

ORIGINAL

In the
Supreme Court of Ohio

CITY OF CINCINNATI)

Appellee,)

-vs -)

JOSEPH W. TESTA,)
TAX COMMISSIONER OF OHIO)

Appellant.)

CASE NO.: 14-0531

Appeal from the Ohio
Board of Tax Appeals

Board of Tax Appeals Case Nos.
2011-143 through 2011-148

MERIT BRIEF OF APPELLANT PAUL MACKE

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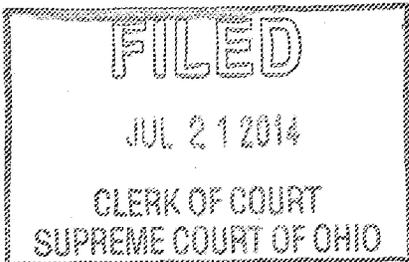
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INTRODUCTION

Appellee, City of Cincinnati ("City"), turned over the operation of its seven golf courses to a professional golf course management contractor. Tax Commissioner's Hearing Exhibit ("Ex.") B, at 310. The contractor, Cincinnati Golf Management, Inc. ("Golf Management"), is a private, for-profit entity with a profit motive. BTA Hearing Transcript ("Hr. Tr.") at 211-12.

In light of this relationship, Paul Macke, appellant, a local golf course owner, filed a complaint against the continuing exemption of the City's golf courses pursuant to R.C. § 5715.27. See, e.g. Statutory Transcript for Case No. 2011-143 at 12. Mr. Macke's complaint gave rise to the final determination made by appellant, Joseph W. Testa, Tax Commissioner of Ohio ("Commissioner"), in this matter. In his reasoned determination, the Commissioner appropriately found that the golf courses are not used exclusively for a public purpose that would qualify for exemption under the requirement for exclusive public use and public purpose of R.C. § 5709.08.

The Ohio Board of Tax Appeals ("Board") improperly reversed the Commissioner's final determination, concluding that the City's golf courses were entitled to a "public use" exemption under R.C. § 5709.08. In reaching its decision, the Board erred on multiple grounds.

This Court has already recognized, in a separate appeal, the clear separation between Golf Management and the City. Golf Management is an independent contractor, and not an agent of the City, and therefore is not entitled to claim the City's exemption for purposes of sales/use tax. See *Cincinnati Golf Mgmt., Inc. v. Testa*, 132 Ohio St.3d 299, 2012-Ohio-2846, ¶¶ 24-29. The City's real property exemption

application in this case fares no better than its contractor's previous bid for sales/use tax exemption.

To obtain exemption under R.C. § 5709.08, (1) the property must be public property, (2) it must be used for a public purpose, and (3) the use must be exclusively for a public purpose. *City of Parma Heights v. Wilkins*, 105 Ohio St.3d 463, 2005-Ohio-2818, ¶ 11 (quoting *Columbus City Sch. Dist. Bd. of Educ. v. Zaino*, 90 Ohio St.3d 496, 497 (2001)); *Cleveland v. Perk*, 29 Ohio St.2d 161, 163 n.2 (1972).

Under well-settled law, the City's choice to turn over operations to a for-profit entity eliminates the possibility of public purpose exemption. In *Parma Heights*, this Court explained, "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,' the property no longer meets the R.C. 5709.08 requirement that the property be 'used exclusively for a public purpose.'" 2005-Ohio-2818, ¶ 12 (quoting *Perk*, 29 Ohio St.2d at 166). That exact situation is what exists in the case at hand, wherein a private, for-profit enterprise is making a profit utilizing public property.

The City's aim in ceding management and operation of the golf courses to Golf Management was "to establish and exceed the goals of operating a profitable, private-public partnership business." Hr. Tr. at 71, 74, 111; Ex. B, at 310; Ex. D, at 459; see also, e.g., Hr. Tr. at 111 (placing "ongoing emphasis on . . . a 'revenue culture' that breeds success"). And, it has done so. The private-public partnership has been highly profitable for Golf Management and the City.

Golf Management has profited handsomely from its “public-private partnership business” with the City – to the tune of **millions of dollars**. See detail *infra*. To the extent that the BTA found that this income was “incidental,” was quite simply erroneous. Indeed, profitability was the City’s intent when it consciously chose to privatize operation of its golf courses. See Hr. Tr. at 54-55, 140; Ex. A, at 11 (the City had “the goal to maximize cash flows so we could get back to the reinvestment for our golf courses.”) The City profited by obtaining cheaper and easier operation at the golf courses and greater revenue, by allowing a for-profit company to run them. *Id.* But the decision to privatize golf operations has consequences. In doing so, the City abandoned any claim to an “exclusive” public purpose on the property. Instead, there is a private business operating the property for profit. This operation negates the possibility – indeed, the very purpose – of real property tax exemption.

Furthermore, and independently, the City’s use of the property to produce income (as a revenue-generating asset) through its “public-private partnership business” is itself not a public use of the property. 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.” *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). Though 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.

Indeed, the City aimed to put its golf courses in competition with local courses. In addition to turn-key operation of the courses, the City's agreement also required Golf Management to create and implement annual marketing and business plans. Hr. Tr. at 59-63; Ex. D, at 610-14. Golf Management monitored the performance of roughly 100 golf courses within a 25-mile radius of Cincinnati and also analyzed overall golf revenue trend data in the area. Hr. Tr. at 102-03, 174-75; see Ex. H; Ex. G, at 754-57. Its marketing plans laid out aggressive marketing and growth strategies, and identified and assessed the impact of other area golf courses. Hr. Tr. at 102-05; 108-13; see Ex. M, at 1262-69 (marketing plan). Golf Management's annual plans include strategies developed for "how to deal with the competition," including adjusting the cost of greens fees and other prices at the City's courses, based upon the competition. Hr. Tr. at 105-12. Golf Management "engage[d] in aggressive guerrilla marketing efforts" for the City's courses, in order to "effectively combat competitive offers." Ex. M, at 1265; see *also* Hr. Tr. at 107-08 (discussing need for "attract[ing] a sufficient and appropriate customer base," lest those customers "take their business to other facilities").

In light of these facts, and facing a competitive disadvantage Mr. Macke filed his complaint against the continuing exemption of the City's golf courses. Mr. Macke explained that he doesn't mind competing against City courses, but "it's not on a level playing field." Hr. Tr. at 227. Before the Board, Mr. Macke explained that the City's competitive advantage drove one of his courses out of business. Hr. Tr. at 227-28. And, in fact, as of the date of this filing, Mr. Macke's golf course, Hillview, has closed.

Mr. Macke's concerns reflect the very basis for this Court's demand that statutes granting tax exemptions be strictly construed. As this Court has repeatedly explained,

tax exemption statutes must be strictly construed *against the exemption* because they are “in derogation of equal rights.” *Anderson/Maltbie P’ship*, 127 Ohio St.3d 178, 2010-Ohio-4904, ¶ 16; *Westinghouse Elec. Corp. v. Lindley*, 58 Ohio St.2d 137 (1979); *Ares, Inc. v. Limbach*, 51 Ohio St.3d 102, 104 (1990). The reason is that the exemption of one property burdens other taxpayers with the need to raise additional tax revenue, and the tax burden should only be shifted when the “present benefit to the general public” is “sufficient to justify the loss of tax revenue.” See *White Cross Hospital Ass’n v. Bd. of Tax Apprs.*, 38 Ohio St.2d 199, 201 (1974); *State Teachers Ret. Bd. v. Kinney*, 68 Ohio St.2d 195, 196 (1981). On the other hand, when, as here, the property is used for private pecuniary gain, there is no present benefit to the general public that justifies shifting the tax burden to other taxpayers. This Court cannot allow a public body to act as a “commercial landlord,” and wield the exemption as “a competitive advantage” over the nonexempt. *Columbus City Sch. Dist. Bd. of Educ. v. Testa*, 2011-Ohio-5534, 130 Ohio St.3d 344, ¶ 33.

For those reasons, this Court must reverse the Board’s decision. The for-profit operation of these golf courses defeats any claim to public purpose or public use, as mandated by Statute in order to obtain tax exemption, and the exemption must be denied.

