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INTRODUCTION

In this appeal, the Board of Tax Appeals (the “Board”) reasonably and lawfully denied the request of Appellant, 250 Shoup Mill, LLC (“Shoup Mill”), for an exemption from real property taxation for the 2010 tax year. The Board correctly determined that, for that tax year, Shoup Mill did not use the property in a charitable manner, it did not qualify as a charitable or educational organization, and it did not qualify for the former public schoolhouse exemption, as set forth in Ohio’s statutes and this Court’s decision.¹

Shoup Mill is in the business of leasing property. Shoup Mill is a nonprofit limited liability corporation that leases property it owns to a charter school, Horizon Science Academy-Dayton High School (“Horizon”). But leasing is not a charitable use. *Northeast Ohio Psych. Inst. v. Levin*, 121 Ohio St.3d 292, 2009-Ohio-583, ¶ 11. And Shoup Mill’s core activity is as a real-estate title holding company, formed for the exclusive purpose of holding title to property, collecting income from the property, and turning over the income to its sole owner, New Plan Learning, Inc. (“NPL”). Shoup Mill’s Brief at p. 21. In fact, Shoup Mill’s sole business purpose

¹This matter shares a common legal issue with *2350 Morse, LLC v. Testa*, S.Ct. Case No. 2015-0342, and *Breeze, Inc. v. Testa*, S.Ct. Case. No 2015-0341: whether property leased to a charter school is entitled to exemption from real property taxation.

Nevertheless, these three cases are not identical. Among the notable distinctions are: 1) in *Shoup Mill* and *Morse*, the entities are not-for-profit limited liability companies registered with the Secretary of State, but in *Breeze*, the entity is a for-profit corporation; 2) the tax year at issue for *Shoup Mill* and *Morse* is only 2010, but in *Breeze*, the 2008-2010 tax years are at issue; 3) the number of parcels at issue varies within each appeal: *Morse* has a number of parcels in Franklin County, whereas *Shoup Mill* and *Breeze* only involve one parcel, in Montgomery and Franklin Counties, respectively; and 4) although the local board of education is not a party in the *Shoup Mill* or *Breeze*, it is in *Morse*.

is to hold, lease, and manage the lease. ST ST 90, 97, 99. This alone is sufficient for Shoup Mill to fail to be a charitable or educational organization. *Id.* at ¶ 15.

Nor do the terms of the lease support Shoup Mill's exemption claim. These terms require substantial lease payments, which are then used to make payments on a commercially acquired, market-driven investment or business loan. As a result, the lease and loan transaction orchestrated by Shoup Mill was properly held to be with a view to a profit. *Anderson/Maltbie Partnership v. Levin*, 127 Ohio St.3d 178, 2010-Ohio-4904, syllabus; *Northeast Ohio Psych. Inst.*, 121 Ohio St.3d 292, 2009-Ohio-583, at ¶ 15.

Because of these dispositive facts, Shoup Mill does not use the property in a charitable manner for purposes of R.C. 5709.12, it is not as a charitable or educational organization for purposes of R.C. 5709.121, and it does not meet the requirements for use of the former public schoolhouse exemption pursuant to R.C. 5709.07(A)(1). *Dialysis Clinic, Inc. v. Levin*, 127 Ohio St.3d 215, 2010-Ohio-5071, ¶ 27; *Anderson/Maltbie Partnership* at syllabus; *Northeast Ohio Psych. Inst.* at ¶ 11, 20; *OCLC Online Computer Library, Inc. v. Kinney*, 11 Ohio St.3d 198, 201 (1984).

This Court should affirm the decision of the Board, and the final determination of the Tax Commissioner, that denied exemption to Shoup Mill.

STATEMENT OF THE CASE AND FACTS

Shoup Mill appeals from a decision of the Board, which affirmed the Tax Commissioner's denial of its application for exemption from real property taxation for tax year 2010. ST1 1; ST2 1; Board Decision, dated January 27, 2015. Shoup Mill filed an application for real property exemption and remission ("Application") for a parcel of property in

Montgomery County (“Property”) on January 30, 2010. Statutory Transcript (ST) 21. Shoup Mill acquired the Property in 2009. ST 22. Shoup Mill requested exemption pursuant to R.C. 5709.121, the provision that pertains to the charitable use of property owned by another charitable or educational organization. *Id.*; Hearing Transcript (HT) 22.

In the Application, Shoup Mill stated that Horizon used the Property for charter school purposes pursuant to a lease between Shoup Mill and Horizon. ST 22, 56, 86. Horizon is a nonprofit organization that qualifies for federal tax exempt status pursuant to Internal Revenue Code (“I.R.C.”) Section 501(c)(3). ST 22, 73. Horizon has provisions in its articles of incorporation that state: (i) it is organized for charitable and educational purposes, (ii) no part of its net earnings shall inure to the benefit of, or be distributed to, its members, directors, officers, or any other private individual, and (iii) upon Horizon’s dissolution, its assets must be distributed to another organization that also has a I.R.C. Section 501(c)(3) designation. ST 126, 127.

The lease is for a ten year term, and provides that Horizon will pay Shoup Mill a monthly amount of \$33,806.25. ST 56. The monthly amount increases annually by 3% over the term of the lease and a 5% late fee is due if the amount is not paid by the 10th of the each month. ST 56. The lease terminates the earlier of August 31, 2035, or the last day of Horizon’s charter. ST 57. If Horizon is in default of some payment or expenditure, Shoup Mill may charge 10% interest on the amount in default, in addition to seeking the eviction of Horizon. ST 59, 62. Horizon cannot sublease without Shoup Mill’s permission and Horizon will indemnify and defend Shoup Mill in any proceeding brought against the Property. ST 60, 63. Horizon cannot make any alterations or additions to the property that cost more than \$1,000, or affix any signage, without Shoup Mill’s prior written permission. ST 60.

Shoup Mill acknowledged that it generated lease income as a result of the lease arrangement. ST 22, 74. In support of its statements pertaining to its lease of the Property, Shoup Mill submitted financial statements. ST 22, 75. These financial statements indicated that in 2011, Shoup Mill's surplus rental income over expenses was \$150,412. Shoup Mill Hearing Exhibit 5 (Consolidated Financial Statement).

