NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE TAX COURT COMMITTEE ON OPINIONS

GOURMET DINING, LLC, Plaintiff, v. UNION TOWNSHIP, KEAN UNIVERSITY and NEW JERSEY EDUCATIONAL FACILITIES AUTHORITY, Defendants.	:	TAX COURT OF NEW JERSEY DOCKET NOS.: 016504-2013 012334-2014 Approved for Publication In the New Jersey Tax Court Reports

Decided: March 14, 2018

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Robert F. Renaud for defendant, Union Township (Palumbo Renaud & DeAppolonio, LLC, attorneys).

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NOVIN, J.T.C.

These matters come before the court on defendant, Union Township's ("Union Township"), motions for summary judgment, and plaintiff, Gourmet Dining, LLC's ("Gourmet Dining"), cross-motions for summary judgment. Joining in Gourmet Dining's motions for summary judgment is defendant, Kean University ("Kean"). At issue is whether Gourmet Dining is subject to local property tax for the portion of the building it occupies and possesses under N.J.S.A. 54:4-2.3 or N.J.S.A. 54:4-1.10, or, is exempt from local property tax under N.J.S.A. 54:4-3.3, N.J.S.A. 54:4-3.6, or N.J.S.A. 18A:72A-18.

For the reasons set forth below, the court grants Union Township's motions for summary judgment and denies Gourmet Dining's and Kean's cross-motions for summary judgment.

I. Procedural History and Findings of Fact

Gourmet Dining is a restaurant, food service, dining operator, and manager. During the tax years at issue, Gourmet Dining operated and managed a fine dining restaurant called Ursino ("Ursino"), consisting of approximately 7,040 square feet of the building located at 1075 Morris Avenue, Union, New Jersey (the "subject property"). The subject property is designated as Block 101, Lot 4.0103, Qual. C0103 on Union Township's tax map.

The subject property comprises approximately 6.40% of Kean's 110,000 square foot New Jersey Center for Science, Technology, and Mathematics building ("NJCSTM Building"). Construction of the NJCSTM Building was financed with the sale of tax-exempt bonds procured through the New Jersey Educational Facilities Authority ("NJEFA"). As discussed in Part II.C.3, infra, the NJEFA is a governmental instrumentality, authorized to borrow money and issue bonds in order to finance construction projects for New Jersey educational institutions. The NJEFA owns the NJCSTM Building and leases it to Kean pursuant to a Lease Agreement dated December 1, 2005.[1]

By Resolution of Kean's Board of Trustees dated June 28, 2010 (the "Resolution"), Kean envisioned that the NJCSTM Building would house "a full-scale restaurant open to the public." Under the Resolution, Kean charged Kean University Foundation, Inc. (the "Foundation"), with the right to "complete the restaurant project . . . and engage a restauranteur to launch the project." The Resolution stated that "a minimum of 10 percent of the restaurant's gross revenues annually be allocated for scholarship purposes within the Foundation."

[1] Although Kean and NJEFA entered into a Lease Agreement for the NJCSTM Building on December 1, 2005, Kean did not transfer title to NJEFA for the land on which the NJCSTM Building is located until 2015.

On October 19, 2011, Kean and Foundation entered into a management agreement affording Foundation the "exclusive right to operate, manage and control" the subject property ("Management Agreement"). The Management Agreement further permitted Foundation to "subcontract its Management Right to a manager with extensive experience and expertise in the management and operation of various restaurant and catering businesses, with [Kean] University's written consent." In consideration for the covenants set forth in the Management Agreement, Foundation agreed to pay Kean the sum of one ($1.00) dollar per year.[2]

On October 19, 2011, Foundation and Gourmet Dining entered into a Management Subcontract Agreement ("MSA"). The MSA recites that Gourmet Dining "has extensive experience and expertise in the management and operation of various restaurant and catering businesses, and is a party to that certain Food Service Agreement with the University. . . ." The MSA granted Gourmet Dining "the exclusive right to operate, manage and control the [Ursino] Facility. . . ." Under the MSA, Gourmet Dining was named "exclusive manager of the [Ursino] Facility," responsible for "all reasonable, necessary and advisable management and operational services . . . in compliance with all applicable municipal, county, state and federal laws, statutes, ordinances, rules and regulations." Gourmet Dining was charged with "sole responsibility for hiring all employees necessary for the efficient operation of the [Ursino] Facility." Moreover, under the MSA, Gourmet Dining bore sole responsibility for:

> [A]ll expenses relating to the Facility during the Term, including but not limited to food costs and inventory expenses, liquor costs, supplies, salaries, Manager's salaries (if any), payroll expenses, taxes of every kind and nature (corporate taxes, sales taxes, federal, state and local taxes), equipment leases, advertising, licenses, and fees, insurance, maintenance and improvements, normal janitorial services and phone bills.