STATEMENT OF THE CASE AND FACTS

Golf Management is a subsidiary of Billy Casper Golf Management, Inc., and was incorporated to operate seven golf courses owned by the City. Hr. Tr. at 211-13. Like its corporate parent, Golf Management is a for-profit entity incorporated in Virginia. Hr. Tr. at 211-12. Golf Management exists specifically to operate and manage golf

courses, whether for individual, corporate, or public entities. Hr. Tr. at 192-93. In all, Golf Management operates about 150 golf courses – about 30-40 percent of which are publicly-owned. Hr. Tr. at 193.

Just as it “typically” does for golf courses that it manages – whether public or private – Golf Management entered into a management agreement with the City to manage the City’s golf courses. Hr. Tr. at 221-22; see Ex. D. When Golf Management assumed control over the management of the City’s golf courses, “solid operational and expense management practices were already in place, so the main focus of improvement [for the golf courses] was the area of marketing, revenue generation, and staff training.” Hr. Tr. at 74; Ex. D, at 459. Indeed, Golf Management and the City agreed that they needed to “transition[] to be more revenue-focused with emphasis on understanding [its] guests in order to make smart promotional decisions.” *Id.* Accordingly, the City engaged Golf Management as an “expert” in golf management services, with the intent “to establish and exceed the goals of operating a profitable, private-public partnership business.” Hr. Tr. at 71, 111.

Under its contract with the City, Golf Management provides full-service management services regarding the City’s golf courses, including creating the marketing and business plans for the courses, as well as hiring, paying, and managing all golf course employees. Hr. Tr. at 59-63; Ex. D, at 610-14. Golf Management has “exclusive responsibility and control over all areas and structures within the boundaries of the golf premises.” Ex. D, at 609. It supervises all golf course facility operations and is responsible for the maintenance of all facilities and grounds. Ex. D, at 609-10.

Additionally, Golf Management carries liability insurance and indemnifies the City for losses caused by the actions of its employees. Ex. D, at 603.

Pursuant to the management agreement, Golf Management prepares annual plans that, among things, chart out aggressive marketing and growth strategies for the golf courses. Hr. Tr. at 108-13; see Ex. M, at 1262-69 (marketing plan). As part of its marketing plan, Golf Management analyzed the “area competition,” identifying and assessing the impact of other golf courses in the Cincinnati area on the City’s golf courses. *Id.*; see also Hr. Tr. at 102-05 (discussing historical trends regarding golf courses within the “Cincinnati and tri-state area”). Golf Management also tracked historical revenue trends for each of the City’s golf courses, so as to understand each course’s performance relative to “what was going on in the . . . local [golf] market,” and to understand “what we can expect going forward given the current trends.” Hr. Tr. at 174-76. The Cincinnati area is “a very competitive golf market.” Hr. Tr. at 177. In fact, the City decided to close one of the golf courses at issue in this appeal (Dunham), because it “operated at a loss” and was not being used “to the extent that it could remain profitable.” Hr. Tr. at 22, 171.

Vendors make out all invoices to Golf Management, and Golf Management pays those invoices directly from its own bank account. Ex. D, at 600-01, 614-15. Golf Management invests its own funds for capital expenditures in food and beverage operations. Hr. Tr. at 159. Golf Management neither holds itself out to third parties as an agent of the City, nor does it enter into contracts on behalf of the City. Indeed, Golf Management’s agreement with the City expressly sets forth that Golf Management is an “independent contractor” – and **not** an agent of the City. Ex. D, at 605. Additionally, the

City outsourced all services relating to the golf courses to Golf Management – everything from vehicle maintenance to payroll. The City no longer pays for employee benefits relating to the golf courses, nor does it pay into the pension fund for golf course employees. Hr. Tr. at 60.

By contract, in exchange for its management of the golf courses, Golf Management receives income from numerous sources, including:

- (1) an annual management fee of approximately \$200,000;¹
- (2) \$150,000 to \$200,000 per year, from Golf Management's generous share of food and beverage sale revenues at the golf courses;
- (3) \$30,000 to \$50,000 per year, from Golf Management's further generous share of merchandise sale revenues at the golf courses;² and
- (3) "incentive" bonuses for reaching certain revenue targets at the golf courses.

Hr. Tr. at 81, 216-19; Ex. D, at 599, 642, 650; see also Ex. E (sales data). Additionally, golf professionals (who are employed by Golf Management) individually retain all revenues from golf lessons that they conduct. Hr. Tr. at 179.

Since 2003, Golf Management has earned a steady stream of revenues, both for itself and for the City – amounting to aggregate annual gross revenues of approximately

¹ The original contract between Golf Management and the City contemplated an annual fixed management fee of \$200,000, but the parties later amended the contract that determined the management fee based upon a "sliding scale." During the periods at issue, Golf Management received the following in management fees: \$200,000 from 2003-2007; \$203,599 from 2008-2011; and \$165,000 since 2012. Hr. Tr. at 81, 216-19; Ex. D, at 599, 642, 650.

² Originally, Golf Management was slated to retain 83 percent of food and beverage revenues and 93 percent of merchandise revenues. Later, the parties amended those percentages to 80 percent and 90 percent, respectively. Hr. Tr. at 90; Ex. D at 647.

\$6-7 million from all its golf courses. See Ex. E; e.g., Hr. Tr. at 101. According to witness testimony, of that annual revenue, “roughly 15 to 20 percent of the overall [golf course] operation” revenue is passed on to Golf Management. Hr. Tr. at 26.

The Commissioner’s final determination and the Board’s decision

Despite allowing an independent facilities-management contractor to operate a turnkey golf management service for a profit on its property, the City of Cincinnati continued to claim real property tax exemption for its golf courses. Final Determination at 1.

Appellant, Paul Macke, who operates local Cincinnati golf courses, and who paid real property tax on all his golf courses, filed a complaint against the continuing exemption of the City’s golf courses. Mr. Macke has owned multiple golf courses over the years, some of which reside within a few miles of the City’s golf courses. Hr. Tr. at 230. The Commissioner considered Mr. Macke’s complaint and ultimately determined that the City was not entitled to exemption for public use purposes. The Commissioner found that Golf Management’s private operation of the golf courses on the premises defeated public purpose exemption, pursuant to well-settled Supreme Court case law, including *Parma Heights*, following the language enumerated by Statute.

The City appealed to the Board, claiming entitlement to the exemption for public use codified in R.C. 5709.10. In a Decision and Order dated March 6, 2014, the Board reversed the Commissioner’s final determinations, concluding that the golf courses were entitled to exemption under R.C. 5709.08. In so doing, the Board concluded that “the lack of a lease, and the terms of the management contract, sufficiently distinguish[es] these matters from *Parma Heights*.” BTA Decision at 4. Specifically, the Board

concluded that “[t]he City continues to exercise significant authority over the subject golf courses.” *Id.* The Board also concluded that the management contract is “not a situation where a private enterprise is occupying publicly-owned property and profiting thereby; instead, [Golf Management’s] labor is largely reaped by the City.” *Id.* at 5. Finally, the Board concluded that the City “remains responsible for the payment of all real property taxes,” and that “exemption from real property taxes will benefit the City, not [Golf Management].” *Id.* at 6.

The Commissioner and Mr. Macke now appeal to this Court.

ARGUMENT

In review of decisions of the Board, this Court determines whether the Board’s decision is reasonable and lawful. *Gallenstein v. Testa*, 138 Ohio St.3d 240, 2014-Ohio-98, ¶ 14. A Board decision is unreasonable and unlawful if it is based on incorrect legal conclusions, and a decision of this nature will be reversed by a reviewing court. *Id.*

First Proposition of Law:

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

It is well-established that, in Ohio, all property is taxable. R.C. § 5709.01. Tax exemptions are a matter of legislative grace that are the exception to this rule. *Seven Hills Schs. v. Kinney*, 28 Ohio St.3d 186 (1986).