Shoup Mill attached its articles of incorporation for a domestic nonprofit limited liability company and the operating declaration to its Application. ST 22, 90, 94. These documents indicate that Shoup Mill's organizational purpose to be "(i) to acquire, renovate, rehabilitate, and construct a charter school facility at 250 Shoup Mill Road, Dayton, Ohio (the "Project"), (ii) to own, hold, lease, mortgage, and pledge the Project at the direction of, and for the benefit of, the Sole Member and (iii) any purposes incidental thereto." ST 90, 96. The "Sole Member" of Shoup Mill is New Plan Learning, Inc. ("NPL"). ST 94.

The Operating Declaration further provides that Shoup Mill's "profits and losses shall be allocated to the Sole Member[,]" and that "[d]istributions shall be made to the Sole Member at such times and in such aggregate amounts as may be determined by the Sole Member, provided that at the time of any such distribution the Sole Member is a 'Non-profit corporation' as such term is defined by [the non-profit corporation statute, R.C. 1702.01(C)]." ST 97. The dissolution provisions in the Operating Declaration provide that Shoup Mill will be dissolved only upon the written approval of NPL, or upon the entry of a decree of judicial dissolution. ST 99. There are no provisions within the Operation Declaration that make any specific reference to the distribution of the assets upon the dissolution of Shoup Mill. ST 99.

NPL is an Ohio nonprofit organization, and a Section 501(c)(3) federal tax exempt organization. ST 106, 108, 120. NPL obtained its federal tax-exempt status by qualifying as a supporting organization: one that carries out its purpose by supporting other organizations that are usually charities. IRS: *Section 509(a)(3) Supporting Organizations*, at [http://www.irs.gov/Charities-&-Non-Profits/Section-509\(a\)\(3\)-Supporting-Organizations](http://www.irs.gov/Charities-&-Non-Profits/Section-509(a)(3)-Supporting-Organizations) (last accessed Oct. 2, 2015). NPL's articles of incorporation provide that it is organized and operated "for the benefit and support" of I.R.C. Section 501(c)(3) publicly-supported organizations that operate charter schools, to which NPL may lease real property. ST 108. The articles further provide that no part of NPL's net earnings "shall inure to the benefit of any incorporator, member, or director of the Corporation, or of any other private individual," and that upon dissolution of NPL, its assets are to be distributed to other I.R.C. Section 501(c)(3) recognized organizations. ST 109, 110.

On June 29, 2011, the Tax Commissioner released his final determination. ST 1. In his decision, the Tax Commissioner concluded that Shoup Mill's use of the Property did not meet the requirements for exemption pursuant to the charitable use exemptions of R.C. 5709.12 or R.C. 5709.121, or the public schoolhouse exemption of R.C. 5709.07. ST 2, 3, 4.

In August, 2011, Shoup Mill filed its notice of appeal. In this notice of appeal, Shoup Mill claimed that the Tax Commissioner erred in denying the requested exemption because it "is a charitable organization defined in Section 501(c)(3) and the use of the property is a charitable use" pursuant to R.C. 5709.121, R.C. 5709.12 and/or R.C. 5709.07(A)(1). Notice of Appeal, 2.

In 2013, in reliance on a 2011 legislative revision to R.C. 5709.07(A)(1), Shoup Mill filed a new application for exemption pursuant to the public schoolhouse exemption of R.C.

5709.07.² Pursuant to the terms of the revised statute, Shoup Mill's exemption request was granted for the 2011, 2012, and 2013 tax years. Appellee Tax Commissioner Post Hearing Brief, Attachment 1, Final Determination, dated June 23, 2013. But the final determination also provided that the property would be returned the tax rolls for the 2014 tax year, with the instruction that Shoup Mill could reapply for exemption at that time. *Id.* Because of the effect of the amended statute, and the subsequent Tax Commissioner final determination for the 2011-2013 tax years, the 2010 tax year is the only year for review.

A hearing was held before the Board on December 16, 2013. At the hearing, Shoup Mill presented one witness, Mr. Murat Arabaci, the President of NPL. HT 7. At this hearing, Mr. Arabaci spoke about the organizational structure of the three entities involved in this appeal, the school and lease arrangement for the Property, and the finances pertaining to the lease arrangements for the Property. See, HT 12, 14, 15-21, 22-26. In particular, Mr. Arabaci stated that the purpose of Shoup Mill was "to acquire, renovate, and hold title for this building located at 250 Shoup Mill Road, Dayton, Ohio." HT 27. Mr. Arabaci also noted that the Application affirmatively indicated the Property was used to produce income other than donations. HT 35.

The Board affirmed the Tax Commissioner's final determinations. BTA Decision and Order, p. 3 (dated January 27, 2015). The Board concluded that Shoup Mill was not entitled to exemption under R.C. 5709.12, or for purposes of R.C. 5709.121. Because Shoup Mill's sole use was to hold the Property, to lease it, and to "provide a vehicle for New Plan to assist Horizon

² R.C. 5709.07 was amended in 2011. 129th General Assembly, HB 153, Section 101.01, eff. Sept. 29, 2011. The amended version removed the "not leased or otherwise used with a view to profit" restriction that had been present in the prior version of the statute. *Id.*

in meeting its facility needs,” Shoup Mill’s use of the Property was not charitable, and Shoup Mill was not a charitable or educational education. *Id.* at 2, 3.

The Board also relied on *Anderson/Maltbie Partnership v. Levin*, 127 Ohio St.3d 178, 2010-Ohio-4904, to conclude that Shoup Mill’s lease of the Property with Horizon produced substantial revenue and demonstrated “a view to profit.” The Board held that Shoup Mill was not entitled to exemption under R.C. 5709.07(A)(1). *Id.* at 3.

Shoup Mill now appeals the Board’s decision to this Court.

LAW AND ARGUMENT³

Proposition of Law No. 1:

Tax exemption statutes are strictly construed against the party claiming exemption and the property owner bears the burden to show entitlement to exemption.

