

In the
Supreme Court of Ohio

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

BRIEF OF AMICUS CURIAE
CITY OF MASON, OHIO, IN SUPPORT OF
APPELLEE CITY OF CINCINNATI

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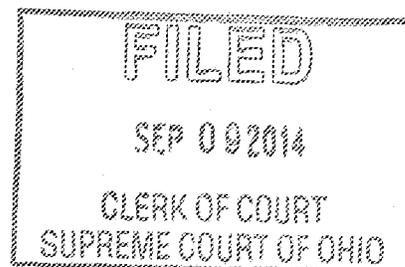
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INTRODUCTION

Amicus the City of Mason (“Mason”) respectfully submits this brief in support of the position of Appellee the City of Cincinnati (“the City”) and asks that the decision of the Ohio Board of Tax Appeals (“the BTA”) below be affirmed for the reasons stated below.

STATEMENT OF THE IDENTITY AND INTEREST OF AMICUS

Mason is a municipal corporation located in southwestern Ohio. Mason owns a municipal golf course called The Golf Center at King’s Island – The Grizzly (“The Grizzly”). In 2006, hoping to achieve greater efficiency and cost-effectiveness in the delivery of recreational services to patrons of this golf course, Mason entered into a management contract with a golf course management company – Recreation Management Services, Inc. (“RMS”) – to handle day-to-day operations and management of The Grizzly. RMS is a for-profit Ohio corporation.

In 2011, Mason filed an Application for Real Property Tax Exemption and Remission with Richard A. Levin, the Ohio Tax Commissioner at the time. This gave rise to a final determination made by Appellant Joseph W. Testa, Tax Commissioner of Ohio (“the Commissioner”), denying the exemption. In his decision, the Commissioner improperly determined that The Grizzly was not entitled to exemption under R.C. 5709.08, which exempts “public property used exclusively for a public purpose,” because he found that RMS occupies and uses the golf course to make a profit and, in so doing, unfairly competes with similarly situated privately owned golf courses. Mason appealed this final determination to the BTA, where the matter has been stayed pending the outcome of this appeal.¹ Mason supports the City’s position in this case because if this Court were to reverse the BTA’s decision, the ruling would have a chilling effect on the ability of Ohio municipalities such as Mason to enter into

¹ See Order Staying Proceedings, *City of Mason v. Joseph W. Testa, Tax Commissioner of Ohio*, BTA Case Nos. 2011-1661 and 2011-1662 (June 6, 2014).

public-private partnerships with private sector entities to achieve greater efficiencies and cost-effectiveness in an austere public spending environment. In this day and age of dwindling revenues in local government budgets, reduced spending, delayed project implementation, and deferred maintenance on important public projects, local governments throughout Ohio face significant challenges in how to best address the needs of their citizens and continue delivering high-quality services to their citizens. One of the best options for addressing these challenges is the use of public-private partnerships substantially similar to the one the City has entered into with Golf Management, Inc. (“Golf Management”) and the one that Mason has entered into with RMS.

Public-private partnerships are contractual agreements that allow the delivery of a service or facility for public use.² Public-private partnerships offer many advantages, including the reduction of development risks, providing more cost-effective and timely infrastructure delivery, offering the potential for better ongoing maintenance, and the ability to leverage limited public sector resources, all while maintaining an appropriate level of public ownership and control over projects.³ These partnerships can address public needs in the areas of facilities, real estate development, energy, information technologies, transportation, education, health care, and water and wastewater treatment.⁴ In each of these areas, unlike privatization, the public sector entity retains a high degree of ownership and control over the projects and their outcomes.⁵ These valuable partnerships, and the ability of Ohio municipalities to enter into them to achieve valuable cost savings and greater efficiencies, will be seriously jeopardized if this Court reverses

² See “Testing Tradition – Assessing the Added Value of Public-Private Partnerships,” National Council for Public-Private Partnerships, <http://www.ncppp.org/wp-content/uploads/2013/03/WhitePaper2012-FinalWeb.pdf>, p. 1 (2012).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

the decision of the BTA. For these reasons, Mason respectfully requests that the Court affirm the BTA's decision and allow the exemption.