This Court has repeatedly explained that tax exemption statutes must be strictly construed because they are “in derogation of equal rights.” *Anderson/Maltbie P’ship*, 127 Ohio St.3d 178, 2010-Ohio-4904, ¶ 16; *Westinghouse Elec. Corp. v. Lindley*, 58 Ohio St.2d 137 (1979); *Ares, Inc. v. Limbach*, 51 Ohio St.3d 102, 104 (1990). This

principle of strict construction requires the statute's language be construed against the exemption – meaning that the onus is 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*, 2010-Ohio-4904, ¶ 16 (quoting *Ares*, 51 Ohio St.3d at 104). Thus, the property owner bears the burden to show that it meets the statutory requirements for the tax exemption. R.C. § 5715.271 (placing burden of proof “on the property owner to show that the property is entitled to exemption”); *Anderson/Maltbie*, 2010-Ohio-4904, ¶ 16. “In all doubtful cases,” the claim must be resolved against the asserted statutory tax exemption. *Id.*

This principle is rooted in the very reasons for tax exemption – the exemption of one property burdens other taxpayers with the need to raise additional tax revenue. See *White Cross Hospital Ass'n v. Bd. of Tax Apps.*, 38 Ohio St.2d 199, 201 (1974). It is a well-settled principle that “[t]he rationale justifying a tax exemption is that there is a present benefit to the general public” and that such public benefit is “sufficient to justify the loss of tax revenue.” *Id.*; *State Teachers Ret. Bd. v. Kinney*, 68 Ohio St.2d 195, 196 (1981). The tax burden shifts to other taxpayers because the property at issue is entitled to be treated differently when used to provide a public good. *Id.* When, as here, the property is used for private pecuniary gain, there is no benefit to the general public that would warrant tax exemption. *Id.*

Where, as here, a public entity provides property upon which a private business may operate for a profit, the Court will not presume that the General Assembly intended to provide the public entity with “preferred tax status” over taxpaying property owners; to do so would enable the property owner to act as a “commercial landlord,” and wield the

exemption as “a competitive advantage” over the nonexempt. *Columbus City*, 2011-Ohio-5534 at ¶ 33. Yet, the City seeks to do just that – operate a “public-private partnership business” as a commercial golf course owner, allowing a private contractor to operate its business on-site, and leverage its property exemption as a competitive advantage. See Ex. B, at 310. To do so, the City has employed Golf Management to operate its golf courses with profit motive, both for itself and for the City. The competitive advantage has been evidenced and testified to in numerous instances, including by Appellant, Paul Macke.

The City contends that the exemption does not provide a competitive advantage over other courses – but, rather, that “losing the tax exemption has actually put the City at a major competitive disadvantage . . . and has harmed the City’s ability to provide this public service.” Hr. Tr. at 14. However, in so contending, the City attempts to make a distinction without a difference. Either way, the City’s golf operations have harmed local taxpaying golf course owners, who do not similarly enjoy the City’s “preferred tax status.” Indeed, this case was initiated by the complaint of one such taxpayer over the City’s continued exemption of its property. Appellant, Macke, a local golf course owner, testified before the Board that his family has always competed with the City’s courses, and the only problem he has with that competition is when “it’s not on a level playing field.” Hr. Tr. at 227. Mr. Macke’s family operates five golf courses – four of which reside near City golf courses. Hr. Tr. at 229-30.

Mr. Macke explained that the real trouble started when the City hired Golf Management, who then reduced greens fees at City courses to drive business into the courses, and, in turn, increase the food and beverage revenues. Hr. Tr. at 231-32. (The

City keeps all greens fees, while Golf Management retains the vast majority of food and beverage gross revenues. Hr. Tr. at 25-27). Mr. Macke explained that the City's unfair competitive advantage forced his family to close its original golf course, as it could no longer be operated profitably:

The City talks about how they are at a competitive disadvantage. I, as an individual owner, pay income taxes, sales taxes, use taxes, property taxes. Every one of my employees are paid employees.

Being a small business, trying to borrow money, I'm paying a lot more in interest than the City of Cincinnati or any government agency. We have – excuse me – competed against government courses our whole entire career. But they have finally put me out of business. Sorry.

Our original golf course started when I was four years old and we can't afford to operate it anymore. It's worth more as a development than a golf course. And I just want it fair.

Hr. Tr. at 227-28.

As discussed below, the City devised an aggressive plan to maximize profits on its golf courses and enhance them as "assets." In carrying out its plan, the City hired a management company, for profit, to help the City maximize profitability and efficiency. Golf Management carried out the City's plan through strategic marketing, threat identification, and strategic pricing. Ever since Golf Management assumed control of the City's golf course operations, the City has behaved as a commercial golf course owner, and its competitive advantage has harmed local golf course owners who did not enjoy "preferred tax status." The City's competition even forced at least one owner to close his golf course.

This situation perfectly illustrates the principle that tax exemption is in derogation of the rights of all other taxpayers. As the Court explained long ago, "The end sought is the public good, and not injustice. The small home-owner, struggling sometimes amidst adverse surroundings, deserves consideration at our hands. His burden of taxation is made heavier whenever property of any kind is withdrawn from the field of taxation." *Benjamin Rose Inst. v. Myers*, 92 Ohio St. at 252. Accordingly, the applicability of tax exemption statutes must be strictly construed against exemption for the City's golf courses, and the City bears the heavy burden of proving entitlement to exemption. *White Cross*, 38 Ohio St.2d at 201. The City simply cannot meet that burden in this appeal.

Thus, when evaluating the City's claim of "public use" exemption, this Court must strictly construe the statute against exemption. Under that standard, as this Court has directed, where a public entity enters into competition with the marketplace at large in a "public-private partnership business" like the one in this case, the public character of that property is destroyed and the exemption of the property is no longer justified or allowed. See *Cleveland*, 153 Ohio St. at 111.

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.

The Board erred in determining that Golf Management's operation of the City's golf courses satisfied 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 Final Determination at 5.

To qualify for exemption under R.C. § 5709.08, (1) the property must be public property, (2) it must be used for a public purpose, and (3) the use must be exclusively for a public purpose. *Parma Heights*, 2005-Ohio-2818, ¶ 11. In *Parma Heights*, the Supreme Court affirmed the Board's conclusion that a city-owned ice rink was not exclusively devoted to a public purpose and thus did not qualify for exemption. *Id.* at ¶ 12. In so doing, the Court cited a number of factors, including that an outside company: (1) operated the rink for profit, with the intent to increase rink revenues; (2) was contractually entitled to "use and occupy" the rink, with responsibility for the rink's "operation and management"; (3) used its own employees, who would not be treated as City employees; and (4) leased the rink. *Id.* Here, however, despite being presented with a substantially similar relationship as in *Parma Heights* between a public and private entity, the Board failed to conclude that the City's golf courses did not qualify for exemption under R.C. § 5709.08. In fact, the Board neglected even to discuss how the golf courses were "used exclusively for a public purpose."

The Board's decision to grant exemption to the City runs contrary to well-settled Supreme Court precedent. See, e.g., *Parma Heights*, 2005-Ohio-2818, ¶ 11; *Columbus City*, 90 Ohio St.3d at 497; *Perk*, 29 Ohio St.3d at 163; *Cleveland*, 153 Ohio St. at 111. In *Parma Heights*, the Court explained that 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 is no longer "used exclusively for a public purpose," as required by R.C. § 5709.08. *Id.*, at 465-66 (quoting *Perk*, 29 Ohio St.2d at 166). Moreover, profit-maximization as a "public-private partnership business" is itself not an exclusive public use. See

Cleveland, 153 Ohio St. at 111. This is true even if there exists a public purpose in such an arrangement. See *Perk*, 29 Ohio St.2d at 166; *Parma Heights*, 2005-Ohio-2818, ¶¶ 11-12. As the court has explained, if a public entity “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.

It is undisputed that Golf Management (along with its corporate parent and related subsidiaries) is a for-profit entity. Hr. Tr. at 211-12. In turn, the evidence in this case bears out the Commissioner’s finding that the Golf Management operated the City’s golf courses as a for-profit business – a finding with which the Board erroneously declined to concur.