The well-established rule in Ohio is that all property is taxable. R.C. 5709.01. Tax exemptions are a matter of legislative grace and are an exception to the rule. *Seven Hills Schools v. Kinney*, 28 Ohio St.3d 186 (1986). Furthermore, tax exemption statutes must be strictly construed because they are “in derogation of equal rights.” *Anderson/Maltbie Partnership*, 127 Ohio St.3d 178, 2010-Ohio-4904, at ¶ 16; *Ares, Inc. v. Limbach*, 51 Ohio St.3d 102, 104 (1990); *Westinghouse Electric Corp. v. Lindley*, 58 Ohio St.2d 137, 141 (1979).

³ S.Ct.Prac.R. 16.02(B)(1)(c) provides that the contents of the appellant’s brief shall contain “[t]he argument with numbered propositions of law[.]” This requirement is further clarified at S.Ct.Prac.R. 16.02(B)(4), which provides that the appellant’s brief shall contain:

[A]n argument, headed by the proposition of law that appellant contends is applicable to the facts of the case and that could serve as a syllabus for the case if the appellant prevails. If several propositions of law are presented, the argument shall be divided with each proposition set forth as a subheading.

“The purpose of this rule is to present to the court in concise form the legal issues involved in the cause.” *Drake v. Bucher*, 5 Ohio St.2d 37, 39 (1966).

The brief submitted by Shoup Mill in this case fails to comply with S.Ct.Prac.R. 16.02(B). No propositions of law are presented. These rules are “promulgated so that causes coming before the court will be presented in a clear and logical manner.” *Drake*, 5 Ohio St.2d at 39. And although Shoup Mill’s Brief may not demonstrate a substantial disregard for the Court’s rules, this inattention to detail clearly frustrates the purpose of the rule, “the legitimate interests of litigants,” and the principle that “adherence to our rules should be dedicated.” *Id.*

Accordingly, in conformance with this Court’s rules of practice, the Tax Commissioner presents propositions of law “that could serve as a syllabus for the case.” S.Ct.Prac.R. 16.02(B)(4).

The principle of strict construction requires the statute’s language be construed against exemption, leaving the obligation on the taxpayer to show that the language of the statute “clearly express[es] the exemption” in relation to the facts of the claim. *Anderson/Maltbie Partnership* at ¶ 16, quoting *Ares, Inc.* at 104. Thus, the property owner bears the burden to show that it meets the statutory requirements for tax exemption. R.C. 5715.271 (the burden of proof shall be placed on the property owner to show that the property is entitled to exemption.”); *Anderson/Maltbie Partnership* at ¶ 16. “In all doubtful cases,” the claim must be resolved against the asserted statutory tax exemption. *Anderson/Maltbie Partnership* at ¶ 16.

Augmenting the strict construction standard is the principle that this Court will affirm a Board’s determination if, upon hearing and consideration of the record and evidence, this Court finds that the determination is “reasonable and lawful.” R.C. 5715.04; *A. Schulman, Inc. v. Levin*, 116 Ohio St.3d 105, 2007-Ohio-5585; ¶ 6; *PPG Industries, Inc. v. Kosydar*, 65 Ohio St.2d 80, 81 (1981). Similarly, the standard for Board review of the Commissioner’s final determination is that “[t]he Tax Commissioner’s findings are presumptively valid, absent a demonstration that those findings are clearly unreasonable or unlawful.” *Shiloh Auto v. Levin*, 117 Ohio St.3d 4, 2008-Ohio-68, ¶ 16; *Hatchadorian v. Lindley*, 21 Ohio St.3d 66, 69 (1986).

Proposition of Law No. 2:

An owner that uses property for the sole purpose of leasing is not engaged in a use that qualifies as “exclusively charitable” and the owner is ineligible for charitable exemption.

A. Shoup Mill is ineligible for exemption pursuant to R.C. 5709.12(B) because it uses property for leasing, which is not a charitable use of property.

R.C. 5709.12(B) provides that “[r]eal *** property belonging to institutions that is used exclusively for charitable purposes shall be exempt from taxation.” This Court has set forth two-part test for considering exemptions under R.C. 5709.12(B). “[T]he arbiter must determine that (1) the property belongs to an institution, and (2) the property is being used exclusively for charitable purposes.” *Highland Park Owners, Inc. v. Tracy*, 71 Ohio St.3d 405, 406-407 (1994) (citing *Cullitan v. Cunningham Sanitarium*, 134 Ohio St. 99 (1938); *Cleveland Osteopathic Hosp. v. Zangerle*, 153 Ohio St. 222 (1950); *Lincoln Mem. Hosp., Inc. v. Warren*, 13 Ohio St.2d 109 (1968)). This Court went on to explain that: “We have held that a private profit-making venture does not use property exclusively for charitable purposes.” *Id.* Shoup Mill, as a non-profit limited liability company organized in accordance with its operating declaration, qualifies as an “institution” for purposes of R.C. 5709.12(B). *Id.* at 407.

The relevant factor for determining exemption, however, is whether Shoup Mill is using the property “exclusively for charitable purposes.” The phrase “used exclusively” has been interpreted by this Court to mean primary use. *True Christian Evangelism v. Zaino*, 91 Ohio St.3d 117, 120 (2001).

While the General Assembly has not defined what activities of an institution constitute charitable purposes, this Court held in *Planned Parenthood Assn. of Columbus, Inc. v. Tax Commr.*, 5 Ohio St.2d 117 (1966), paragraph one of the syllabus, that:

In the absence of a legislative definition, ‘charity,’ in the legal sense, is the attempt in good faith, spiritually, physically, intellectually, socially and economically to advance and benefit mankind in general, or those in need of advancement and benefit in particular, without regard to their ability to supply that need from other sources, and without hope or expectation, if not with positive abnegation, of gain or profit by the donor or by the instrumentality of the charity.

Accordingly, Shoup Mill must establish that it is using the subject property “exclusively for charitable purposes.”

Shoup Mill contends that it and NPL should be viewed as a single organization for purposes of this appeal. Nevertheless, Shoup Mill and NPL are separate entities. Shoup Mill is an Ohio limited liability company, and NPL is a separate Ohio not for profit-corporation. Even though NPL is the sole member of Shoup Mill, it is also well-settled that a corporation is a separate legal entity, “separate and apart” from those who compose it. *Agley v. Tracy*, 87 Ohio St.3d 265, 268 (1999). See also *Ohio Bur. of Workers’ Comp. v. Widenmeyer Elec. Co.*, 72 Ohio App.3d 100, 105 (1991). Under R.C. 5709.12, the use that is relevant is the use of the subject property by its owner, i.e., Shoup Mill, and not its lessee. *Highland Park Owners, Inc.* at 406-407. See also, *Northeast Ohio Psych. Inst.*, 121 Ohio St.3d 292, 2009-Ohio-583, at ¶ 11.

