

OHIO BOARD OF TAX APPEALS

NBC-USA Housing, Inc.-Five)
(dba) Love Zion Manor,)
) CASE NO. 2006-N-1492
 Appellant,)
) (REAL PROPERTY TAX EXEMPTION)
 vs.)
) DECISION AND ORDER
 William W. Wilkins, Tax)
 Commissioner of Ohio, and)
 Board of Education of the)
 Columbus City School)
 District,)
)
 Appellees.)

APPEARANCES:

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Entered April 21, 2009

Ms. Margulies, Mr. Johrendt, and Mr. Dunlap concur.

On October 5, 2006, appellant, NBC-USA Housing, Inc.-Five (dba) Love Zion Manor, filed an appeal from a final determination of the Tax Commissioner, in which the commissioner denied appellant's application for real property exemption for

tax year 2004. The commissioner further denied appellant's request for remission of taxes and interest for tax years 2001, 2002, and 2003, and ordered that all penalties charged through the date of the commissioner's final determination be remitted.

In denying appellant's application for real property tax exemption, the commissioner made the following pertinent findings:

“Exemption is being considered pursuant to Ohio Revised Code 5709.12, which provides that ‘[r]eal and tangible personal property belonging to institutions that is used exclusively for charitable purposes shall be exempt from taxation, ***.’ In *Highland Park Owners, Inc. v. Tracy* (1994), 71 Ohio St.3d 405, 406-407, the court held that ‘to grant exemption under R.C. 5709.12, the arbiter must determine that (1) the property belongs to an institution, **and** (2) the property is being used exclusively for charitable purposes.’ (Emphasis added.) The Ohio Supreme Court has defined ‘charity’ as ‘the attempt in good faith, spiritually, physically, intellectually, socially and economically to advance and benefit mankind in general, or those in need of advancement and benefit in particular, ***.’ *Planned Parenthood Assn. v. Tax Commr.* (1966), 5 Ohio St.2d 117. Ohio courts use this definition to determine whether a property is used exclusively for charitable purposes.

“The record indicates that applicant is a nonprofit corporation. However, even though applicant may be a charitable institution, the property is not used exclusively for charitable purposes. The general rule in Ohio is that residential property is not exempt from real property taxation. *Philada Home Fund v. Bd. of Tax Appeals* (1966), 5 Ohio St.2d 135. The syllabus of that case states:

“Real property owned by a nonprofit charitable corporation the stated purpose of which is to secure and operate resident apartments for aged and needy persons is not exempt from taxation under section 5709.12, Revised Code, even though it is shown that the rent intended to be charged is at or below cost, and in no event to result in a profit, and that it is expected that some persons unable to

pay the full rental will be assisted by subventions from corporate funds.

“*Id.* at 135, 136.

“The court followed that rule in *Cogswell Hall, Inc. v. Kinney* (1987), 30 Ohio St.3d 43. The appellant in that case was a nonprofit corporation that furnished low-cost housing to 25 elderly women. The court held that the use of the property was not exclusively for charitable purposes and was not entitled to exemption under R.C. 5709.12.

“Because the subject property is used to provide low-cost housing, it is not used exclusively by applicant for charitable purposes and consequently does not qualify for a real property tax exemption under R.C. 5709.12.” Statutory transcript (“S.T.”) at 1-2.

In response to the commissioner’s final determination, the appellant specified the following errors in its appeal to this board:

“(1) The Final Determination of the Tax Commissioner unlawfully denied the Taxpayer’s request for an exemption under Ohio Revised Code §5709.12 since the subject property is used exclusively for charitable purposes.

“(2) The Tax Commissioner erred in determining that the subject property, which is used exclusively as housing for low income elderly or handicapped individuals, does not meet the requirement of being used exclusively for charitable purposes under Ohio Revised Code §5709.12.

“(3) The Tax Commissioner unreasonably and unlawfully relied on *Philada Home Fund v. Bd. of Tax Appeals* (19[6]6), 5 Ohio St.2d 135 and *Cogswell Hall, Inc. v. Kinney* (1987), 30 Ohio St.3d 43 to deny the exemption for the subject real property.