A. Golf Management operated the City’s golf courses as a for-profit business, in competition with other local golf courses.

The Board failed even to acknowledge that Golf Management – a private, for-profit entity – operated the City’s golf courses as a for-profit business, or that those courses operate in direct competition with other local courses.

1. Golf Management’s operations per its management agreement with the City

Just as it “typically” does for golf courses that it manages – whether public or private – Golf Management entered into a management agreement with the City, whereby Golf Management provided a full range of operational expertise to manage the City’s golf courses. Hr. Tr. at 221-22; see Ex. D. In handing over management control over the golf courses, the City tasked Golf Management with focusing primarily upon “marketing, revenue generation, and staff training,” with the intent “to establish and

exceed the goals of operating a profitable, private-public partnership business.” Hr. Tr. at 71, 74, 111; Ex. B, at 310; Ex. D, at 459; *see also, e.g.*, Hr. Tr. at 111 (placing “ongoing emphasis on . . . a ‘revenue culture’ that breeds success”).

To that end, pursuant to that management agreement, Golf Management not only conducted the golf courses’ day-to-day operations, but also created annual marketing and business plans. Hr. Tr. at 59-63; Ex. D, at 610-14. Those plans charted out aggressive marketing and growth strategies for the golf courses. Hr. Tr. at 108-13; *see* Ex. M, at 1262-69 (marketing plan). As part of its marketing plans, Golf Management analyzed the “area competition,” identifying and assessing the impact of other Cincinnati-area golf courses on the City’s golf courses. *Id.*; *see also* Hr. Tr. at 102-05 (discussing historical trends regarding golf courses within the “Cincinnati and tri-state area”). Golf Management also tracked historical revenue trends for each of the City’s golf courses, so as to understand each course’s performance relative to the local golf market. Hr. Tr. at 174-76.

Not unlike its engagements with other golf courses (both public and private), Golf Management operated with the purpose of achieving cost savings and greater revenues at the golf courses. *See* Ex. A, at 11. It follows, then, that Golf Management would be compensated in ways consistent with those goals. Indeed, in exchange for its services, Golf Management not only received an annual management fee, but also the lion’s share of revenues from sales of food, beverages, and golf merchandise at the golf courses. Hr. Tr. at 81, 216-19; Ex. D, at 599, 642, 650; *see also* Ex. E (sales data). Golf Management also was contractually entitled to receive “incentive” bonuses for reaching

certain revenue targets at the golf courses.³ *Id.* Also, golf professionals (who are Golf Management employees) individually retain all revenues from golf lessons that they conduct. Hr. Tr. at 179.

In addition to benefiting from the expertise and efficiencies that Golf Management could bring, the City also enjoyed cost savings in other ways as well. For instance, the City achieves cost savings because Golf Management's employees are not City employees, subject to the City's living-wage laws, benefits, and pension. See Final Determination at 3; Ex. D, at 609-11 ("All personnel shall be employees of Contractor."). Golf Management hires, supervises, and pays the golf course employees, provides human resources services including personnel policy and guidelines, and pays all wages and payroll taxes. *Id.* Therefore, it seems incongruous that the City could be found by the Board to "exercise significant authority over the subject golf courses." BTA Decision at 4.

As the Golf Management witness explained at the hearing, Golf Management's relationships with private golf course owners are similar to that with the City. Hr. Tr. at 220-23. Both relationships are governed by similar contracts, and both contracts have "financial" and other "controls" built into them – differentiated solely by the level of "bureaucracy" associated with a relationship with the City. Hr. Tr. at 220-23. Subject to that difference, however, the terms of the management agreement demonstrate that Golf Management and the City enjoy the same relationship as would most any golf course owner with its management company. Ultimately, the City's very purpose for

³ As noted during the hearing, Golf Management never actually reached the revenue targets associated with the "incentive" bonus. Hr. Tr. at 81-82. Nevertheless, that provision remains in the management agreement, and Golf Management thereby continues to have financial incentive to reach those revenue targets. *See* Ex. D, at 599.

hiring a private management company was to derive greater profit from the golf operations, which could be reinvested into the property. The City wished to take operation of the golf courses out of the hands of the government – which the City viewed as inefficient and unorganized – and put it into the hands of a business that would run the property effectively and at a better profit.

What is clear from the fee schedule provided by the City is that Golf Management keeps fees low in order to maximize rounds played at the golf courses it manages. This may be long-range counterproductive, however certainly increases the potential for food and beverage and pro shop revenues, of which Golf Management reaps extensive revenue. Further, a review of the Hamilton County golf courses that have an 18-hole layout indicates that on an average rate per course, Hamilton County charges 20% more for greens fees on the weekdays and 25% more on the weekends than the City of Cincinnati courses. Both City of Cincinnati and Hamilton County courses are significantly less than privately owned courses. This is significant in that the purported public purpose of the courses in question may be being over utilized so as to be ultimately detrimental to the public property but so as to maximize profits for the private, for-profit entity managing the course and seeing significant sales revenue from maximal use of said property.

2. The City's golf courses directly compete with other local courses.

Also akin to for-profit businesses, Golf Management has operated the golf courses with an eye for the local competition. Where, as here, a public entity uses property as part of competition within the marketplace at large, that property's public

character is destroyed, and a public purpose exemption is no longer appropriate. See *Cleveland*, 153 Ohio St. at 111.

There are about 100 golf courses within 25 miles of the City's courses. See Ex. H. Golf Management tracks the performance of these courses and also analyzes overall golf revenue trend data in the area. Hr. Tr. at 102-03, 174-75; see Ex. G, at 754-57. Golf Management's annual plans included a section discussing local competitors and explaining its strategies for "how to deal with the competition" (including determining its greens fees and other prices, based upon this information). Hr. Tr. at 105-12. For example, in its 2006 Annual Plan, Golf Management recognized "many direct and indirect competitors" and the need to "stay current with their pricing strategies and market communication vehicles." Ex. M, at 1264-65. According to that plan, Golf Management promised to "engage in aggressive guerrilla marketing efforts" to "effectively combat competitive offers." Ex. M, at 1265; see also Hr. Tr. at 107-08 (discussing need for "attract[ing] a sufficient and appropriate customer base," lest those customers "take their business to other facilities").

The City cannot deny that it deliberately placed its golf courses into direct competition with private courses. Indeed, it has acknowledged as much. At hearing, the City's witness contended that "losing the tax exemption has actually put the City at a major competitive disadvantage" relative to other local golf courses. See Hr. Tr. at 14. Of course, this is a misstatement—the City's loss of tax exemption is not a competitive disadvantage (how could it be if the other players in the market have that burden) — it actually just levels the playing field. In light of such direct competition, that property is no longer tax-exempt. See *Cleveland*, 153 Ohio St. at 111.

B. The City's stated purposes for operating the golf courses do not change the fact that Golf Management operated them with a private, for-profit purpose.

The City claims that its golf courses serve, among other purposes, "to provide recreational and cultural activities enhancing health and wellness" and "to grow the game of golf." Hr. Tr. at 21-22. Laudable as those stated purposes may be, they do nothing to change the fact that the golf courses were not used "exclusively" for a public purpose, as R.C. § 5709.08 requires. Moreover, these purposes could occur at any golf course—the City did not explain how these are specifically "public" purposes. Having failed to recognize this, the Board erred in its decision.

Where a public entity uses its property as would a commercial entity, that property is not entitled to exemption, even if such commercial use may promote an ancillary public purpose. See *Benjamin Rose Inst. v. Myers*, 92 Ohio St. 252, 264-66 (1915). R.C. § 5709.08(A)(1) requires that "public property [be] used exclusively for a public purpose." However, that requirement "does not mean [that the property is merely] used for a public benefit." *Cleveland*, 153 Ohio St. at 107. Indeed, "that some public purpose may be served is not sufficient to constitute an *exclusive* public use." *Id.* (emphasis added).