[2] The Management Agreement does not contractually obligate or require any portion of Ursino's gross revenues be allocated by the Foundation for scholarship purposes.

In exchange for the conveyance of these exclusive rights, authority, and obligations, Gourmet Dining agreed to pay Foundation an annual "management fee" in the sum of two hundred fifty thousand dollars ($250,000) per year, for nine years, and five hundred thousand dollars ($500,000) for the tenth year (the "fixed fee," collectively). The initial fixed fee was due and payable twelve (12) months following execution of the MSA and every twelve (12) months thereafter. Under the MSA, Gourmet Dining was also obligated to pay Foundation twelve and one half percent (12.5%) of the gross revenues derived from Ursino's operations ("operations fee"). The operations fee was due quarterly.

By letter dated August 27, 2012, Union Township notified Gourmet Dining that it would be issuing a tax bill to Gourmet Dining "for the Ursino Restaurant facility at Kean University." Relying upon N.J.S.A. 54:4-2.3, Union Township maintained that Gourmet Dining was a "lessee" of Kean and therefore, Union Township was "required to assess as taxable real property the portion of Kean University's Stem Building used and operated by Gourmet Dining, LLC as the Ursino Restaurant." The letter further stated that since Ursino had been in operation since October 25, 2011, Gourmet Dining would receive a tax bill for the last two months of 2011 and for the entire 2012 tax year. Union Township's municipal tax assessor "estimated the true market value of the restaurant portion of the building" to be $1,956,000. After applying Union Township's 15.38% ratio of assessed to true value, a 2012 local property tax assessment of $300,800 was imposed on the subject property.

For the 2013 and 2014 tax years, the subject property was assessed as follows:

Land	$ 50,000
Improvements	$250,800
Total	$300,800

Gourmet Dining did not challenge the 2011 or 2012 tax year added assessments on the subject property. However, it challenged the 2013 and 2014 tax year assessments by filing petitions of appeal with the Union County Board of Taxation. The Union County Board of Taxation entered judgments dismissing, without prejudice, those petitions. Gourmet Dining filed timely complaints with the Tax Court contesting the Union County Board of Taxation's judgments.

Thereafter, Union Township filed the instant motions for summary judgment, and Gourmet Dining filed its cross-motions for summary judgment. Following initial oral argument, the court issued an Order requiring Kean and NJEFA, to show cause before the court why Kean and/or NJEFA should not be joined in this action as necessary parties under R. 4:28-1. Kean consented to joinder, however NJEFA objected to being joined as a necessary party.

The court subsequently entered an order directing NJEFA and Kean be joined in these matters as necessary parties. The court afforded Kean and NJEFA the opportunity to submit written arguments either in support of, or in opposition to, Union Township's motions for summary judgment, or Gourmet Dining's cross-motions for summary judgment.

Union Township's motions for summary judgment seek dismissal of Gourmet Dining's complaints, contending that Gourmet Dining's interest in the subject property under the MSA is fundamentally a leasehold, and subject to local property tax under N.J.S.A. 54:4-2.3. Alternatively, Union Township argues that regardless whether Gourmet Dining's interest is determined to be a leasehold, Gourmet Dining's actual use, operation, and interest in the subject property is nevertheless subject to taxation under N.J.S.A. 54:4-1.10.

Gourmet Dining and Kean assert that Gourmet Dining's interest in the subject property is exempt from local property tax based on ownership and use of the subject property. They further assert that the MSA is not a lease and therefore, is not subject to local property tax under N.J.S.A.