ARGUMENT

In reviewing decisions of the BTA, this Court's role is merely to determine whether the BTA's decision is "reasonable and lawful." *Standards Testing Laboratories v. Zaino*, 100 Ohio St.3d 240, 2003-Ohio-5804, 797 N.E.2d 1278, ¶ 10. This Court does not sit as a "super" board of tax appeals with unrestrained ability to reverse decisions of the BTA. *Hercules Galion Products, Inc. v. Bowers*, 171 Ohio St. 176, 168 N.E.2d 404 (1960). It is not the function of this Court to substitute its judgment for that of the BTA on factual issues, although any facts determined by the BTA must be supported by sufficient probative evidence. *Bethesda Healthcare, Inc. v. Wilkins*, 101 Ohio St.3d 420, 2004-Ohio-1749, 806 N.E.2d 142, ¶ 18. Furthermore, the Court does not question the weight and credibility the BTA assigns to witnesses and evidence, and it will not overrule the BTA's factual conclusions when they are based on sufficient probative evidence in the record. *Cincinnati Community Kolllel v. Testa*, 135 Ohio St.3d 219, 2013-Ohio-396, 985 N.E.2d 1236, ¶ 16. If there is evidence that reasonably supports the factual conclusions reached by the BTA, the BTA's decision must stand. *Highlights for Children, Inc. v. Collins*, 50 Ohio St.2d 186, 187-188, 364 N.E.2d 13 (1977).

Proposition of Law:

Where a municipality enters into a public-private partnership with a for-profit entity by entering into a management agreement whereby the municipality grants a for-profit entity a non-exclusive right to occupy public property but exercises significant ownership, supervision, and control over the entity's operations, the property is "used exclusively for a public purpose" under R.C. 5709.08.

The BTA correctly reversed the Commissioner's erroneous final determinations, concluding that the City's golf courses were entitled to a "public use" exemption under R.C. 5709.08. The Ohio Constitution expressly authorizes the Legislature to enact laws exempting

from taxation “public property used exclusively for any public purpose.” Ohio Const. Art. 12, §

2. The Ohio General Assembly has provided for exemption from taxation of real or personal property belonging to the state, or other public property used exclusively for a public purpose, and has granted specific exemptions with respect to lands and buildings of counties, townships, or municipal corporations used exclusively for parks and nature preserves, historical sites and monuments, fairgrounds, and certain recreational properties. R.C. 5709.08; R.C. 5709.15 to 5709.18; *Muskingum Watershed Conservancy Dist. v. Walton*, 21 Ohio St. 2d 240, 257 N.E.2d 392 (1970).

To obtain a property tax exemption under R.C. 5709.08, the following three requirements must be met: (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, 828 N.E.2d 998, ¶ 11 (quoting *Columbus City School Dist. Bd. of Edn. v. Zaino*, 90 Ohio St.3d 496, 497, 739 N.E.2d 783 (2001)); *Cleveland v. Perk*, 29 Ohio St.2d 161, 163, 280 N.E.2d 653 (1972), fn. 2. The City’s golf courses – and Mason’s golf course – satisfy all three of these requirements – (1) the properties are owned by municipalities, so they are public property; (2) the properties are used for a public purpose – recreation and exercise; and (3) the properties are used exclusively for the public purpose of providing greater public access to and enhancing participation in the game of golf. Because golf is a game that has historically only been available to the wealthy and affluent, it is entirely in keeping with the letter and spirit of R.C. 5709.08 for municipalities such as the City and Mason to use public-private partnerships to promote greater access to open-air recreational opportunities for their citizens. As such, the City and Mason are entitled to receive the property tax exemptions for the golf courses, and the BTA decision below should be affirmed.

A. Any Revenue Generated Under the Management Agreement Is Inconsequential and Trivial and Does Not Violate the “Exclusively for Public Purpose Requirement” of R.C. 5709.08.