Here, the Board neglected to discuss whether the City could properly identify an "exclusive" public purpose for its golf courses. Had it done so, however, it would have concluded that such a public purpose did not exist. For example, the City's stated purposes of providing "recreational and cultural activities" and "grow[ing] the game of golf" could equally be said if the golf courses were privately-owned, or if they were targeted for private use. Tellingly, in fact, in the request of proposals containing the

“minimum requirements” for the operation of the City’s golf courses, the City did not require that the winning contractor identify, perform, or support any “public purposes.”⁴ Hr. Tr. at 161. Nor did the City’s request for proposals (“RFP”) make any specific mention of or requirement relating to the City’s purported “clientele” (*i.e.*, children, elderly, and handicapped individuals). Hr. Tr. at 140-42; Ex. A, at 173-99. Similarly, the management agreement makes virtually no mention of “public purposes” that Golf Management must serve. See Ex. D, at 594-633.

To understand more accurately the City’s purpose in engaging Golf Management, one can glean from the Cincinnati mayor’s charge that “the goal of the [golf course operations] should be to enhance [that] asset while maximizing cash flow,” and from the City’s response thereto. See Hr. Tr. at 54; Ex. A, at 11. In response, the City noted that “it has always been [a goal] to maximize cash flow for projects and handle them as valuable assets,” and that the City “will utilize this goal in the decision making process for managed competition [privatization].” *Id.* As a corollary, the City had “the goal to maximize cash flows so we could get back to the reinvestment for our golf courses.” Hr. Tr. at 55, 140. This is borne out by the fact that, notwithstanding the City’s stated public purposes, the City opted to close one of its golf courses, because it “operated at a loss” and was not being used “to the extent that it could remain profitable.” Hr. Tr. at 22, 171.

⁴ The request for proposals included a requirement that the winning contractor “maintain” a preexisting set of “community programs,” *e.g.*, youth golf programs. See Ex. A, at 190. However, within a 59-page request for proposal, the City devoted less than a single page to discussing these programs. See *generally* Ex. A. Similarly, the 40-page management agreement included minimal discussion of these programs. See *generally* Ex. D. The furtherance of such programs is at best minimal and hardly rises to the level of an “exclusive” public purpose under R.C. § 5709.08.

Even accepting that it is in the public's interest for the City to maximize cash flows, reinvest in the golf courses, and thereby improving the golf courses, this Court has held that such an endeavor cannot constitute a public purpose under R.C. § 5709.08. Where, as here, one operates property commercially, and with a profit motive, then it is the *use of the property* that determines exemption, not the *use of income derived* from that operation. See *Benjamin Rose*, 92 Ohio St. at 252 (“It is the use of property for purposes other than making money that justifies its exemption from taxation, and all constitutions and laws on this subject are fairly replete with this spirit and no other.”). Using property commercially to derive profit is simply not an exempt use of that property – regardless of how that profit may be used.

Thus, even had the Board identified one or more public purposes for the City's golf course operations, the City's for-profit use of the golf courses to generate reinvestment funds renders any public purposes moot. As this Court explained in *Perk*, when “private enterprise is given the opportunity to occupy public property in part and make a profit, even though in so doing it serves not only the public, but the public interest and a public purpose, such part of the property loses its identity as public property and its use cannot be said to be exclusively for a public purpose. A private, in addition to a public, purpose is then subserved.” *Perk*, 29 Ohio St.2d at 166. Accordingly, the Board erred by failing to recognize a private purpose that would defeat an exemption under R.C. § 5709.08.

C. Golf Management is an independent contractor, and not an agent of the City.

The Board concluded that the City exercises “significant authority” over the golf courses, and that Golf Management “simply carries out the day-to-day operations of the

courses according to the [City's] direction and control." Final Determination at 4-5. Insofar as the Board implicitly determined that Golf Management acted merely as an agent for the City, and not as an independent contractor, the Board erred.

Here, the City specifically chose Golf Management for its expertise and experience in handling golf course operations. Hr. Tr. at 111. Golf Management provides full-service management under its agreement with the City; creates marketing and business plans for the golf courses; and provides, pays, and manages all golf course employees. Ex. D, at 603, 609-33. Golf Management sets the golf courses' membership dues and green fees, and determines what merchandise will be sold in the pro shop and the snack bars and obtains it. *Id.* Vendors make out all invoices to Golf Management, and Golf Management pays them directly from its own bank accounts. *Id.* at 600-01. Furthermore, Golf Management purchases any necessary property, and takes title to it, in order to carry out its contractual operation of the golf courses. *Id.* at 606.

Golf Management does not hold itself out to third parties as an agent of the City, nor does it enter into contracts on the City's behalf. In fact, the parties' management agreement expressly sets forth that Golf Management is an "independent contractor," and not an agent of the City:

SECTION 14. INDEPENDENT CONTRACTOR

A. The Contractor shall perform all work and services described herein as an independent contractor and not as an officer, agent, servant or employee of the City of Cincinnati or the Commission. Nothing herein shall be construed as creating a partnership or joint venture between the Commission and the Contractor. No person performing any of the work or services described hereunder shall be considered an officer, agent, servant or employee of the City

of Cincinnati or the Commission, nor shall any such person be entitled to any benefits available or granted to employees of the City of Cincinnati or the Commission.

B. None of the provisions of this Agreement is intended to create, nor shall be deemed or construed to create, any relationship between the parties other than that of independent parties contracting with each other hereunder solely for the purpose of effecting the provisions of this Agreement.

C. None of the parties hereto is an agent, employee, or representative of the other.

D. None of the provisions of this Agreement is intended to create, nor shall be deemed or construed to create, any rights hereunder to third parties or other persons, or to increase the duties or responsibility of the parties to other persons; the sole purpose of this Agreement is to establish the relationships and the respective rights or duties of the parties hereto, each to the other.

Id. at 605. The provision's language is clear that the agreement expressly disavows any agency relationship. In that same vein, Golf Management does not stand in the City's shoes, for purposes of tax exemption, either.

This Court has already recognized the clear separation between Golf Management and the City. In *Cincinnati Golf Management*, 2012-Ohio-2846, this Court held that Golf Management was not entitled to exemption from use tax based upon the claim that it be treated as the City when making purchases. In other words, Golf Management could not vicariously claim the tax exemption afforded the City by statute. In so doing, the Court reviewed the Board's interpretation of *the very contract provision quoted above*, agreeing that that provision clearly precluded any agency relationship between Golf Management and the City. *Id.* Notwithstanding that this case relates to a different type of tax exemption, it is incongruous to suggest that Golf Management is viewed as the City's agent in one context, and an independent contractor in another – when the parties' relationship is governed by identical provisions.

What Golf Management could not prove for use tax purposes in *Cincinnati Golf Management*, the City cannot prove for real property tax exemption purposes. Thus, Golf Management must be considered an independent contractor for purposes of its relationship with the City.

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

The Board erred in concluding that, because the City is responsible for paying real property taxes relating to the golf courses, "exemption from real property taxes will benefit the City, not [Golf Management]." BTA Decision at 6. Nor should it matter.

As an initial matter, where, as here, property owned by one entity is used by another, the question of whether that property is exempt from the public purpose exemption does not turn on which party is responsible for paying the property taxes. See *City of Toledo v. Jenkins*, 143 Ohio St. 141, 158-59 (1944). Rather, the *use of the property* dictates whether that property enjoys the exemption. *Id.* In *Toledo*, the city leased an airport hangar under an agreement whereby it agreed to pay property taxes relating to that structure. Regardless, the land on which the hangar stood was deemed exempt, due to the public use associated with the hangar. *Id.* Similarly, here, whether the City (and not Golf Management) was responsible for paying taxes relating to the golf courses has no bearing on whether an exemption under R.C. § 5709.08 is appropriate. Rather, as discussed above, the private, for-profit purpose associated with the golf courses negates any possibility of an exemption. Again, as the statute maintains, the property must be used exclusively for a public purpose in order to be exempt.