1. Shoup Mill’s use of the Property for leasing is not a charitable use.

This Court has consistently concluded that leasing is not a charitable use of property, and on this basis, has repeatedly denied exemption under R.C. 5709.12. *Dialysis Clinic, Inc.*, 127 Ohio St.3d 215, 2010-Ohio-5071, at ¶ 37; *Northeast Ohio Psych. Inst.*, 121 Ohio St.3d 292, 2009-Ohio-583, at ¶ 11; *Lincoln Mem. Hosp. v. Warren*, 13 Ohio St.2d 109, 110 (1968).

In this matter, it is clear that Shoup Mill’s primary use of the Property is leasing. ST 55. Shoup Mill’s stated purpose is “(i) to acquire, renovate, rehabilitate, and construct a charter

school facility at 2350 Shoup Mill Road, Columbus, Ohio (the “Project”), (ii) to own, hold, lease, mortgage, and pledge the Project at the direction of, and for the benefit of New Plan Learning, Inc., an Ohio nonprofit corporation, and (iii) any purposes incidental thereto.” ST 90, 96; HT 27. Shoup Mill even describes itself as a real-estate title holding company formed for the exclusive purpose of holding title to property, collecting income from the property, and turning over the income to NPL. Shoup Mill Brief, at p. 21.

Shoup Mill concerns itself only with the lease and financing arrangements of the Property. HT 27. Shoup Mill does not operate the charter school on the Property. Rather, the school is operated by another entity, and accordingly, Shoup Mill has nothing to do with the provisions of educational or curriculum services. *Id.* Here, the presence of the lease alone is sufficient to disqualify Shoup Mill from exemption. *See, e.g., Thomaston Woods Limited Partnership v. Lawrence*, BTA Case No 99-L-551, 2001 WL 672164, *4 (June 15, 2001) (the Board denied an exemption for real property, stressing that its decision was based upon the existence of the lease).

Part of the rationale underlying the rule that leasing is not a charitable use is based on the premise that exemption pursuant to R.C. 5709.12 requires ownership and use for charitable purposes to coincide. *First Baptist Church of Milford v. Wilkins*, 110 Ohio St.3d 496, 2006-Ohio-4966, ¶ 12-16; *Lincoln Mem. Hosp.*, 13 Ohio St.2d at 110; *Zangerle v. State ex rel. Gallagher*, 120 Ohio St. 139, 145-148 (1929). In a lease situation, ownership and use do not coincide because the owner’s “use” in the form of a financial arrangement to another, and not a “use” by the owner exclusively for charitable purposes. *Lincoln Mem. Hosp.*, at 110. *See also, Ripple v. Mahoning Nat. Bank*, 143 Ohio St. 614, 619 (1944) (a lease creates a present

possessory interest and estate in the land of another); *Jones v. Keck*, 79 Ohio App. 549, 552 (1946) (“A lease is a conveyance of an estate in real property for a limited term, with conditions attached, in consideration of rent”). Through the lease, Shoup Mill, as the titleholder and owner of the Property, has transferred its right to use and occupy the Property to Horizon. Accordingly, Shoup Mill’s ownership and exempt use do not coincide and use of the R.C. 5709.12 exemption is inapposite.⁴

Further, this Court’s decisions have uniformly held that profit-making use of property by its owner disqualifies the property from the “exclusively for charitable purposes” exemption. *Northeast Ohio Psychiatric Inst.*, 121 Ohio St.3d 292, 2009-Ohio-583, at ¶ 15; *City of Parma Heights v. Wilkins*, 105 Ohio St.3d 463, 468-469 (2005); *Hubbard Press v. Tracy*, 67 Ohio St.3d 564, 566 (1993); *OCLC Online Computer Library Center, Inc.*, 11 Ohio St.3d at 201; *Joint Hospital Services v. Lindley*, 52 Ohio St.2d 153, 155 (1977); *Ohio Masonic Home v. Board of Tax Appeals*, 52 Ohio St.2d 127, 130 (1977); *Lincoln Mem. Hosp.*, 13 Ohio St.2d at 110; *Benjamin Rose Institute v. Myers*, 92 Ohio St. 252 (1915), syllabus. A lease in which revenues exceed expenses is evidence of a profit making use of property. *American Soc. for Metals v. Limbach*, 59 Ohio St.3d 38, 40 (1991); *Seven Hills Schools*, 28 Ohio St.3d at 187-188 (profit is the excess income over expenditure, as in a business or any of its departments, during a given period of time).

⁴ In fact, it is specifically contemplated that in this circumstance where ownership and use do not coincide, R.C. 5709.121 is the applicable exemption. See, e.g., *Dialysis Clinic, Inc.*, 127 Ohio St.3d 215, 2010-Ohio-5071, at ¶ 24; *First Baptist Church of Milford*, 110 Ohio St.3d 496, 2006-Ohio-4966, at ¶ 12-16.

Shoup Mill's lease demonstrates a clear intent to earn a net profit, i.e., to have its revenue exceed its expenses. Shoup Mill acknowledges that it generates lease income in excess of its expenses as a result of the lease arrangement with Horizon. HT at 35; ST 22; *American Soc. for Metals* at 40; *Seven Hills Schools* at 187-188. Shoup Mill receives \$405,675 a year in lease payments from Horizon, and for 2011, Shoup Mill's surplus revenue, over expenses, was \$150,412. ST 56; Shoup Mill Hearing Exhibit 5 (Consolidated Financial Statement).

The lease also has provisions in it that mirror those found in commercial leases: over the term of the lease, the monthly amounts due increase annually by 3%, and late fees are due if the payment is late. ST 56. In the event Horizon defaults on a payment, Shoup Mill can charge 10% interest on the defaulted amount and evict Horizon. ST 59, 63. Shoup Mill retains the ability to approve any changes to the property that cost more than \$1,000 and approve any sublet arrangements. ST 60, 63. The lease payments made by Horizon are used by Shoup Mill to make loan payments on a commercially acquired, market-driven business and investment loan, which also evidences Shoup Mill's intention to obtain a return on its investment. HT 16; Shoup Mill Hearing Exhibits 18, 19, 20.