Under the respective management agreements that the City and Mason have with Golf Management and RMS, the municipalities receive all operating revenues, including greens fees and cart rental fees, which the municipalities directly reinvest into the golf facilities. In the City’s situation, Golf Management only receives a flat management fee, a portion of merchandise, food, and beverage sales, and may receive an incentive fee if certain revenue targets are met. Thus, this is not a situation where private enterprise has been allowed to occupy the public space for-profit, as the bulk of the revenue generated goes to the City and not the private entity. Golf Management receives only a portion of the revenue from merchandise and food and beverage sales, and these revenues are merely incidental and do not violate the “exclusively for a public purpose” requirement of R.C. 5709.08, as the BTA correctly found.

In a previous decision involving a snack bar leased to a private concessioner on a municipal golf course, the Court reached a similar conclusion, determining that any such revenues received from such concessions were “inconsequential and trivial.” In *Board of Educ. of South-Western City Schools v. Kinney*, 24 Ohio St.3d 184, 494 N.E.2d 1109 (1986), the city of Columbus owned a golf course that included a clubhouse containing a snack shop, a pro shop, and an efficiency apartment. The city leased the snack shop to a private concessioner for 22 percent of its gross profits. *Id.*, 24 Ohio St.3d at 187, 494 N.E.2d 1109. The golf course professional was a city employee who was paid a small salary and drew the balance of his income from the sale of pro shop merchandise. The city rented the efficiency apartment to a non-city employee for \$80 per month. *Id.*, 24 Ohio St.3d at 184, 494 N.E.2d 1109. The school board challenged the tax-exempt status of the golf course under R.C. 5709.08, arguing that the

property was not used “exclusively for a public purpose” because the snack shop and pro shop were operated to generate a profit for private concerns and the efficiency apartment was operated to the benefit of a private person. Guided by the definition of the term “exclusively” as set forth in R.C. 5709.121(B), the Court held that the renting of the efficiency apartment did not violate the “exclusively for a public purpose” requirement of R.C. 5709.08 because the purpose for renting the apartment as to ensure that someone would be at the golf course during evening hours to deter vandalism and other damage to the property, and this purpose was incidental to the course's public purpose and not with a view to profit. *Id.*, 24 Ohio St.3d at 187, 494 N.E.2d 1109. The Court further held that the operation of the pro shop and snack shop did not violate the “exclusively for a public purpose” requirement of R.C. 5709.08 because there was nothing in the record suggesting that the profit realized by the course pro or concessioner was anything other than “trivial and inconsequential.” *Id.* Accordingly, the Court concluded that the golf course should retain its tax-exempt status.

B. Public Golf Courses Are Open-Air Recreational Facilities That Are Essential to the Health, Comfort, and Pleasure of the Citizenry and Fit Squarely Within the Definition of “Public Property Used Exclusively for a Public Purpose” Contemplated by R.C. 5709.08.

Under well-settled Ohio law, land that is generally open and accessible to the public on the basis of equality and to the extent of its capacity, without charge, for open-air recreational and educational purposes, is “used exclusively for a public purpose” within the meaning of R.C. 5709.08. *Walton, supra*, 21 Ohio St.2d 240, 257 N.E.2d 392, paragraph two of the syllabus. On two previous occasions, the Court has held that a municipal golf course open to the public for a fee that makes the course self-sufficient qualifies as “public property used exclusively for public a purpose” under R.C. 5709.08. *Walton*, 21 Ohio St.2d at 243-244, 257 N.E.2d 392; *Atwell v.*

Bd. of Park Com'rs of Cleveland Metropolitan Park Dist., 2 Ohio St.2d 257, 208 N.E.2d 541 (1965).

In *Walton*, the property at issue was a 76-acre tract of land that the Muskingum Watershed Conservancy District operated as a public park for hunting, hiking, and other recreational activities free of charge. *Walton*, 21 Ohio St.2d at 241, 257 N.E.2d 393. The Commissioner and the BTA denied the district's application for a tax exemption because they found that the district's operations were funded from the proceeds of leases of parts of its lands to private and public agencies that operated for-profit enterprises on the properties. *Id.* The BTA concluded that "the nontax funds were used to acquire the tract and thus so tainted it with commerciality that its taxation was forever inescapable." *Id.* The Court squarely rejected that argument and reversed the BTA's decision, holding that land which is available to the public generally on the basis of equality and to the extent of its capacity, without charge...for open-air recreational and educational purposes is "used exclusively for a public purpose" within the meaning of 5709.08. *Id.*, 21 Ohio St.2d at 242, 237 N.E.2d 393. The *Walton* Court went on to observe that "[p]ublic parks are as essential to the health, comfort and pleasure of the citizenry as a public water supply...a natural gas supply...a mass transportation system...or a public auditorium." *Id.* (citations omitted).