Additionally, and contrary to the Board's decision, the benefits of exemption flow not only to the City, but also directly to Golf Management. Here, the City contends that

the additional expense of property taxes for the golf courses forced the City to close one of the seven golf courses at issue in this case. Hr. Tr. at 116-17. In light of that closure, the parties amended the management agreement – reducing by one the number of courses being managed, and in accordance with that reduction, reducing the management fee due Golf Management. Hr. Tr. at 89-90; *compare* Ex. A, at 595-96, 599 *with* Ex. A, at 647, 650. Moreover, because Golf Management retains a share of food and beverage sales and merchandise sales at each golf course, see Ex. D, at 598, that take-home amount necessarily decreases due to the closed course. Accordingly, the introduction of property taxes has directly impacted Golf Management's resulting income. It follows, then, that the opposite scenario – tax exemption – would similarly flow to Golf Management as well as the City.

Further evidence of the impact of property taxes on Golf Management can be found in the City's latest request for proposals, which instructs all bidders to account for the property tax bill in their projections and estimates in preparing their bids. See Ex. C, at 589. The City explained to bidders that they should consider the property tax bill when preparing their proposals to operate the golf 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. And **that** is the case with all other golf courses with which the City courses are competing. The contractor eventually would need to include a separate line item in its budget forecasts for property tax payments. *Id.* Ultimately, the winning bidder would be the one that could generate the most revenues *while accounting for the property tax bill*. The result is that Golf Management

needed to be cheaper and/or “propose[s] very aggressive marketing” relative to its fellow bidders – and that Golf Management will need to continue doing so.

In sum, ownership and use of these City-owned properties do not coincide. Instead, the City has authorized a private company to use City property to operate its business. As this Court has explained, such a public-private partnership means that that property is no longer used “exclusively” for a public purpose, and thus, exemption is not allowed. *Parma Heights*, 2005-Ohio-2818, ¶ 12 (quoting *Perk*, 29 Ohio St.2d at 166).

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.

The Board erred in determining that Golf Management’s earnings, from managing the City’s golf courses at issue in this matter, were merely “incidental” to the use of that property and thus did not violate the “exclusively for a public purpose” requirement of R.C. § 5709.08.

As an initial matter, the amount of money earned by Golf Management during its handling of the City’s golf courses can hardly be considered *de minimis*. As discussed above, in exchange for managing the City’s golf courses, Golf Management received a fixed management fee of roughly \$200,000 per year; portions of revenues from food, beverage, and merchandise sales; and “incentive” bonuses for reaching certain revenue targets. Ex. D, at 598. For example, in 2008 alone, Golf Management collected more than \$2 million in gross sales at the golf courses (\$553,746 for merchandise, equipment rentals, and golf lessons; and \$1,398,705 for food and beverages). Ex. E, at 722-23.

Based upon hearing testimony, Golf Management realized about 10 percent profit on merchandise sales and 20-30 percent profit on food and beverage sales (after accounting for costs and returning the City's share of those revenues).⁵ Hr. Tr. at 216-

17. Based upon those estimates, Golf Management's *profit* in 2008 alone amounted to:

	\$200,000	(management fee)
	\$55,000	(merchandise sales)
+	\$350,000	(food/beverage sales)
	<hr/>	
	\$605,000	(total estimated 2008 profit)

The Board presented a much different financial picture in rendering its decision. The Board correctly cited total annual revenues (for 2007 through 2012) of \$5.3 million to \$6.7 million – figures that included all revenue sources. BTA Decision at 5. However, based in part upon an estimate of Golf Management's *profits* arising from merchandise and food and beverage sales, the Board inexplicably concluded that Golf Management's "share of the *revenues* from the golf courses was no more than 5%." *Id.* (emphasis added). As a result, the Board erroneously determined that Golf Management's revenues from merchandise and food and beverage sales are "incidental" and do not violate the "exclusively for a public purpose requirement" of R.C. § 5709.08. *Id.*

The Board's conclusion regarding Golf Management's profits is erroneous for several reasons. *First*, the Board made an apples-to-oranges comparison by comparing Golf Management's *profits* against the operation's total *revenues*, thereby arbitrarily under-reflecting Golf Management's "share of the revenues." *Second*, the Board neglected to account for Golf Management's management fee – which, depending on

⁵ Pursuant to the management agreement, Golf Management returned \$40,315 and \$203,600 in merchandise sales and food and beverage sales, respectively, to the City, then retained the remainder for itself. Ex. E, at 722-23.

the year, could approximately *double* Golf Management's take-away amount. *Third*, the Board failed to view these figures with an eye for how they trended over the years. As multiple witnesses testified, the golf courses operated at a significant loss during the first two years of Golf Management's tenure – after which Golf Management took over the food and beverage operations from an outside vendor, and those revenues began to upswing. Hr. Tr. at 28-29, 214-15.

It is crucial to understand the manner with which the Board misread the financial landscape of Golf Management's operations, for they underlie the Board's erroneous conclusion that Golf Management's revenues were "incidental." This Court has noted that "in some situations a non-public use can be so incidental and so *de minimis* that it does not defeat an R.C. § 5709.08 exemption." *Whitehouse v. Tracy*, 72 Ohio St.3d 178, 181 (1995). Here, the Board cited *Board of Education of South-Western City Schools v. Kinney*, 24 Ohio St.3d 184, 187 (1986) as supporting its conclusion. In that case, the operation of a pro shop and snack shop on a golf course's grounds was deemed "inconsequential and trivial," where a golf professional was allowed to supplement his salary by working in the pro shop, and a private concessioner leased the snack shop for a portion of its gross sales. *Id.*

The two situations are clearly light years apart, where in this instance Golf Management is not merely operating the pro shop to yield merchandise sales, or a snack shop to yield food and beverage sales. Rather, the City tasked Golf Management to assume comprehensive control of *the entire golf course operations*, from soup to nuts (or, from hotdogs, to greens maintenance, to lessons, to advertising). See *Parma Heights*, 2005-Ohio-2818, ¶ 17 (private entity played "a central – not an incidental – role

in the operation of the [property]"). Indeed, as Appellant, Macke noted, "if you don't have a golf course, you don't sell any food and beverage. . . . So you can't separate the two." Hr. Tr. at 232. Because Golf Management was centrally involved with the entire golf course operations, it makes little sense to assess whether its role was "incidental," based solely upon one discrete aspect of that operation.

More fundamentally, the Board made the wrong inquiry by examining Golf Management's revenue share. In other words, the amount of Golf Management's take-away amount, as a percentage of total operations, is irrelevant. As discussed above, where, as here, property is operated commercially, and with a profit motive, it is the use of the property that determines exemption – not the use of income derived from that operation. See *Benjamin Rose*, 92 Ohio St. at 252. Here, how much money that Golf Management generated is less important than *whether Golf Management intended to generate more money* in operating the City's golf courses. Clearly, that was there objective. As discussed above, Golf Management operated the City's golf courses with the intent to procure profit and maximize revenues. Moreover, business income may fluctuate from year to year and can be often low in the first years of a new business. See Hr. Tr. at 28-29, 214-15 (City's golf courses operated at loss during first two years under Golf Management). Accordingly, the magnitude of Golf Management's revenue share has no bearing on whether an R.C. § 5709.08 exemption is appropriate.

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 Board also concluded that “the lack of a lease” between the City and Golf Management “sufficiently distinguish[ed] these matters from *Parma Heights*” so as to justify an exemption under R.C. § 5709.08. BTA Decision at 4. In so doing, however, the Board erred on two fronts: (1) concluding that the exemption turned on whether a lease agreement existed between the parties; and (2) failing to consider whether the contractual relationship between the parties amounted to the functional equivalent of a lease.

The presence or absence of a lease agreement between the parties, by itself, has no bearing on whether an R.C. § 5709.08 exemption is appropriate. Rather, where some form of property transfer has occurred (regardless of whether it is described as a “lease”), the key inquiry is *whether the use of the property at issue changes as a result of that transfer*. Indeed, this Court has held that a lease does not negate an R.C. § 5709.08 exemption, provided that the purpose of that lease was consistent with the property’s public purpose. See *S.-W. City Schs.*, 24 Ohio St.3d at 187; see also, e.g., *Maumee v. Kinney*, BTA No. 81-A-400, *unreported* (1983) (public property does not lose its identity as having public purpose when leased to private enterprise, provided that tenant uses property in manner totally consistent with public entity’s legitimate public purpose). Accordingly, insofar as the Board determined that the exemption was appropriate simply because no lease existed, the Board erred in doing so.

