which reads, in its entirety: “In any event, noncompetitive, regulatory charges, or such charges as are necessary to defray the cost of operation, would not be destructive of tax exemption, particularly where, as here, *no part of the revenues will inure to the personal profit of any person.*” 21 Ohio St.2d at 243 (emphasis added) (citations omitted).

The Court in *Muskingum* rejected exactly the argument the City now advances. There is no evidence that City’s courses are available to all free of charge; instead, admission rates were determined competitively, and a substantial portion of revenue from the courses went directly to Golf Management. Hr. Tr. at 105-12; Ex. D, at 598, 650. Thus, *Muskingum* anticipates, and is wholly consistent with, this Court’s subsequent pronouncements that a public entity’s choice to have a for-profit entity engage in a competitive, for-profit activity *negates* the possibility of exemption under R.C. 5709.08. *See, e.g., Parma Heights*, 2005-Ohio-2818, ¶ 12.

2. *The City did not “control” the actions of Golf Management in a manner that is meaningful for purposes of tax exemption.*

In the alternative to its “public purpose” argument, the City contends that Golf Management’s occupation and use of the City’s courses as a for-profit business does not defeat exemption, because the City “controls” Golf Management. *See* Ape. Br. at 15-17. This Court has long foreclosed this argument, however.

In *Board of Park Commissioners of City of Troy v. Board of Tax Appeals*, 160 Ohio St. 451, 452-54 (1954), the city of Troy leased a sports arena to a private corporation to stage entertainment events there, for a monthly rental fee plus a percentage of event concessions. The corporation staged both public and private events, charging admission and generating concessions, and competed with other private enterprises in the field of entertainment. *Id.* In concluding that the city was not eligible for exemption, this Court noted that, for purposes of R.C. 5709.08, the private corporation (and not the city) was the property's user. *Id.*

Here, similarly, the City has handed over the responsibility for management and operation of its courses to Golf Management. Accordingly, it is *Golf Management's* use that determines whether an exemption is appropriate. And, just as in *Troy*, because Golf Management carried on a use in competition with similar enterprises, such use cannot be exempt under R.C. 5709.08. *See id.* at 453 (citing *Cleveland*, 153 Ohio St. at 111).

The City goes to great length to contend that it “retains significant control over the operation of its golf courses.” *See* Ape. Br. at 15-17. Yet, as discussed in the Commissioner's initial brief, the management agreement between the parties expressly set forth that Golf Management is an “independent contractor,” and not an agent of the City. *See* Apt. Br. at 21-23; Ex. D, at 605. It would be incongruous to suggest that the City retains significant control over an “independent contractor” like Golf Management. Indeed, as the management agreement indicates, the City has tasked Golf Management with providing full-service management of the City's golf course operations, from creating marketing and business plans; providing, paying, and managing course employees; setting membership dues and greens fees; and handling pro shop and snack bar inventory and sales. *See* Ex. D, at 603, 609-33; Apt. Br. at 21.

The City contends that this Court has held that private activities on public property “do not defeat exemption because the governmental entity effectively retained full control over the use of the property.” See Ape. Br. at 15 (citing *Village of Whitehouse v. Tracy*, 72 Ohio St.3d 178, 181 (1995)). However, as explained below (in the Commissioner’s discussion of Proposition of Law No. 4), *Whitehouse* sets forth a fundamentally different scenario than in this case, wherein this Court concluded that the farming was merely an “incidental” private use that did not defeat exemption under R.C. 5709.08. See 72 Ohio St.3d at 181. Here, in stark contrast to *Whitehouse*, the parties went to great length to enter into a comprehensive management agreement, whereby Golf Management would assume responsibility for turnkey operation of the City’s courses. Golf Management’s agreement dealt not with a portion of the lands, or a portion of the operations – but, rather, the *entire* properties, and the *entire* operations.

Instead, the relationship between the City and Golf Management is substantially more similar to that between the public and private entities in *Parma Heights*. See Apt. Br. at 14. Just as this Court concluded that the public-private partnership in *Parma Heights* defeated exemption under R.C. 5709.08, so should this Court conclude that the City’s partnership with Golf Management defeats exemption.