54:4-2.3. Gourmet Dining and Kean charge that the subject property serves a public purpose and thus, is not subject to taxation under N.J.S.A. 54:4-1.10. Moreover, they argue that Ursino is part of Kean and therefore, used for a public purpose and tax-exempt under N.J.S.A 54:4-3.3. Gourmet Dining and Kean contend that Ursino "is clearly used 'for [the University],'" and because a portion of "the 'profit' from the property 'goes back into the cause of education,'" it should be exempt from local property tax under N.J.S.A. 54:4-3.6. Finally, they submit that the subject property is a "project" of the NJEFA, and Kean and its assigns are "agents" of the NJEFA, therefore, the subject property is exempt under N.J.S.A. 18A:72A-18.[3]

II. Conclusions of Law

A. Summary Judgment

Summary judgment should be granted where "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the [moving] party is entitled to a judgment or order as a matter of law." Alpha I, Inc. v. Dir., Div. of Taxation, 19 N.J. Tax 53, 56 (Tax 2000) (citing R. 4:46-2). Pursuant to R. 4:46-2, a motion for summary judgment should be granted:

> if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.
>
> [R. 4:46-2(c).]

[3] NJEFA, Union Township, Kean, and Gourmet Dining agree that NJCSTM Building is a "project" of the NJEFA under N.J.S.A. 18A:72A-18. However, NJEFA disputes that Kean and/or Gourmet Dining are "agents" of the NJEFA under N.J.S.A. 18A:72A-18.

In Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 536 (1995) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)), our Supreme Court adopted the federal approach to resolving motions for summary judgment, in which "the essence of the inquiry . . . is . . . 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" In conducting this inquiry, the trial court must engage in a "kind of weighing that involves a type of evaluation, analysis and sifting of evidential materials." Ibid. The standard established by our Supreme Court in Brill is as follows:

> [W]hen deciding a motion for summary judgment under R. 4:46-2, the determination whether there exists a genuine issue with respect to a material fact challenged requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.
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> [Id. at 523.]

In considering all of the material evidence to determine if a genuine issue of material fact exists, the court must view most favorably those items presented to it by the party opposing the motion and all doubts are to be resolved against the movant. Ruvolo v. American Casualty Co., 39 N.J. 490, 499 (1963). It is the burden of the moving party "to exclude any reasonable doubt as to the existence of any genuine issue of material fact" with respect to the claims being asserted. United Advertising Corp. v. Borough of Metuchen, 35 N.J. 193, 196 (1961). Nevertheless, "[b]y its plain language, R. 4:46-2 dictates that a court should deny a summary judgment motion only where the party opposing the motion has come forward with evidence that creates a 'genuine issue as to any material fact challenged.'" Brill, 142 N.J. at 529. If the party opposing the motion for summary judgment merely presents "facts which are immaterial or of an insubstantial nature, a

mere scintilla, fanciful, frivolous, gauzy or merely suspicious," then a meritorious application for summary judgment should not be defeated. Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 75 (1954) (citation and internal quotation marks omitted). Indeed, if the evidence presented "'is so one-sided that one party must prevail as a matter of law, . . . the trial court should not hesitate to grant summary judgment.'" Brill, 142 N.J. at 540 (quoting Liberty Lobby, Inc., 477 U.S. at 252).

The court concludes that no genuine issues of material fact exist, as these matters involve an interpretation of law, as such, they are ripe for summary judgment.

B. Exemption of public property

It is well-settled that unless expressly exempted by our Legislature, "[a]ll property real and personal . . . shall be subject to taxation annually. . . ." N.J.S.A. 54:4-1. Our Legislature's authority to grant tax exemptions is expressly limited by our State's Constitution of 1947, which provides, in part, that "[e]xemption from taxation may be granted only by general laws." N.J. Const. art. VIII, § 1, ¶ 2. As our Supreme Court has expressed, in considering the grant of a tax exemption, the legislature "must base tax exemptions on the property's use, not the owner's identity." Township of Holmdel v. New Jersey Highway Auth., 190 N.J. 74, 87 (2007). Tax exemption statutes, which are "based on the personal status of the owner rather than on the use to which the property is put, run afoul of" our State's Constitutional mandate that all property be "assessed for taxation under general laws and by uniform rules." New Jersey Turnpike Authority v. Township of Washington, 16 N.J. 38, 44-45 (1954).