The Board properly determined that Shoup Mill's use of the subject property was to lease it, and that the lease was also with a view to profit. Leasing property is not an exclusively charitable use, and accordingly, Shoup Mill is ineligible for charitable exemption pursuant to R.C. 5709.12.

2. Shoup Mill's use of the Property is not exclusively for charitable purposes because its claim for exemption relies on how it uses the proceeds generated from the lease.

Inherent within the “exclusive use” language of R.C. 5709.12 is an additional principle: the determinative test for granting an exemption is the use to which the property is used, and not how the proceeds generated from the use of the property are applied. *Dialysis Clinic, Inc.*, 127 Ohio St.3d 215, 2010-Ohio-5071, at ¶ 33; *Northeast Ohio Psych. Inst.*, 121 Ohio St.3d 292, 2009-Ohio-583, at ¶ 15-16; *Hubbard Press*, 67 Ohio St.3d at 566; *Columbus Youth League v. Cty Bd. of Revision*, 172 Ohio St. 156, 158 (1961); *Lutheran Book Shop v. Bowers*, 164 Ohio St. 359, 361 (1955) (the test is the present use of the property rather than the ultimate use of the proceeds received from the property sought to be exempted); *Barberton Bank Boosters, Inc. v. Testa*, BTA Case No. 2012-2252, 2013 WL 6833375 (Oct. 29, 2013). This rule is based on the principle that it is the use of the property and charitable activities of the taxpayer seeking the exemption which must be considered when reviewing an application for a charitable exemption. *Hubbard Press* at 566; *Seven Hill Schools*, 28 Ohio St.3d at 186.

Further, this Court has specifically stated that real property is not eligible for exemption if it is subject to a rental agreement, even if the proceeds deriving from the rental agreement are devoted to a charitable purpose. *Benjamin Rose Institute*, 92 Ohio St. at syllabus. Such is the circumstance presented by Shoup Mill in this case.

Throughout this appeal, Shoup Mill has gone to lengths to demonstrate that the lease proceeds generated from its use of the property are either returned to Horizon for its use, or distributed to the non-profit parent corporation, NPL. HT 21; Shoup Mill's Brief at 7 (“NPL obtains the funds it needs to support its charter schools solely from the rentals paid by the charter schools to NPL's title-holding entities such as Shoup Mill.”). This is because Shoup Mill

understands that the operation of a school would be an exempt use. *See*, R.C. 5709.07, R.C. 5709.121(A)(b); *American Committee of Rabbinical College of Telshe v. Board of Tax Appeals*, 156 Ohio St. 376 (1951), paragraph one of the syllabus (construing General Code 5353, recodified at R.C. 5709.12).

But simply because the proceeds from an income producing activity, i.e., lease payments pursuant to an underlying lease, are applied to what could be a charitable and exempt purpose, does not mean that an income producing activity qualifies as charitable. ST 22; HT 21; *Northeast Ohio Psch. Inst.*, 121 Ohio St.3d 292, 2009-Ohio-583, at ¶ 16. Accordingly, Shoup Mill may not establish its own core activity of leasing as charitable by pointing to a financial benefit that it confers upon another entity whose activity may be charitable. *Dialysis Clinic, Inc.*, 127 Ohio St.3d 215, 2010-Ohio-5071, ¶ 33. The use of the property is determinative of the question of tax exemption, and in this case, Shoup Mill's use of the property is for leasing.

3. Shoup Mill's use of the Property is not exclusively for charitable purposes because its claim for exemption relies on the exempt status of its lessee, Horizon, rather than on its own use of the Property.

Related to the principle that the use of proceeds does not determine exempt status is a second concept. An institution may not claim an exemption from real property taxation vicariously through the entities it supports, because it is the property owner's use of the property that is relevant. *First Baptist Church of Milford*, 110 Ohio St.3d 496, 2006-Ohio-4966, ¶ 12-13; *OCLC*, 11 Ohio St.3d at 201; *National Church Residences of Chillicothe v. Lindley*, 18 Ohio St.3d 53, 58; *Falls Masonic Temple Co. v. Limbach*, BTA Case No. 90-A-1563, 1993 WL 257919 (June 30, 1993).

Again, Shoup Mill's only use of the Property is for leasing. Shoup Mill does not provide any charitable service. It may well be very noble that Shoup Mill, through NPL, applies the lease proceeds from Horizon's use of the Property back to charter schools and their financial needs. Nevertheless, Shoup Mill cannot claim exemption through Horizon's operation as a charter school Shoup Mill is vicariously relying on Horizon's use of the leased property. *Id.* The focus of the exemption inquiry is on the *property owner's* use of the property. Shoup Mill's use of the Property is leasing and that is not a charitable use that qualifies for exemption. *Northeast Ohio Psych. Inst.*, 121 Ohio St.3d 292, 2009-Ohio-583, at ¶ 11.

B. Shoup Mill does not qualify for exemption through R.C. 5709.121. Shoup Mill is not a charitable or educational organization because its organizational purpose is to lease property and manage that leased property.

Because Shoup Mill cannot qualify for a charitable exemption pursuant to R.C. 5709.12, it must qualify, if at all, for a charitable-use exemption under R. C. 5709.121. Yet Shoup Mill cannot avail itself of exemption under R.C. 5709.121, because it is not a charitable or educational organization.

R.C. 5709.121(A) provides,

(A) Real property * * * belonging to a *charitable or educational institution* * * * shall be considered as used exclusively for charitable * * * purposes by such institution * * * if * * *:

(1) It is used by such institution * * * under a lease, sublease, or other contractual arrangement:

* * *

(b) For other charitable [or] educational * * * purposes.

(2) It is made available under the direction or control of *such institution* * * * for use in furtherance of or incidental to its charitable [or] educational * * * purposes and not with the view to profit. (Emphasis added).