With that, the Board neglected to consider whether Golf Management was functionally equivalent to a lessee of the City, notwithstanding the absence of any lease agreement. The Board concluded that the lack of a lease distinguishes this case from *Parma Heights*. Yet, contrary to that conclusion, this Court in *Parma Heights* did not

focus on the presence of a lease agreement – but rather, that the lease “gave [the private entity] the right to use and occupy the property, and it called for [the private entity] and its own employees to play a *central – not an incidental – role* in the operation of the [property].” *Id.*, 2005-Ohio-2818, ¶ 17 (emphasis added). The Board’s failure to consider whether Golf Management enjoyed similar rights, and played a similar role in the operation of the City’s golf courses, is further evidence that the Board failed to properly apply this Court’s reasoning in *Parma Heights* to the facts in this case.

Here, as was the case for the private entity in *Parma Heights*, Golf Management enjoyed full possessory rights and control of the City’s golf courses, and using its own employees, it played a central role in the management of those courses. The City hired Golf Management as a standalone, self-managed entity to provide “turnkey” operation of its golf courses. See Ex. C, at 310. Golf Management has “exclusive responsibility and control over all areas and structures within the boundaries of the golf premises.” Ex. D, at 609. It supervises all golf course facility operations and is responsible for the maintenance of all facilities and grounds. *Id.* Additionally, Golf Management carries liability insurance and indemnifies the City for losses caused by the actions of its employees. *Id.* at 10; Ex. J. The liquor licenses on the premises are issued to Golf Management. Ex. I.

Certainly, as is often the case with contracting property owners, the City maintained the right to freely enter the property and to inspect the operations. Hr. Tr. at 24. Such right of entry is a necessary correlative to allowing someone else to manage an operation like a golf course. In any event, the City has granted Golf Management – and only Golf Management – the exclusive right to operate structures and premises with

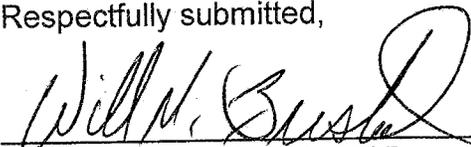
the boundaries of the golf courses. Hr. Tr. at 85. Further, there is no difference in the relationship between the City and Golf Management and a traditional for-profit golf course owner and its management company. Hr. Tr. at 220-23. Indeed, Golf Management manages numerous golf courses – both public and private – pursuant to management agreements similar to the one at issue here, containing similar degrees of financial and other controls as those retained by the City. *Id.*

Accordingly, there is no functional difference between Golf Management and a traditional lessee. Yet, the Board erroneously distinguished this case from *Parma Heights* on that ground. Golf Management's contract gives it sole operational rights as to the golf courses, including the right to "cure" contract breaches prior to termination. Ex. D, at 605. However, rather than focus on the nature of Golf Management's use and occupation of the City's golf courses, the Board focused solely upon the absence of any lease agreement. In doing so, the Board essentially ignored the wealth of facts demonstrating that the City hired Golf Management to enter and occupy its golf courses, and to operate them just as it would do for others.

CONCLUSION

For all the reasons stated above, Appellant, Paul Macke, respectfully requests that the Court reverse the Board's March 6, 2104 Decision and Order.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above Notice of Appeal has been served upon all counsel of record, including Terrance A. Nestor and Marion E. Haynes, City of Cincinnati, City Hall, Room 214, Cincinnati, Ohio 45202; Joseph W. Testa, Tax Commissioner of Ohio, Dept. of Taxation, 30 East Broad Street, Columbus, Ohio 43215; and Daniel W. Fausey and Daniel G. Kim, Asst. Attorneys General, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215 by Certified Mail and/or facsimile and/or email.



William M. Bristol
Attorney at Law

ORIGINAL

IN THE SUPREME COURT OF OHIO

PAUL A. MACKE,)	CASE NO.: <u>14-0531</u>
)	
Appellant,)	Appeal from the Ohio
)	Board of Tax Appeals
-vs -)	
)	
JOSEPH W. TESTA, TAX)	Board of Tax Appeals Case Nos.
COMMISSIONER OF OHIO)	2011-143 through 2011-148
)	
Appellee.)	

NOTICE OF APPEAL OF COMPLAINANT, PAUL A. MACKE

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NOTICE OF APPEAL OF COMPLAINANT

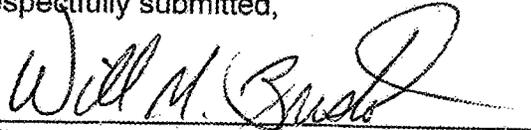
Complainant, Paul A. Macke, hereby gives notice of his appeal as of right under R.C. § 5717.04 to the Supreme Court of Ohio from a Decision and Order of the Board of Tax Appeals journalized in Case Nos. 2011-143, through 2011-148 on March 6, 2014. A true copy of the Decision and Order of the Board being appealed is attached hereto as Exhibit A and incorporated herein by reference. Complainant hereby complains of the following errors in the Decision and Order of the Board of Tax Appeals:

1. The Board of Tax Appeals' decision is unreasonable and unlawful.
2. The Board of Tax Appeals erred in determining that the subject properties are subject to tax exemption under R.C. § 5709.08.
3. The Board of Tax Appeals' decision is unreasonable and unlawful in that it improperly distinguished precedential, dispositive case law decided by this Court, including, but not limited to *City of Parma Heights v. Wilkins*, 105 Ohio St.3d 463, 2005-Ohio-2818 (2005) and *City of Cleveland v. Board of Tax Appeals*, 153 Ohio St. 97 (1950).
4. The Board of Tax Appeals' decision is unreasonable and unlawful since the findings of fact and conclusions of law are against the manifest weight of the evidence.
5. The Board of Tax Appeals' decision erred in determining that the subject properties were "exclusively used for a public purpose" when said properties were operated by a for-profit, private company in competition with other area golf courses.
6. The Board of Tax Appeals' decision erred as a matter of fact and law that monies earned by the aforementioned for-profit, private company managing the subject properties were "incidental," and erred as well in their calculation and categorization of said monies.
7. The Board of Tax Appeals' decision erred in equating a golf course snack shop with a company managing the golf, merchandise and concessions as well as every other aspect of six (6) golf courses.

8. The Board of Tax Appeals' decision erred in holding that a tax exemption will benefit only the City of Cincinnati and not the for-profit, private company whose pricing of the fees is in direct competition with other area golf courses.

Appellant requests that the Court vacate the Board of Tax Appeals' decision and order the Board of Tax Appeals to determine the subject properties as taxable.

Respectfully submitted,



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Attorney for Complainant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above Notice of Appeal has been served upon all counsel of record, including John P. Curp, Sean S. Suder, and Terrance A. Nestor, City of Cincinnati, City Hall, Room 214, Cincinnati, Ohio 45202; Joseph W. Testa, Tax Commissioner of Ohio, Dept. of Taxation, 30 East Broad Street, Columbus, Ohio 43215; and Daniel W. Fausey, Asst. Attorney General, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215 by Certified Mail and/or facsimile and/or email.



William M. Bristol
Attorney at Law

and thereafter.¹ We proceed to consider the matters upon the notices of appeal, the statutory transcripts certified by the commissioner, the record of the hearing before this board ("H.R."), and the parties' briefs.

These matters emanate from final determinations of the commissioner in which he denied exemption to the subject properties in response to a complaint against the continued exemption of real property from taxation filed by Paul A. Macke, the owner of several other golf courses near the subject properties. As explained in the final determinations, the subject golf courses, while owned by the City, are operated by Billy Casper Golf Management, Inc. ("BCG"), a for-profit corporation, pursuant to a management contract. The commissioner found the courses were not entitled to exemption under R.C. 5709.08, which exempts "public property used exclusively for a public purpose," because BCG occupies and uses the subject properties to make a profit, and, in doing so, competes with similar, private enterprises. The City appealed all six final determinations, arguing that the fact that the properties are not leased to BCG makes these situations distinguishable from cases where exemption was denied, that no unfair competitive advantage exists, that the relationship between it and BCG is that of principal-agent, and that the "managed competition" created by its contract with BCG does not serve private interests.