The court's "interpretation of statutory tax exemption [provisions are] governed by principles of general statutory construction." Township of Holmdel, 190 N.J. at 87. Thus, tax exemptions "in favor of nongovernmental owners are strictly construed," and should not be

expanded beyond the clear intent of our Legislature. Walter Reade, Inc. v. Township of Dennis, 36 N.J. 435, 440 (1962). Conversely, local property "tax immunities for government authorities should be liberally construed because they facilitate the provision of public services." Township of Holmdel, 190 N.J. at 88. See also City of Newark v. Essex County Board of Taxation, 54 N.J. 171, 187 (1969); Township of Hanover v. Town of Morristown, 4 N.J. Super. 22, 24 (App. Div. 1949). This mindset is derived from the rationale that "[i]t would be strange for the Legislature to enable the Authority to choose among several modes of rendering [a] public service and then encumber the choice with tax consequences." Walter Reade, Inc., 36 N.J. at 440.

Relevant here, Gourmet Dining asserts that its interest in the subject property is exempt from local property tax under three statutory provisions: N.J.S.A. 54:4-3.3, N.J.S.A. 54:4-3.6, and N.J.S.A. 18A:72A-18. Each statutory exemption requires a separate and distinct analysis by the court.

C. Analysis

1. Used for a public purpose

N.J.S.A. 54:4-3.3 provides that government property used for a public purpose is exempt from taxation. Specifically, it states, in part, that:

> . . . the property of the State of New Jersey; and the property of the respective counties and municipalities, and their agencies and authorities, school districts, and other taxing districts used for public purposes . . . shall be exempt from taxation under this chapter. . . .
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> [N.J.S.A. 54:4-3.3.]

By design, "property employed primarily for a public use does not lose immunity because [an] agency incidentally derives some private business income from it." Borough of Moonachie v. Port of New York Authority, 38 N.J. 414, 427 (1962). Our courts have "recognized that private lease agreements do not automatically forfeit an agency's tax immunity." Township of Holmdel,

190 N.J. at 88. When "a government property or facility is leased to a private entity and the private entity operates the property or facility in accordance with the agency's statutory purpose, the tax immunity may still apply." Id. at 89. Nonetheless, "a tax exemption based upon a statute specifying a particular public use is clearly lost when the use to which the property is put is foreign to the prescribed use and the revenue motive in adopting the use is the primary or exclusive one." Borough of Moonachie, 38 N.J. at 427.

In Borough of Moonachie, 38 N.J. 414, the Port Authority of New York acquired a parcel of real property surrounding Teterboro Airport. Initially, the property was purchased to provide noise protection for the residential communities surrounding the airport, but also afforded the Port Authority an opportunity for future airport growth. Id. at 417. The Port Authority subsequently entered into a lease with a company for a portion of the property, to be used to construct a building housing a metal design and fabrication business. Our Supreme Court remarked, "the manufacture of metal windows, doors and the like clearly is not an air terminal purpose within the statutory definition. Nor is the building when built for and devoted to such use an air terminal facility. . . ." Id. at 424. Rejecting the Port Authority's claim that the property was being used for a public purpose, the Court concluded that "when a public agency undertakes to lease a building owned by it for a purpose foreign to its statutorily described public function, it engages in competition for tenants with private owners who may be pursuing the same objective." Ibid. Thus, "property owned by a public agency but employed primarily to obtain revenue or profit through private business uses is not immune from taxation. . . ." Id. at 426.

In County of Bergen v. Borough of Paramus, 79 N.J. 302 (1978), Bergen County asserted that certain County owned properties were used for public purposes under N.J.S.A. 54:4-3.3, and thus exempt from taxation. Id. at 304. The trial court observed that although the property was

vacant and the County had no present plan "'to do anything'" with the property, the property had a potential future public use. Id. at 304-05. Because of this potential future public use, the trial court granted the County a tax exemption. Id. at 305. In reversing the trial court, the Appellate Division concluded that the grant of the tax exemption was improper "unless the land was used for public purposes or there was a present intent for public use." Ibid. On further review, our Supreme Court explained that, "[t]he statutory language 'used for public purposes' clearly contemplates that something more than ownership must be established. The word 'used' connotes employment or application to an end." Id. at 306. However, the Court explained that restricting exemption solely to property being actually used for a public purpose might cause complications for newly acquired property in the process of being placed into public use. Id. at 308. Accordingly, the Court posited that, under N.J.S.A. 54:4-3.3, "a present intent to devote the property to a public use within a reasonable length of time" suffices for exemption. Ibid. Thus, public ownership does not automatically confer a property tax exemption under N.J.S.A. 54:4-3.3, rather the actual use, or an intent to use the property for a public purpose within a reasonable time period, is more germane in discerning exemption from taxation. See also New Jersey Turnpike Auth., 16 N.J. at 44-45.