B. The City’s courses directly competed with other local courses.

As this Court explained, “When a city undertakes an enterprise which is proprietary in its nature, and thereby enters into competition with similar enterprises privately operated, its real estate used in such enterprise is not exempt from taxation.” *Cleveland*, 153 Ohio St. at 111. Even if there may be a public purpose in such proprietary arrangements, a “public-private partnership business” will not qualify as an “exclusive” public use. *Perk*, 29 Ohio St.2d at 166; *Parma Heights*, 2005-Ohio-2818, ¶ 12.

The City contends that its courses do not directly compete with other local courses. *See* Ape. Br. at 17-22. In disputing any notion of competition, in disputing any notion of competition, the City attempts to undercut the Commissioner's reliance on *Cleveland*. *See id.* at 17. As the City notes, the Court has since held that "a public purpose of a proprietary nature is still a public purpose" under R.C. 5709.08, thereby "questioning" a portion of *Cleveland*. *See id.* at 18 (citations omitted). Yet, the Court's subsequent consideration has implicated *neither* of the propositions that the Commissioner cites. Indeed, none of the cases cited by the City involves a situation in which a public entity has *entered into competition with private enterprises*, as is the case here. The City's criticism of *Cleveland* is thus simply misplaced.

The City attempts to cite evidence supporting its claim that no competition exists with local courses. In so doing, however, the City contradicts the testimony of its own witnesses at the Board hearing, which the Commissioner discussed in his initial brief. *See* Ape. Br. at 14-21. Indeed, at hearing, the City's witnesses discussed identifying "many direct and indirect competitors"; strategies for "how to deal with the competition"; and the need to "attract[] a sufficient and appropriate customer base," or else customers may "take their business to other facilities." *See id.* at 18. In fact, one witness testified that "losing the tax exemption has actually put the City at a major competitive disadvantage" relative to other local courses. *Id.*

For the first time in these appeals, the City now purports to offer non-competitive explanations for why Golf Management collects data regarding "private golf courses' operations"; conducts "business analyses [for] gathering historical information to identify trends in the local golf industry"; and conducts SWOT (*i.e.*, "strengths, weaknesses, opportunities, and threats") analyses. *See* Ape. Br. at 19; *see also* Hr. Tr. at 108 (defining SWOT analyses). These novel explanations notwithstanding, the more plausible interpretation of this evidence is that the

City's courses are in fact directly competing with local private courses, and that the City and Golf Management uses competitive data to inform its decision-making process.

The City also appears to contend that no competition exists for its courses, because no “private golf operator in the Cincinnati market operates under this type of governmental control.” *See* Ape. Br. at 20. This contention, however, is belied by the fact that Golf Management compiled data on and conducted analyses regarding local courses – despite the supposed fact that none of them was an actual competitor of the City's.

Certainly the complainant in this case, Mr. Macke, would take issue with the City's contention that it is not in “competition” with local courses. At hearing, Mr. Macke explained that he did not mind competing against City courses, but “it's not on a level playing field.” Hr. Tr. at 227. He explained that the City's competitive advantage drove one of his family's courses out of business. *Id.* at 227-28. Accordingly, the evidence in this case demonstrates that the City's courses in fact did compete directly with other local, privately-owned courses.

C. The benefits of tax exemption directly impact Golf Management, even if the City pays property taxes for its courses.

The City contends that it is the “sole beneficiary of exemption under R.C. 5709.08.” *See* Ape. Br. at 24. However, in his initial brief, the Commissioner demonstrated a myriad of ways in which Golf Management enjoys (or bears) the consequences of the exemption, alongside the City. *See* Apt. Br. at 23-25.

Most tellingly, the City's latest request for proposals for managing its courses instructed bidders to account for the property tax bill in preparing their bids. *See* Ex. C, at 589. The City explained that bidders should consider the property tax bill when preparing their proposals to operate the courses, because “[t]he property tax would then have to be absorbed by the rates, the greens fees, and the golf revenues that could be generated.” Hr. Tr. at 66-67. Notably, under the

parties' current agreement, the City and Golf Management share these "revenues." *Id.* at 81, 216-19; Ex. D at 599, 642, 650.