“(4) The Tax Commissioner failed to consider in its determination that the subject property is owned by a religious non-profit organization whose purpose is to provide housing to the aged, low-income residents.

“(5) The Final Determination of the Tax Commissioner is unreasonable and unlawful since it misinterpreted R.C. §5709.12(B), §5709.12(C) and §5709.12(E).

“(6) The Final Determination of the Tax Commissioner is against the manifest weight of the evidence.”

All parties appeared and were represented by counsel at the hearing before this board. We proceed to consider this matter based upon the notice of appeal, the statutory transcript certified to this board by the tax commissioner, the record of the hearing before this board (“H.R.”), and the briefs submitted by the parties.

We begin our review by observing 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.

The issue presented in the instant matter is whether the commissioner erred in denying tax exempt status to certain real property. The authority to exempt property from ad valorem taxation emanates initially from Section 2, Article XII, of the Ohio Constitution:

“Without limiting the general power, subject to the provisions of Article I of this constitution, to determine the subjects and methods of taxation or exemptions therefrom,

general laws may be passed to exempt *** institutions used exclusively for charitable purposes ***.”

While the General Assembly has exercised its authority to enact legislation to exempt qualifying property from taxation, it has also expressed the limited scope of the grant, acknowledging that “all real property in this state is subject to taxation, except only such as is expressly exempted therefrom.” R.C. 5709.01(A). As a result, “in any consideration concerning the exemption from taxation of any property, the burden of proof shall be placed on the property owner to show that the property is entitled to exemption.” R.C. 5715.271. Therefore, apparent from the preceding, “exemption is the exception to the rule and statutes granting exemption are strictly construed.” *Seven Hills Schools v. Kinney* (1986), 28 Ohio St.3d 186.

In the appeal before us, appellant sought exemption for the subject property pursuant to R.C. 5709.12.¹ R.C. 5709.12(B) provides, in pertinent part:

“Lands, houses, and other buildings belonging to a county, township, or municipal corporation and used exclusively for the accommodation or support of the poor, or leased to the state or any political subdivision for public purposes shall be exempt from taxation. Real and tangible personal property belonging to institutions that is used exclusively for charitable purposes shall be exempt from taxation.”

¹ Prior to considering the merits of this case, we must note that appellant only sought exemption under R.C. 5709.12, and did not specify R.C. 5709.121 in its notice of appeal or in its application for exemption. Notice of appeal at 1-2, S.T. at 7. It is well settled that the Board of Tax Appeals has jurisdiction to consider only the applicability of those sections of the Revised Code raised by an appellant before the Tax Commissioner. See *Moraine Hts. Baptist Church v. Kinney* (1984), 12 Ohio St.3d 134. See, also, *Ohio Nurses Assoc. v. Levin* (Nov. 4, 2008), BTA No. 2007-N-148, unreported; *Walkley v. Wilkins* (May 20, 2008), BTA No. 2006-N-1580, unreported. Cf. *CNG Development Co. v. Limbach* (1992), 63 Ohio St.3d 28. Furthermore, “a notice of appeal does not confer jurisdiction upon the Board of Tax Appeals to resolve an issue, unless that issue is clearly specified in the notice of appeal.” *Cleveland Elec. Illum. Co. v. Lindley* (1982), 69 Ohio St.2d 71, 75. See, also, *Kern v. Tracy* (1995), 72 Ohio St.3d. In *Queen City Valves, Inc. v. Peck* (1954), 161 Ohio St. 579, the court determined that the term “specify” means to “mention specifically, to state in full and explicit terms.” *Id.* at 583. Thus, we consider only R.C. 5709.12 in reviewing this matter. See *Oikos Community Dev. Corp. v. Zaino* (Nov. 9, 2001), BTA No. 2000-T-2037, unreported. We note that recently the court held that it was jurisdictionally barred from considering a specification of error not raised in the notice of appeal to the Board of Tax Appeals, or in the notice of appeal to the court. See *Northeast Ohio Psych. Inst. v. Levin*, Slip Opinion No. 2009-Ohio-583, at ¶13.