Application of this exemption is contingent upon the owner's qualification as a charitable or educational institution. *Dialysis Clinic, Inc.*, 127 Ohio St.3d 215, 2010-Ohio-5071, ¶ 22. See also *Episcopal Parish of Christ Church v. Kinney*, 58 Ohio St.2d 199, 201 (1979) (R.C. 5709.121 only applies "to property 'belonging to,' i.e. owned by, a charitable or educational institution"). This provision has no application to noncharitable institutions seeking tax exemption. *OCLC*, 11 Ohio St.3d at 202, *Episcopal Parish of Christ Church* at 201; *Cincinnati Nature Center v. B.T.A.*, 48 Ohio St.2d 122, 125 (1976). As a result, this Court has held that "the first inquiry must be directed to the nature of the institution applying for exemption," and if the institution is not a charitable or educational institution, the analysis under R.C. 5709.121 terminates. *Id.*; *Northeast Ohio Psych. Inst.*, 121 Ohio St.3d 292, 2009-Ohio-583, at ¶ 12, 22.

Accordingly, to be entitled to exemption Shoup Mill must establish: 1) it is a charitable or educational institution, 2) another organization (i.e. Horizon) is using the subject property in furtherance of Shoup Mill's charitable or educational purpose, and 3) the use of the property is not with a view to profit. See, *Dialysis Clinic, Inc.* at ¶ 24, 33; *Northeast Ohio Psych. Inst.* at ¶ 11-12; *OCLC* at 201.

Shoup Mill, however, cannot meet the threshold requirement for the use of R.C. 5709.121 because it is neither a charitable nor an educational organization. Therefore, no further inquiry into the additional elements of R.C. 5709.121 is necessary. *Northeast Ohio Psych. Inst.* at ¶ 22; *OCLC* at 202; *Episcopal Parish of Christ Church* at 201.

1. Shoup Mill has not established that it is a "charitable organization."

The record before the Board clearly establishes that Shoup Mill's exclusive purpose is to acquire, renovate, and hold title for the building located at 2350 Shoup Mill Road, Columbus,

Ohio, and own, hold, lease, mortgage, and pledge the Property at the direction of, and for the benefit of, NPL. HT 27; ST 90, 96. Included within this purpose is the obligation to collect income, and turn over the entire amount to its sole member, NPL. ST 90, 97, 99; HT 27. Shoup Mill's business purpose is leasing property and leasing is not an activity that qualifies Shoup Mill as a charitable organization. See Shoup Mill's Brief at p. 21; *Northeast Ohio Psych. Inst.* at ¶ 15-16.

This is not the first time this Court has seen this set of facts. See *Northeast Ohio Psych. Inst.*, 121 Ohio St.3d 292, 2009-Ohio-583, at ¶ 12, 15, 20. (exemption under the R.C. 5709.121 provisions denied because the property owner's activities were leasing property and generating significant revenue); *Lincoln Mem. Hosp.*, 13 Ohio St.2d at 110. Moreover, this conclusion is entirely consistent with this Court's analysis of the meaning of "charity" in *Planned Parenthood*: there is nothing uniquely charitable about holding title to property, leasing it, and collecting income. 5 Ohio St.2d, at paragraph one of the syllabus. Nor is Shoup Mill's leasing some incidental activity: it is Shoup Mill's *only* business activity. ST 90, 97, 99; Shoup Mill's Brief at p. 21. *Contra*, *Community Health Professionals, Inc. v. Levin*, 113 Ohio St.3d 432, 2007-Ohio-2336, ¶ 3 (where the organization's main purpose was the provision of skilled, in-home nursing care and hospice services).

To support its claim that it is a charitable organization, Shoup Mill relies on its status as a single-member, nonprofit limited liability company, which allows it to be treated as a part of the same legal entity as its nonprofit sole member. R.C. 5701.14. Shoup Mill contends that this means that all the assets and liabilities of Shoup Mill are considered to be that of NPL, an Ohio nonprofit corporation that is also recognized as federally tax exempt pursuant to I.R.C. Section

501(c)(3) and 509(a)(3). ST 110, 122. NPL's federal exempt status is granted by virtue of its status as a supporting organization pursuant to Section 509(a)(3), rather than as a public charity. "A supporting organization is a charity that carries out its exempt purposes by supporting other exempt organizations, usually other public charities." IRS: *Section 509(a)(3) Supporting Organizations*, at [http://www.irs.gov/Charities-&-Non-Profits/Section-509\(a\)\(3\)-Supporting-Organizations](http://www.irs.gov/Charities-&-Non-Profits/Section-509(a)(3)-Supporting-Organizations) (last accessed Oct. 2, 2015).

But the very first phrase in R.C. 5701.14 sets forth the subject of the legislation: to determine to determine a limited liability company's *status as a for-profit, or not for profit, organization*. In contrast, the inquiry that Shoup Mill must address is whether it is a *charitable organization*. The determination of whether an entity is a charitable organization is different from whether it is a not-for-profit organization, because an entity can be not-for-profit, but not charitable. *See, e.g., Northeast Ohio Psych. Inst.*, 121 Ohio St.3d 292, 2009-Ohio-583, at ¶ 11, 15. Here, there is no question that Shoup Mill is a not-for-profit organization, but because of its leasing activity and business purpose, it is not charitable. *Id.*

In addition, Shoup Mill claims that because its finances are "disregarded" and are "part-and-parcel" with that of NPL's, and because NPL is an I.R.C. Section 501(c)(3) federal tax exempt entity, Shoup Mill should also be considered a charitable institution and entitled to exempt status. ST 106-110, 120. Yet similar to the distinction between not-for-profit organization status and charitable organization status, simply because an entity possesses exempt status pursuant to I.R.C. Section 501(c)(3), does not qualify the organization as charitable for R.C. 5709.121 purposes regardless of Shoup Mill's tax-relationship with NPL. *Dialysis Clinic, Inc.* at ¶ 19, 20, 25, 26; *NBC-USA Hous., Inc.-Five v. Levin*, 125 Ohio St.3d 394, 2010-Ohio-

1553, ¶ 20. Shoup Mill’s reliance on NPL’s federal tax-exempt status to support Shoup Mill’s claim for real property exemption pursuant to R.C. 5709.121 is unavailing.