In any event, the City neglects to address the Commissioner's contention that eligibility for the R.C. 5709.08 exemption "does not turn on which party is responsible for paying the property taxes." *See id.* at 23. As discussed in the Commissioner's initial brief, this Court's decision in *City of Toledo v. Jenkins*, 143 Ohio St. 141, 158-59 (1944), explains that the use of the property – and not who pays property taxes – drives the exemption analysis. As the Court recognized in *Toledo*, the parties' contract (including a provision that the city, as lessee, would be responsible for property taxes) "does not alter the legal situation" – *i.e.*, whether exemption is appropriate. This result makes sense – for whereas parties are free to contractually obligate themselves in any way that they choose, the use of the property remains unchanged. Accordingly, regardless of who pays the property taxes, Golf Management's private, for-profit use of the courses defeats exemption.

D. The City's contention that R.C. 5709.08 should "specifically permit[] public-private partnerships" is a public policy argument better suited for the General Assembly.

The City contends this Court "should conclusively determine as a matter of law that R.C. 5709.08 specifically permits public-private partnerships as a vehicle" that it may use "without endangering" the exemption. *See* Ape. Br. at 35. The City expresses concern that "cost savings generated through public-private partnerships will be lost to taxation" if this Court adopts the Commissioner's "hard-line" position and limits the government's ability to employ such partnerships. *See id.* at 38. Similarly, the amicus, Mason, contends that reversing the Board's decision "could have a chilling effect on the ability of Ohio municipalities to leverage public-private partnerships." *See* Mason Br. at 9.

These arguments are thinly-veiled public policy appeals. To the extent that the City seeks to judicially expand the scope of R.C. 5709.08, this Court should decline to do so. The City's policy concerns are better heard by the General Assembly, and not this Court. "[T]he General Assembly is the final arbiter of public policy. . . . [I]t is not the role of the courts to establish legislative policies or to second-guess the General Assembly's policy choices." *State ex rel. Cydrus v. Ohio Pub. Emples. Ret. Sys.*, 127 Ohio St.3d 257, 2010-Ohio-5770, ¶ 24.

Third Proposition of Law:

Where a for-profit entity operates a for-profit business on public property, with the intent to profit, the monies earned by that entity are not "incidental" to the property's use, and thus that property is no longer used "exclusively for a public purpose," as R.C. 5709.08 requires.

Despite the City's arguments, the question of whether Golf Management's profits were substantial in relation to the City's profits is moot. Where, as here, a private entity operates property commercially, and with a profit motive, it is the use of the property – and not the use of any derived income – that determines exemption. See *Benjamin Rose*, 92 Ohio St. at 264-66; Apt. Br. at 28. It makes sense that exemption does not depend on the magnitude of profits. In *Cleveland*, the city contended that a proprietary activity does not necessarily render property non-public, in part because that use could substantially benefit the public. 153 Ohio St. at 111. The Court countered, however, that "[s]uch theory would require that the determination of the question of exemption await the calculation of profit or loss at the end of each year." *Id.* Such a solution is impractical, and, ultimately, unnecessary.

In any event, neither the City nor Mason refutes the legal authority demonstrating that a profit inquiry is moot. In fact, one of the cases cited by both the City and Mason actually supports this very notion. In *Troy*, this Court held that "[w]hen public property is leased to a private corporation, it is no longer *public property* under the control of a government unit" –

even when, there, “neither the lessor nor lessee ha[s] made *any net profit* from these operations.” 160 Ohio St. at 453-54 (emphasis in original) (emphasis added). Thus, in determining whether the city was not entitled to exemption, this Court did not rely on profits (or lack thereof), but rather the nature of the property’s use. *See id.* at 454.

Still, to the extent that an inquiry as to Golf Management’s earnings is even relevant, the evidence in this case indicates that Golf Management played a central role in the success of the City’s courses, and the Board erred in concluding otherwise.

The Commissioner demonstrated in his initial brief how Golf Management earned multiple millions of dollars since assuming management control of the City’s courses in 2003, and that the Board thus erred by characterizing Golf Management’s profits as “incidental.” *See* Apt. Br. at 25-28. Tellingly, the City makes no attempt to challenge or correct the Commissioner’s discussion of Golf Management’s earnings, or demonstrate that Golf Management’s earnings The City contends, consistent with the Board’s conclusion, that Golf Management’s profits were merely “incidental to the operation of the City’s courses and do not preclude exemption.” *See* Ape. Br. at 28-32; *see also* Mason Br. at 5-6 (same).