At this board's hearing, the City presented the testimony of Christopher A. Bigham, Director of Recreation for the city of Cincinnati, Steve Pacella, Superintendent of Administrative Services for the Cincinnati Recreation Commission, and Joseph Livingood, Senior Vice President of BCG, who testified regarding the operation of the golf courses and the relationship between the City and BCG.

¹ Specifically, the commissioner denied exemption of parcel numbers 111-0004-0001-90 and 111-0002-0002-90 (Avon Fields Golf Course); 182-0003-0004-90 and 182-0003-0011-90 (Dunham Golf Course); 015-0003-0004-90 (Reeves Golf Course); 570-0040-023-90, 570-0040-0355-90, 570-0040-0408-90, 570-0050-0072-90, 570-0040-0401-90, 570-0040-0232-90, 570-0040-0229-90, 570-0050-0073-90, 570-0040-0230-90, 570-0040-0407-90, 570-0040-0228-90, 570-0040-0028-90, 570-0040-0406-90, 570-0040-0403-90, and 570-0040-0105-90 (Neumann Golf Course); 550-0163-0010-00 and 550-0152-0003-90 (Woodland Golf Course); and 590-0110-0001-00 and 590-0121-0001-90 (Glenview Golf Course).

In our review of this matter, we are mindful that the findings of the Tax Commissioner are presumptively valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. Consequently, it is incumbent upon a taxpayer challenging a determination of the commissioner to rebut the presumption and to establish a clear right to the requested relief. *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St.2d 135; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138. In this regard, the taxpayer is assigned the burden of showing in what manner and to what extent the commissioner's determination is in error. *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213.

Because this matter involves the exemption of real property, we are also mindful that the rule in Ohio is that all real property is subject to taxation. R.C. 5709.01. Exemption from taxation is the exception to the rule. *Seven Hills Schools v. Kinney* (1986), 28 Ohio St.3d 186. The burden of establishing that real property should be exempt is on the taxpayer. Exemption statutes must be strictly construed. *Am. Soc. for Metals v. Limbach* (1991), 59 Ohio St.3d 38; *Faith Fellowship Ministries, Inc. v. Limbach* (1987), 32 Ohio St.3d 432; *Willys-Overland Motors, Inc. v. Evatt* (1943), 141 Ohio St. 402. However, such construction must also be reasonable. *In re Estate of Morgan v. Bowers* (1962), 173 Ohio St. 89.

The City seeks exemption under R.C. 5709.08. The requirements to qualify for an exemption thereunder are as follows: (1) the property "must be public property, (2) it must be used for a public purpose, and (3) the use must be exclusively for a public purpose." *Columbus City School Dist. Bd. of Edn. v. Zaino* (2001), 90 Ohio St.3d 496, 497. The court explained the application of these requirements where a private entity is also involved, in *City of Parma Heights v. Wilkins*, 105 Ohio St.3d 463, 2005-Ohio-2818:

"We have said in past cases that 'whenever public property is used by a private citizen for a private purpose, that use generally prevents exemption.' *Whitehouse v. Tracy* (1995), 72 Ohio St.3d 178, 181, ***. The rule explained more than 30 years ago remains true today:

'When *** private enterprise is given the opportunity to occupy public property in part and make a profit, even though in so doing it serves not only the public, but the public interest and a public purpose,' the property no longer meets the R.C. 5709.08 requirement that the property be 'used exclusively for a public purpose.' *Cleveland v. Perk* (1972), 29 Ohio St.2d 161, 166 *** (holding that areas of a city-owned airport that were leased to private entities for commercial enterprises were not exempt from real property taxes)." Id. at ¶12.

In that case, the court affirmed this board's decision denying exemption under R.C. 5709.08 of a city-owned ice rink leased to a third-party private enterprise, noting that the third party's use of the property "was not consistent with the text of or purposes underlying R.C. 5709.08, which is designed to help governmental bodies rather than private commercial interests." Id. at ¶14. The court rejected the city's argument that the goal of leasing to a third party "development and management firm" was "the public-spirited one of providing a better ice-skating facility for the benefit of area residents," given this board's finding that the third party firm leased the property with a view to profit. Id. at ¶15.

The commissioner argues that *Parma Heights* is dispositive in this matter. The City argues that the facts of these matters are distinguishable, because BCG does not lease the subject properties from the City, but, rather, merely enjoys a "non-exclusive right to occupy the courses." City Post-Hearing Reply Brief at 3. Indeed, the City notes that testimony at this board's hearing demonstrates that the City intentionally did not lease the property to BCG in order to retain control over the properties. H.R. at 34. However, the commissioner notes that, under the terms of the management agreement, BCG has exclusive responsibility and control over the areas within the boundaries of the golf courses. H.R., Ex. D. at 609.

We find the lack of a lease, and the terms of the management contract, sufficiently distinguish these matters from *Parma Heights*. The City continues to exercise significant authority over the subject golf courses through the Cincinnati Recreation Commission ("CRC"), including the right to enter the properties at any

time, to approve rate schedules, budgets, marking plans, programs, and hours of operations, and to approve capital expenditures. BCG simply carries out the day-to-day operations of the courses according to CRC's direction and control.²

Under the management contract, the City receives all operating revenues, including greens fees and cart rentals fees, which it reinvests into the golf facilities. BCG only receives a flat management fee, a portion of merchandise and food and beverage sales, and may receive an incentive fee if certain revenue targets are met. This is therefore not a situation where a private enterprise is occupying publicly-owned property and profiting thereby; instead, the fruit of BCG's labor is largely reaped by the City. BCG receives only a portion of the revenue from merchandise and food and beverage sales – just as did the thirty-party contractor before it.³ Such revenues are incidental and do not violate the “exclusively for a public purpose requirement” of R.C. 5709.08. Indeed, the court held thus in a case involving a snack shop on a golf course leased to a private concessioner. *South-Western City Schools Bd. of Edn. v. Kinney* (1986), 24 Ohio St.3d 184. The court found that any revenues received from concessions were “inconsequential and trivial.” *Id.* at 187. Here, the record indicates that CRC's municipal golf fund saw revenues of approximately \$5,300,000 to \$6,655,000 during the years 2007 through 2012. H.R., Ex. 8. Although it is unclear what is included in these figures, i.e., greens fees and cart rental fees, food and beverage sales, and/or merchandise sales, even using a possibly understated number, and the commissioner's statements regarding's BCG's profits from merchandise and food and beverage sales being between approximately \$180,000 to \$250,000 per year, Commissioner's Post-Hearing Brief at 4-5, BCG's share of the revenues from the golf courses was no more than 5%.

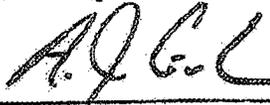
² For example, Steve Pacella, Superintendent of Administrative Services for CRC, testified that BCG asked to close one of the courses during the winter months because it was losing money during that time, and CRC denied the request. H.R. at 156-157.

³ At this board's hearing, Mr. Bigham testified that BCG assumed a previous contract for food, beverage, and merchandise sales from Cincinnati Concessions. He further indicated that, as long as he could recall, food, beverage, and merchandise sales at the courses have been operated by a private third-party. H.R. at 28-29.

Further, as the City notes, it – not BCG – remains responsible for the payment of all real property taxes. The court in *Parma Heights* specifically noted that, under the terms of the lease in that case, a tax exemption would benefit the private, third-party lessee – not the public owner. *Parma Heights*, supra, at ¶17. Here, exemption from real property taxes will benefit the City, not BCG. We therefore find the facts of these matters distinguishable from *Parma Heights*.

Based upon the foregoing, we find that the subject properties are entitled to exemption under R.C. 5709.08. Accordingly, the final determinations of the Tax Commissioner are hereby reversed.

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.



A.J. Groeber, Board Secretary