Similarly, Shoup Mill’s attempt to rely on the charitable status of its sole member, an entity that “carries out its exempt purposes by *supporting* other exempt organizations” (emphasis added), or on the charitable status of its lessee, Horizon, is akin to a vicarious exemption claim: improperly claiming exemption by relying on the status of another entity. *Dialysis Clinic, Inc.*, 127 Ohio St.3d 215, 2010-Ohio-5071, at ¶ 33; *OCLC*, 11 Ohio St.3d at 201; *Falls Masonic Temple Co.*, *supra*.

The bottom line is that Shoup Mill’s own entity status must qualify it as a charitable institution for purposes of R.C. 5709.121. When the property owner’s activities are not charitable, the Court has routinely denied exemption under the R.C. 5709.121 provision. *Northeast Ohio Psych. Inst.* at ¶ 15-16. *See also Dialysis Clinic, Inc.*, 127 Ohio St.3d 215, 2010-Ohio-5071, at ¶ 30, 36 (clinic did not provide its healthcare services on a nonprofit basis to those in need, without regard to race, creed, or ability to pay); *OCLC*, 11 Ohio St.3d at 201 (property owner provided library services for a fee in excess of the actual cost and business operation more closely resembled those of a publisher of library materials).

Here, Shoup Mill may operate as an Ohio nonprofit, limited liability company and there is no evidence of any private inurement of its earnings, but that fact alone does not establish charitable status. Shoup Mill’s leasing activities do not make it into a charitable organization and Shoup Mill is not entitled to an exemption through R.C. 5709.121.

2. Shoup Mill has not established that it is an “educational organization.”

The record before the Board also clearly establishes that Shoup Mill is not an educational organization.

The term “educational institution” has not been defined by the General Assembly, but this Court has provided a thorough and detailed analysis of the term. An entity “meets the standards of an ‘educational institution’ under R.C. 5709.121” if it possesses the following attributes:

Such an institution must be marked by the presence of both students and teachers, offer educational opportunities to the public, involve the transfer of knowledge and skills in one or more structured classes rather than in merely social activities, and have as its primary function the presentation of formal instruction.

Cincinnati Community Kollel v. Levin, 113 Ohio St.3d 138, 2007-Ohio-1249, ¶ 15.

In *Kollel*, a Jewish center qualified as an “educational institution” because the Jewish nonprofit property owner’s primary activities included offering many classes for the community at large, taught by four staff scholars, and the scholars engaged in six hours of study with rabbis each day at the kollel, and they were tested weekly. *Id.* at ¶ 18. In contrast, an institution is not an “educational institution” when it has no teachers, students, or classes. *See, Fairmount Ctr. for Creative Performing Arts, Inc. v. Kinney* 11th Dist. App. No. 1251, 1985 WL 22997 (June 27, 1986) (an education institution is not limited being institutions “chartered by the State Board of Education or licensed by the State Board of College and School Registration, nor to schools staffed by certified teachers,” so long as the activities conducted by the institution are educational).

In this matter, Shoup Mill and NPL meet any of the criteria to be an “educational institution.” Neither Shoup Mill nor NPL employs any teachers, has any students, or offers any

classes. And neither Shoup Mill nor NPL conducts any educational activities. Rather, Shoup Mill holds title to the Property, collects income from the Property, and turns over the income to NPL, at the direction and for the benefit of NPL. ST 90, 97, 99; Shoup Mill's Brief at p. 21. Collecting income and turning it over to NPL does not meet any of educational institution criteria set forth in *Kollel*, or qualify Shoup Mill as an educational institution. And NPL provides school facilities and facility management services to charter schools, essentially acting as a real estate property manager. Shoup Mill Exhibit 21, Exhibit 22.

Shoup Mill and NPL jointly claim to qualify as educational institutions based upon their *support* of charter schools. Shoup Mill's Brief at 21. But even this "support" is overstated. Again, Shoup Mill, as the owner of the property, only collects the income from its commercial lease with Horizon, and submits those proceeds to NPL. ST 90, 97, 99; Shoup Mill's Brief at 21. This activity is not "support" of a charter school. To the contrary, it is real estate investing and property management, which is similar to the character of NPL's "support" of charter schools. *See* Shoup Mill Exhibit 21, Exhibit 22. Again, neither Shoup Mill nor NPL present formal instruction as its primary function, have the presence of both students and teachers within its organization, or offer educational opportunities to the public in structured classes.

Finally, Shoup Mill erroneously analogizes this situation to one in which a vocational school district could obtain an exemption even though property owned by the district generated revenue. 1999 Ohio Op. Atty Gen. No. 99-007. In such a circumstance, a vocational school district, operated pursuant to R.C. 3311.16 to R.C. 3311.214, could provide internet services to governmental entities, nonprofit organizations, students, business and advisory groups, vendors, and employees, if it was within the scope of the district's operational purposes. *Id.* Excess

internet service capacity could be sold or leased, provided the sale or lease served the public interest. *Id.* Moreover, provided the “proceeds received from the provision of [i]nternet access services [were] used for purposes of the vocational school district, it appear[ed] that the district would qualify for tax exemption.” *Id.*

Shoup Mill’s reliance on this circumstance as support for its exemption claim, however, is misplaced. First, the comparison only serves to highlight the fact that Shoup Mill is using the subject Property to generate revenue pursuant to the lease. Second, this comparison is completely inapposite. Shoup Mill, a nonprofit, limited liability company, does not operate within the statutory framework of R.C. 3311.16 to R.C. 3311.214, let alone any of that Chapter, and its *only use* of the Property is for the revenue producing activity of leasing. Shoup Mill, as the lessor of property, is not operating a school district, not providing any service that is attendant to operating a school district, and not conducting any activity that serves the public interest.

Proposition of Law No. 3:

Shoup Mill does not qualify for exemption pursuant to R.C. 5709.07(A)(1) because it uses the property for leasing and the lease has a “view to profit.”

Shoup Mill describes itself as a real-estate title holding company formed for the exclusive purpose of holding title to property, collecting income from the property, and turning over the income to NPL. Shoup Mill’s Brief at p. 21. As a consequence, Shoup Mill is not a school and ineligible for the public schoolhouse exemption at R.C. 5709.07(A)(1).