In *White Cross Hosp. Assn. v. Bd. of Tax Appeals* (1974), 38 Ohio St.2d 199, at 203, the court held that “[a]ny institution, irrespective of its charitable or noncharitable character, may take advantage of a tax exemption if it is making exclusive charitable use of its property.” Therefore, to grant an exemption under R.C. 5709.12, it must first be determined that the property belongs to an institution, and that the property is being used exclusively for charitable purposes. *Highland Park Owners Inc. v. Tracy* (1994), 71 Ohio St.3d 405, 406-407. Additionally, to qualify for exemption under R.C. 5709.12, real property must not be used with a view to a profit, and cannot be in competition with commercial enterprises. *Am. Soc. for Metals v. Limbach* (1991), 59 Ohio St.3d 38; *Lutheran Book Shop v. Bowers* (1955), 164 Ohio St. 359. See, also, *Seven Hills Schools*, supra; *Seven Hills Schools v. Tracy* (June 11, 1999), BTA No. 1997-M-1572, unreported; *Youngstown Area Jewish Fedn. v. Limbach* (June 30, 1992), BTA No. 1988-G-117, unreported; *Jewish Community Ctr. of Cleveland v. Limbach* (June 30, 1992), BTA No. 1988-A-124, unreported; and *Dayton Art Inst. v. Limbach* (June 19, 1992), BTA No. 1986-A-521, unreported.

We initially address the requirement that the property must be owned by an institution. In *True Christianity Evangelism v. Tracy* (1999), 87 Ohio St.3d 48, the court held, “When considering a request for exemption under the portion of R.C. 5709.12(B) ***, the first point of inquiry must be whether the property belongs to an ‘institution.’” *Id.* at 50.

In *Highland Park Owners Inc. v. Tracy* (1994), 71 Ohio St.3d 405, the court defined the term “institution” as:

“An establishment, especially one of eleemosynary or public character or one affecting a community. An established or organized society or corporation. It may be private in its character, designed for profit to those composing the organization, or public and charitable in its purposes, or educational (e.g. college or university). ***”
Id. at 407.

Under this definition of “institution,” there is no specific requirement for an entity to have corporate status in order to be an institution, but it may be any organization or organized society. See, e.g., *Thomaston Woods L.P. v. Lawrence* (June 15, 2001), BTA No. 1999-L-551, unreported (holding that a for-profit limited partnership qualifies as an institution under R.C. 5709.12). In the present matter, the record indicates that appellant is a non-profit corporation engaged in providing residential living and some other services for low income, elderly, and handicapped families. In providing these services and to operate its corporation, appellant relies upon various religious organizations and federal assistance from the Department of Housing and Urban Development (“HUD”). Therefore, under the definition set forth in *Highland Park Owners*, supra, appellant qualifies as an institution.

At the hearing before the board, appellant presented one witness, Michael L. Tarver, the manager of the subject property. H.R. at 9. Ms. Tarver testified that the subject property is a 25-unit apartment complex that houses 26 low-income residents. Id. at 11-12. With regard to her duties as manager, Ms. Tarver stated that her responsibilities include maintenance of the subject property and providing services to the tenants. Id. at 11. Ms. Tarver also testified that, through a housing commission administered by a religious convention known as the National Baptist Convention, local churches sponsor buildings in their communities. Id. at 13-

14. The subject property, known as Love Zion Manor, is sponsored by Love Zion Baptist Church, a local church located in Columbus, Ohio. *Id.* The local churches submit a “memorandum of understanding” to the aforementioned housing commission, which is an agreement that states the local church will sponsor certain costs of constructing a building such as the subject. *Id.* at 14. Ms. Tarver testified that “the local church to [sic] sponsor the predevelopment costs, and the purchasing of the land to participate in the federally subsidized housing program.” *Id.* According to Ms. Tarver, once the property is constructed, the sponsoring church continues to provide services to the residents. *Id.* at 14-15. These services include donating supplemental food to the residents and providing luncheons and bible study classes. *Id.* at 15-16. Ms. Tarver also testified that the subject is not operated to generate a profit, and that all funds are used to maintain the subject and assist the residents. *Id.* at 21.