In *Atwell*, the property at issue was a 192.5-acre tract of land owned by the Board of Park Commissioners of the Cleveland Metropolitan Park District. *Atwell*, 2 Ohio St.2d 257, 208 N.E.2d 541. The property had been developed into a recreational premises known as Manakiki Golf Course, and it had been acquired by the Board of Park Commissioners as a gift and was being operated as a public golf course. *Id.* The park board had instituted a policy to set the greens fees at a fixed rate that was estimated to cover the costs of operation and maintenance

over the period of a number of years so as to make the course self-sufficient without profit or loss. *Id.* The BTA held that the property qualified for a property tax exemption, and the Court affirmed. *Id.*, 2 Ohio St.2d at 258, 208 N.E.2d 541.

Similar to public parks and nature preserves, municipal golf courses are open-air recreational premises that are essential to the health, comfort, and pleasure of the citizenry. It is a well-recognized fact that the number of overweight and obese Americans has risen dramatically since the 1970s, and, during a similar time period, physical activity rates have declined in both children and adults.⁶ Being physically active is more than a personal decision; community design and the availability of open spaces and recreational areas such as municipal golf courses strongly influence how active people are. Public parks, walkable neighborhoods, open spaces, and municipal golf courses can generate economic benefits to local governments, homeowners, and businesses through higher property values and correspondingly higher tax assessments. The economic benefits of municipal golf courses can play an important role in policymakers' decisions about zoning, restrictions on land uses, and government purchase of lands for parks and similar initiatives.⁷ Municipal golf courses – just like municipal parks, municipal nature preserves, and other open-air recreational premises – provide many public benefits to the whole community, such as reducing air pollution, promoting flood control, enhancing wildlife habitat, improving water quality, and encouraging active and healthy

⁶ See Ogden C., Carroll M., Curtin L., et al. "Prevalence of Overweight and Obesity in the United States, 1999–2004." *Journal of the American Medical Association*, 295(13): 1549–1555, April 2006; Koplan J, Kraak V and Liverman C. "Preventing Childhood Obesity: Health in the Balance." *Washington: National Academies Press*, 2005; Brownson R., Boehmer T. and Luke D. "Declining Rates of Physical Activity in the United States: What Are the Contributors?" *Annual Review of Public Health*, 26: 421–443, April 2005.

⁷ See Shoup L. and Ewing R., "The Economic Benefits of Open Space, Recreation Facilities and Walkable Community Design," *Active Living Research – Building Evidence to Prevent Childhood Obesity and Support Active Communities*, Research Synthesis, p. 2 (May 2010).

lifestyles of citizens by offering a healthy recreational outlet. These benefits redound to the public at large, and provide ample support for the proposition that municipal golf courses constitute property that falls within the category of "public property used exclusively for a public purpose" as contemplated by R.C. 5709.08.

CONCLUSION

The BTA's decision was not unreasonable or unlawful, and it was based on sufficient probative evidence to support the conclusion that the City's golf courses qualify for tax exemption under R.C. 5709.08. The decision should not be disturbed or second-guessed by this Court on appeal. If the Court reverses the BTA's decision, it could have a chilling effect on the ability of Ohio municipalities to leverage public-private partnerships to achieve greater cost-savings and efficiencies in a fiscally austere economic environment. For the reasons set forth above, amicus the City of Mason respectfully urges the Court to affirm the BTA's decision below and grant the City the property tax exemption for the subject golf courses.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Brief of Amicus Curiae City of Mason, Ohio, In Support of Appellee City of Cincinnati" was served by U.S. Mail on this 9th day of September, 2014, upon the following:

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