At the time Shoup Mill filed its Application, the “public schoolhouse” property tax exemption provided:

The following property shall be exempt from taxation:

- (1) **Public schoolhouses**, the books and furniture in them, and the ground attached to them necessary for the proper occupancy, use, and enjoyment of the schoolhouses, **and not leased or otherwise used with a view to profit[.]**⁵

Under its plain meaning, the exemption embraced only such real property that is “not leased or otherwise used with a view to profit.” The leading case interpreting this version of R.C. 5709.07(A)(1) is *Anderson/Maltbie Partnership*, 127 Ohio St.3d 178, 2010-Ohio-4904. Its syllabus provides:

Property cannot be exempted from taxation as a public schoolhouse when the owner leases the property to the school for profit.

Based on the *Anderson/Maltbie* syllabus law, Shoup Mill’s requested exemption was denied: there was a lease between it and Horizon. ST 1-4, 55. Moreover, there was view to profit in the Shoup Mill’s lease with Horizon. The lease payment amounts are, objectively, substantial: \$33,806.25 a month (\$405,675/year), with a 3% annual increase, indicating a view to profit. ST 1-4, 56. By any standard, the monthly lease payment is not nominal.

In conjunction with the lease is a financing arrangement. The lender underwriting the lease transaction is NCB Capital Impact. Shoup Mill Hearing Exhibits 18, 19, 20. NCB Capital Impact appears to be a nonprofit entity, but that does not mean that NCB operates without a

⁵ As noted in footnote 2, R.C. 5709.07 was amended in 2011, removing the “not leased or otherwise used with a view to profit” restriction that had been present in the prior version of the statute. Because of this amendment, Shoup Mill qualified for the public schoolhouse exemption starting in 2011. Appellee Tax Commissioner Post Hearing Brief, Attachment 1, Final Determination, dated June 23, 2013.

profit. It simply means that any profit generated does not inure to the private benefit of shareholders. NCB Capital Impact is clearly in the business of providing loans, whether it is for the provision of charter school-educational services, affordable housing, or investing in cooperative businesses. See, <http://www.capitalimpact.org/wp-content/uploads/2014/03/CapitalImpactPartnersOverview.pdf> (last accessed October 2, 2015).

In fact, the loan underscoring the Shoup Mill/Horizon lease is a market-driven commercial loan, which by all measures, is complicated and sophisticated, and an additional demonstration that the Shoup Mill/Horizon lease transaction possesses the “view to profit” attribute. HT 5-21, 23-25; Shoup Mill Hearing Exhibits 18, 19, 20. The paperwork accompanying the loan is formal and extensive. The terms of the note the mortgage secures state that the purpose of the loan is for business or investment. Shoup Mill Hearing Exhibit 18. The interest rate for the note varies, from a floating rate, based on the London International Offering Rate, as obtained from Bloomberg Financial Services, to a fixed rate, if certain qualifications are met. *Id.* The fixed rate is based on an amount in excess of the “current weekly average yield for the United States Treasury Securities having five (5) year maturities, as published two (2) days prior to the Conversion Date in Document H.R. 15 (519) published by the Board of Governors of the Federal Reserve System and entitled “Federal Reserve Statistical Release” or its successor publication, said rate to be rounded up to the nearest one-eighth of one percent (1/8%),” with additional qualifications. Shoup Mill Hearing Exhibit 18, p. 31, 39. As to be expected, there are provisions pertaining to the timing of payments, maturity, and default. Shoup Mill Hearing Exhibit 18, p. 33, 40-41.

The terms of this commercial loan is reflective not only of the volatility and risk in the market as a whole, but also of the specific venture of charter schools, particularly since the private market is providing what the public sector cannot. HT 39-40. For instance, Shoup Mill’s loan with Horizon is a twenty-five year financing arrangement, in contrast to the state law which provides that loans entered into directly by charter schools can extend no longer than fifteen years. Shoup Mill Hearing Exhibit 18. The loan is also subject to considerable lender control. As stated at the hearing, the lender and its requirements determined the lease rate, and the lender required certain terms to be included within the lease as a condition for the loan. HT at 15-20, 36, 38.

In other words, NCB Capital Impact enters into its financial arrangements with organizations such as Shoup Mill with an intention to obtain a return on its investment, notwithstanding the generosity Shoup Mill may show in its administration of the loan, such as by waiving lease payments and writing off losses when it deems appropriate. HT 21; HT for 2350 Morse 44-45. In any event, the terms of the loan require repayment. Thus, although Shoup Mill may not evince any view to profit from the lease in and of itself, lease and loan transaction as a whole, in which Shoup Mill is an operative and key player, evinces a view to profit.

In limited situations, this Court has allowed nonprofit entities to use property with a “profit,” i.e., the generation of excess income over expenditures. *Lutheran Book Shop*, 164 Ohio St. at 361, citing *American Jersey Cattle Club v. Glander*, 152 Ohio St. 506, 510 (1950) (“The fact that a corporation is one not-for-profit does not mean that its enterprises may not be conducted for gain, profit or income”); *American Soc. for Metals*, 59 Ohio St.3d at 40; *Seven Hills Schools*, 28 Ohio St.3d at 187-188. Shoup Mill, however, has not demonstrated that the

lease with Horizon and the \$405,675 annual rent is anything other than “with a view to profit.” Indeed, in 2011, Shoup Mill’s surplus rental income over expenses was \$150,412. Shoup Mill Hearing Exhibit 5.

Finally, Shoup Mill tries to distinguish its circumstance from that in *Anderson/Maltbie* on the factual basis that it is a nonprofit limited liability company and the lender in *Anderson/Maltbie* was not a nonprofit entity. But this is not a distinction that is relevant. Rather, the operative fact under *Anderson/Maltbie* is whether there is a lease. *Anderson/Maltbie*, 127 Ohio St.3d 178, 2010-Ohio-4904, at syllabus. Here, there is quite clearly a lease between Shoup Mill and Horizon. This lease, in conjunction with its commercially acquired loan and financing arrangement, most certainly evidences a view to profit and disqualifies Shoup Mill from exemption under R.C. 5709.07. ST 1-4, 90; HT 27.

CONCLUSION

For the foregoing reasons, the Tax Commissioner respectfully requests for this Court to affirm the decision of the Board of Tax Appeals, and the Final Determination of the Tax Commissioner, which denied charitable use and public schoolhouse exemption to Shoup Mill.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served upon the following by regular U.S. Mail and e-mail on this 9th day of November, 2015:

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