Upon cross-examination, Ms. Tarver was asked about the specific services provided to the tenants. Ms. Tarver acknowledged that, similar to other HUD properties, appellant is required to pay the housing and utility expenses associated with the subject. *H.R.* at 26. With regard to health services available at the subject, Ms. Tarver testified that no mental health services or drug counseling is provided, but blood pressure and diabetes screenings are provided through an outside program on a monthly basis. *Id.* at 28-29. Ms. Tarver further stated that if a resident has a specific need, appellant will assist him/her in obtaining the needed services. *Id.* at 29-30, 38-43.

As we determined above that the subject property is owned by an institution, we now consider whether appellant was “making exclusive charitable use”

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

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

The phrase “used exclusively” has been interpreted by the Ohio Supreme Court to mean primary use. *True Christianity*, supra. The court commented further in regard to what constitutes charitable use in *Bethesda Healthcare, Inc.*, 101 Ohio St.3d 420, 2004-Ohio-1749, at 39, stating,

“Whether an institution renders sufficient services to persons who are unable to afford them to be considered as making charitable use of property must be determined on the totality of the circumstances ***.”

We emphasize that the burden rests with appellant to prove by competent and probative evidence that the subject property was used exclusively for charitable purposes. Initially, we note that appellant is a non-profit corporation. *Id.* and H.R. at

² In the context of whether an entity that is leasing a portion of real property is entitled to exemption under R.C. 5709.12(B) and 5709.121 based upon the services rendered by a lessee, the Supreme Court recently stated that “the court has long held that under the general exemption for ‘exclusive charitable use’ of property set forth in R.C. 5709.12(B), it is the *owner’s use* of the property, not the lessee’s use, that determines whether the property should be exempted.” See *Northeast Ohio Psych. Inst.*, supra, at 5. (Emphasis sic.) While R.C. 5709.121 is not applicable in the instant appeal, the court found that the appellant in that matter could not rely upon the lessee’s charitable activities to qualify as a charitable institution under R.C. 5709.121. The court denied exemption under both R.C. 5709.121 and 5709.12(B), finding that, under the latter provision, “the property at issue plainly would not qualify for exemption, because Northeast is using that property for leasing, not for providing mental health care.” *Id.*

18. We also note appellant's answer to question fourteen of its application for real property tax exemption, which inquires as to how the property is currently used. Appellant answered "[s]ince the beginning the property has been solely used for federally subsidized low-income [s]ection 8 [e]lderly and [h]andicapped families." S.T. at 7.

The Ohio Supreme Court, and this board, have previously held that property used for private residential housing, including properties where low-income individuals are not fully responsible for their rent, is not entitled to exemption under R.C. 5709.12(B). *Philada Home Fund v. Bd. of Tax Appeals* (1966), 5 Ohio St.2d 135; *Nat. Church Residences v. Lindley* (1985), 18 Ohio St.3d 53; *Rehab Project v. Tracy* (May 23, 1997), BTA No. 1995-R-418. Also, in *Nat. Church Residences*, supra, the court rejected a "services exception" that had been previously established in *Carmelite Sisters, St. Rita's Home v. Bd. of Review* (1969), 18 Ohio St.2d 41. In *Carmelite*, exemption was granted based upon additional services provided to elderly tenants beyond those traditionally provided to apartment residents. In rejecting this exception, the court relied upon the criteria for the provision of senior housing required by subsequently enacted R.C. 5701.13 and the vicarious nature of the services provided to residents. See, also, *Cogswell Hall v. Kinney* (1987), 30 Ohio St.3d 43 (property rented to elderly women at rates that cover less than half the maintenance costs held taxable); *Oikos Community Dev. Corp.*, supra (finding a 501(c)(3) tax-exempt charitable organization's renting of multi-family properties to low-income tenants was not an exclusive use for charitable purposes and did not qualify for tax exempt status). In *Nat. Steelworkers v. Wilkins* (Jan. 20, 2009), BTA Nos. 2006-728,