Simply put, the City asks this Court for the best of both worlds – but in doing so, the City speaks out of both sides of its mouth. On the one hand, the City enlists Golf Management for its expertise and experience to assume responsibility over the City’s *entire* golf course operations, with the hope of maximizing revenues and enhancing the asset value of the courses through reinvestments. But; on the other hand, when seeking a tax exemption, the City argues that Golf Management’s “profit-making” is limited to revenues generated at pro shops and snack bars, and thereby “incidental to the operation of the golf courses.” *See* Ape. Br. at 31.

This incongruity pervades throughout the City’s narrative, but most notably in the City’s contention that the Board “was correct in excluding Golf Management’s management fee and the golf courses’ financial health from its calculations.” *Id.* It may be true, as the City contends, that “Golf Management is paid its management fee whether its services are exceptional or average,” *see id.*, but that is beside the point. The very fact that Golf Management received *any* annual management fee (let alone one that averaged roughly \$200,000), *see* Apt. Br. at 25, speaks to how Golf Management’s hands touched not just pro shop and snack bar sales, but the entire golf course operations. That is precisely why the City enlisted Golf Management’s services in the first place.¹ To argue now that Golf Management had but a limited role in the golf course operations, the City not only strains credulity, but also bites the hand that helped to feed it.

In support, both the City and Mason cite various cases for the proposition that “a non-public use can be so incidental and so *de minimis* that it does not defeat an R.C. 5709.08 exemption. *Whitehouse*, 72 Ohio St.3d at 181; *see, e.g., Bd. of Educ. of S.-W. City Schs. v. Kinney*, 24 Ohio St.3d 184, 187 (1986). The common theme in the cases cited by the City and Mason is that a private entity conducted a non-public use, generally involving only a small portion of the public property and minimal, if any, revenues. However, as discussed both above and in the Commissioner’s initial brief, the facts in this case present a fundamentally different picture. *See* Apt. Br. at 27-28; *see also Parma Heights*, 2005-Ohio-2818, ¶ 17 (private entity played “a central – not an incidental – role in the operation of the [property]”).

Accordingly, to the extent that an inquiry as to Golf Management’s earnings is even relevant, the evidence in this case indicates that Golf Management played a central role in the success of the City’s courses, and the Board erred in concluding otherwise.

¹ Besides, as Mr. Macke testified before the Board, “[I]f you don’t have a golf course, you don’t sell any food and beverage. . . . So you can’t separate the two.” *See* Apt. Br. at 28.

Fourth Proposition of Law:

Where a for-profit entity retains full possessory rights and control of public property, as the functional equivalent of a lessee, that property no longer qualifies as “public property devoted exclusively to a public purpose,” per R.C. 5709.08.

The City contends that the Board correctly relied upon the absence of any lease between it and Golf Management in determining that the City qualified for exemption. *See* Ape. Br. at 22. In so contending, the City adds that “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.” *Id.* The City also details the differences between a “lease” and a “license” – with the upshot that a licensee, unlike a lessee, “cannot serve as a basis for denying” the exemption. *Id.* at 32-35. Curiously, the City champions the importance of a legal construct like a lease; yet, elsewhere, when the Commissioner challenged whether the City exercises “significant control” over its courses, the City complains that the Commissioner “ask[s] the court to place too much weight on the City’s legal relationship with Golf Management.” *See id.* at 26. To be clear, it is undisputed that the City and Golf Management did not enter into any lease agreement. Yet, the absence of an express lease does not end examination of the parties’ relationship. *See Whitehouse*, 72 Ohio St.3d at 181 (“Even though there is no lease involved here, our inquiry is not at an end.”).