In Stoddard v. Rutgers, The State University, 24 N.J. Tax 187 (Tax 2008), a taxpayer sought to invalidate an exemption granted to Rutgers, for the university's graduate student family housing. Id. at 190. Defending its right to a local property tax exemption, Rutgers asserted, among others, that its graduate student family housing served a public purpose and thus, was tax-exempt under N.J.S.A. 54:4-3.3. Id. at 198. Rutgers contended, and the court agreed, that "[t]he courts of this state have generally concluded that the provision of housing is an appropriate purpose for a university or college." Ibid. The court held that "providing residential housing for its students is an appropriate undertaking by a university, and that the Legislature has given [the university]

ample authority to construct and maintain such housing in furtherance of its mission as the state university." Id. at 199. The court further remarked, "other courts have concluded that property owned by a state authority is eligible for exemption even where there is only a minimal public purpose." Ibid. (citing South Jersey Transp. Auth. v. City of Pleasantville, 312 N.J. Super. 438 (App. Div. 1998)). Whether the university's graduate student family housing generated a profit was irrelevant, absent an allegation that the profits were used for something other than the statutorily authorized purpose. Id. at 202.

In Hackensack City v. Bergen County, 405 N.J. Super. 235 (App. Div. 2009), Hackensack contested the local property tax exemption claimed for County owned property. Id. at 239. During the relevant time-period, a building on the property was being used to store County property, and the parking lot on the property was being used to store and auction forfeited automobiles. Id. at 240-41. Hackensack argued that these uses were not eligible for an exemption under N.J.S.A. 54:4-3.3. Id. at 242. In reviewing the matter, the Appellate Division examined our Supreme Court's explanation of the term "public purpose," which states that:

> The concept of public purpose is a broad one. Generally speaking, it connotes an activity which serves as a benefit to the community as a whole, and which, at the same time is directly related to the functions of government. Moreover, it cannot be static in its implications. To be serviceable it must expand when necessary to encompass changing public needs of a modern dynamic society. Thus it is incapable of exact or perduring definition. In each instance where the test is to be applied the decision must be reached with reference to the object sought to be accomplished and the degree and manner in which the object affects the public welfare.
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> [Id. at 242 (quoting City of Newark v. Essex County Board of Taxation, 54 N.J. 171, 187 (1969)) (emphasis added).]

The Appellate Division concluded that the trial court's finding, the "use satisfactorily met the statute's requisites for public use," was adequate to substantiate a local property tax exemption

under N.J.S.A. 54:4-3.3. Id. at 243. The court noted that the property served public purposes at all relevant times even though the purposes changed as the building was re-purposed and the needs of the county changed. Id. at 243-45.

In Borough of Paramus v. County of Bergen, 27 N.J. Tax 215 (Tax 2013), the court addressed, in part, whether a lease to a private, for-profit entity precluded application of a tax exemption for government property. Id. at 217. Bergen County owned a hospital that transitioned from public management to a third-party private, for-profit management and asserted that the hospital was entitled to a tax exemption under N.J.S.A. 54:4-3.3. Ibid. The court acknowledged, "private lease agreements do not automatically forfeit an agency's tax immunity . . . Rather, the determinative inquiry is whether the property is utilized in furtherance of the agency's statutory mandate." Id. at 232 (quoting Township of Holmdel, 190 N.J. at 88-89). The court denoted that "the law does not allow a [property] to be used for both public and private purposes and to enjoy a tax exemption." Id. at 235. It further explained that under N.J.S.A. 54:4-3.3, the tax assessment could not be apportioned between the public and private use, stating, "we infer a legislative intention that there be no apportionment when an exemption is claimed under N.J.S.A. 54:4-3.3 as that section does not authorize apportionment." Ibid. (quoting County of Essex v. City of East Orange, 214 N.J. Super. 568, 578 (App. Div. 1987)).