729, unreported, appeals pending, this board held that an unlicensed independent living facility, operated in connection with a HUD program, was not exempt from taxation under either R.C. 5709.12(B) or R.C. 5709.121. There, the property in issue provided support services to its tenants such as “Meals-on-Wheels, taxi companies, pharmacies, medical professionals, beauticians, and exercise trainers.” *Id.* at 2. Also provided was assistance with “personal finance issues, personal hygiene, apartment maintenance, and arranging social activities.” *Id.*

Several of the facts in the instant matter are similar to those found in *Nat. Steelworkers*, *supra*, such as the utilization of a service coordinator to assist tenants with certain needs as mentioned above. Unlike *Nat. Steelworkers*, certain religious activities are provided by appellant for the use and enjoyment of its tenants, and a “sponsoring” church will assist in providing services to tenants. As noted above, Ms. Tarver stated that a local church will sponsor predevelopment costs and the purchasing of the land to participate in the HUD program. *H.R.* at 14. Ms. Tarver also testified that a church is a partial owner of appellant. *Id.* at 28. However, no corroborating evidence, in the form of documents showing ownership or costs borne by a church, is found in the record, and even if such evidence was in the record, it would not disprove that appellant is used primarily for federally subsidized housing purposes.³ Appellant’s federal tax returns for tax years 2002 through 2004 show that appellant is almost 100% dependent upon public support to operate. *H.R.*, Exs. C1-C4. No religious institution or church is listed as supporting appellant in these documents. *Id.*

³ While appellant may have an association with a church or religious organization, we emphasize that it is the owner’s *use* that is in issue as it relates to an exemption under R.C. 5709.12(B). See footnote 2. (Emphasis added.)

While several helpful and meaningful services are provided to appellant's residents, the primary purpose, as testified to by Ms. Tarver, is to provide "safe, sanitary, affordable housing so they can live with dignity and pride." H.R. at 43. As such, as in *Nat. Steelworkers* and *Nat. Church Residences*, supra, we find that these services, including any religious services, are vicariously charitable in nature, and that appellant solely provides subsidized housing for low-income, elderly, and handicapped individuals. *Philada*, supra.

We note that this board has previously found a charitable exemption when the use of specific services was an integral requirement for all residents as a condition for admission. See *88/96 LP and Community Housing Network v. Wilkins* (July 20, 2007), BTA No. 2005-A-55, unreported, at 12 (involving property described as "permanent affordable housing linked to a safety net" used to "provide case management services, mental health treatment, drug and alcohol treatment, health services, and those types of services that will help the individuals develop life skills so that they can continue to live in the apartment."); *St. Vincent Hotel, Inc. v. Tracy* (Apr. 25, 1997), BTA No. 1996-K-419, et. seq., unreported (finding property used as part of a general "life skills" program, which provides housing, is entitled to exemption). In the instant matter, appellant does not require its tenants to participate in any specific service or program. The lease agreements in the record do not appear to contain any provision requiring such participation. H.R., Exs. B1-B3. Ms. Tarver's testimony reflects that the services provided by appellant's church sponsor are voluntary in nature: "Well, one thing the mission does is they come every month and they provide a lunch. They provide bible study. They also provide individual support. They have

adopted the residents, those that want to participate, in whatever their needs might be.”

H.R. at 27.

While we recognize the social importance of the services provided by appellant, we are constrained to apply the law to the facts before us. Cf. *Rickenbacker Port Auth. v. Limbach* (1992), 64 Ohio St.3d 628, quoting *Toledo Business & Professional Women’s Retirement Living, Inc. v. Bd. of Tax Appeals* (1971), 27 Ohio St.2d 255. The record reflects that appellant does not use the subject property primarily and exclusively for charitable purposes. *White Cross, Highland Park Owners*, and *True Christianity*, supra. Its primary purpose is to use the subject property as federally subsidized residential housing, and therefore, appellant does not qualify for an exemption under R.C. 5709.12.

Therefore, we find the final determination of the Tax Commissioner to be according to law, and affirm such determination.

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