The City cites various cases involving parties who have entered into a lease agreement and later seek exemption under R.C. 5709.08. *See id.* at 22-24. However, the City fails to contemplate how the R.C. 5709.08 inquiry would appear where, as here, the parties have entered into a comprehensive agreement detailing each party’s rights and responsibilities relating to the public property – but without an express lease. Contrary to the City’s contention – as well as the Board’s determination – this Court has concluded that the presence or absence of a lease is *not* determinative of R.C. 5709.08 eligibility. *See* Apt. Br. at 29. In *Whitehouse*, this Court noted

that “even when public property is leased to a private individual or concern, the non-public use of the property must be more than incidental before the exclusive public purpose requirement [of R.C. 5709.08] will be violated.” 72 Ohio St.3d at 182. The Court added, “This reasoning . . . seems *especially relevant* when, as here, no lease of the property is involved.” *Id.* (emphasis added). In other words, this Court should undertake the same analysis for purposes of R.C. 5709.08, regardless of whether a lease exists between the parties.

Similarly, in *Carney v. Ohio Turnpike Commission*, 167 Ohio St. 273, 276 (1958), this Court concluded that service plaza buildings raised alongside the Ohio Turnpike were intrinsically tied to the state’s turnpike operations. The Court added that “the fact that such facilities are rented out to private corporations who may profit from operation is incidental,” and it “does not change the controlling fact that the project is owned by the public and is devoted essentially to an exclusive public use.” *Id.* As such, cases like *Whitehouse* and *Carney* instruct that the presence or absence of a lease, by itself, has no bearing on an R.C. 5709.08 exemption. *See* Apt. Br. at 29. Rather, one must look to *the prevailing private use* associated with the property at issue to determine whether that use is exempt. *See id.* Here, Golf Management’s use of the City’s courses rendered them ineligible for exemption under R.C. 5709.08 – and that conclusion does not change simply because there was no express lease in place.

Interestingly, the City holds firm to distinguishing between a license and a lease, despite noting that “[c]ontracting parties may create confusion in setting forth the rights created between them.” *See* Ape. Br. at 33. Yet, ultimately, that notion cuts against the City’s argument. As discussed above, eligibility for an R.C. 5709.08 exemption does not turn on which party is responsible for paying property taxes, in part because the contracting parties are free to shift that responsibility as they see fit. In that same vein, the Court in *Whitehouse* speculated that the facts

in that case might have been indistinguishable from the line of private-lease cases, but for the village's decision to "not leas[e] the land (*perhaps in order to gain a tax exemption*).” 72 Ohio St.3d at 181 (emphasis added). Indeed, this Court implicitly recognized the pitfalls of having an exemption turn on something that two parties simply could tailor via contract. As a result, the Court in *Whitehouse* applied R.C. 5709.08 without regard to the legal construct of a lease. So, too, here, this Court should not arbitrarily limit itself to asking whether a lease exists.

Accordingly, to the extent that this Court relies upon case law relating to the lease of public property to a private entity, Golf Management is the “functional equivalent of a lessee” for purposes of an R.C. 5709.08 analysis. In any event, insofar as the Board determined that the exemption was appropriate simply because no lease existed, the Board erred in doing so.

CONCLUSION

For all the reasons stated above, as well as those in his initial brief, the Commissioner respectfully requests that the Court reverse the Board's March 6, 2014 Decision and Order.

Respectfully submitted,

MICHAEL DEWINE
Attorney General of Ohio



DANIEL W. FAUSEY (0079928)
DANIEL G. KIM (0089991)
Assistant Attorneys General
30 East Broad Street, 25th Floor
Columbus, OH 43215
Telephone: (614) 995-9032
Facsimile: (866) 513-0356
daniel.fausey@ohioattorneygeneral.gov

*Counsel for Appellant,
Joseph W. Testa, Tax Commissioner of Ohio*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Reply Brief of Appellant, Joseph W. Testa, Tax Commissioner of Ohio" was served by U.S. Mail on September 29, 2014, upon the following:

Terrance A. Nestor, Esq.
Acting City Solicitor
Marion E. Haynes, III, Esq.
Assistant City Solicitor
Room 214, City Hall
801 Plum Street
Cincinnati, Ohio 45202

Counsel for Appellee, City of Cincinnati

William M. Bristol, Esq.
Gary F. Franke Co., LPA
120 E. Fourth Street, Suite 1040
Cincinnati, Ohio 45202

Counsel for Appellant, Paul Macke


Daniel G. Kim