Here, the court is satisfied that Kean falls under the jurisdiction of N.J.S.A. 54:4-3.3, i.e. that it is a governmental entity, and that the NJCSTM Building is governmental property. This requirement is satisfied under N.J.S.A 18A:64-45, establishing Kean as a "body corporate and politic" of the State of New Jersey comprising part of the "New Jersey Association of State Colleges and Universities." Moreover, N.J.S.A. 18A:62-1 designates "any . . . public universities, colleges, county colleges, and junior colleges now or hereafter established or authorized by law"

as a "public institutions of higher education" in New Jersey. Thus, as a public institution of higher education in New Jersey, Kean falls under the auspices of N.J.S.A. 54:4-3.3.

Additionally, it is undisputed that Gourmet Dining is a for-profit corporation, and its operation and management of Ursino are conducted for-profit. Therefore, the court must determine if Gourmet Dining's use, possession, and occupancy of the subject property as a restaurant fulfills a statutory purpose afforded to Kean. See Township of Holmdel, 190 N.J. at 88-89.

Gourmet Dining and Kean submit that operation of Ursino serves a public purpose for the following reasons: (a) the restaurant is a public dining establishment that may be used by Kean students and the Kean community; (b) a portion of the gross revenues derived from Ursino's operations are paid to the Foundation, which in turn, provides scholarships to Kean students; (c) Ursino raises the public profile of Kean; (d) Ursino employs Kean students; and (e) Ursino is integrated into Kean's mission of environmental stewardship.

a. Public dining establishment

Gourmet Dining and Kean assert that because Ursino may be patronized by Kean students, faculty, and administrators, Ursino's operation and use of the subject property satisfies the public purpose criteria. While the court acknowledges that "public purpose" is a broadly defined concept as explained in Hackensack City v. Bergen County, 405 N.J. Super. at 242, Gourmet Dining and Kean's avowal that Ursino may be patronized by Kean students, faculty, and administrators is not enough to demonstrate that it "serves as a benefit to the community as a whole, and . . . is directly related to the functions of government." Ibid. (quoting City of Newark, 54 N.J. at 187).

Gourmet Dining conceded that during the 2013 and 2014 tax years, Ursino did not participate in, and was not part of, any meal plan offered by Kean to its students, faculty, or

administrators. Additionally, Ursino was not identified by Kean's Office of Residence Life as one of the six "dining service locations" available to students or other members of the Kean community. Significantly, Ursino did not accept the students' "Cougar Dollars" or "Flex Dollars" (Kean's student-dining currencies, which offer flexible dining options to students outside of the traditional meal plans), or offer discounts to Kean faculty, administrators, or students. While none of these factors individually are dispositive, they support Union Township's assertion that Ursino was no different from any other restaurant, bar, or tavern in Union Township.

It is without question that the operation of dining halls, cafeterias, and other food-service establishments for enrolled students, administrators, and faculty is an appropriate purpose for a public university or college. Our Legislature has expressly afforded colleges and universities in this State, the authority to construct, develop, and maintain dining facilities in furtherance of their mission as public institutions of higher education. See N.J.S.A. 18A:72A-18. However, the operation of a restaurant, bar, or tavern on a college or university campus that does not participate, either wholly or partially, in the meal or food-service plans offered by the educational institution, is not a dining hall. Moreover, it is not devoted to serving the basic needs of the student body, administrators, or faculty, and thus, fails to be "directly related to the functions of government."

Gourmet Dining maintains that Ursino is analogous to certain fine upscale restaurants operated in various public locations throughout New Jersey that have been afforded tax exemptions. In support of such argument, Gourmet Dining relies on Judge Crabtree's unpublished Tax Court opinion,[4] County of Essex v. Township of West Orange, Memorandum Opinion, Docket Nos. 07-22-2046-90, 07-13-2047-90, 07-22-3897-2-90D, and 07-22-6198-2-91 (June 25, 1992),

[4] "[N]o unpublished opinion shall constitute precedent or be binding upon any court." R. 1:36-3. See Trinity Cemetery Association, Inc. v. Township of Wall, 170 N.J. 39, 48 (2001) (concluding that an unreported decision serves no precedential value and cannot reliably be considered part of our common law).

wherein an upscale restaurant – the Highlawn Pavilion – was determined to be exempt from local property tax. However, to the extent that said case is even applicable, it is unpersuasive because no unique or distinct legal theories were offered in that case, that were not addressed by the courts in Hackensack City, 405 N.J. Super. 235, and Borough of Paramus, 27 N.J. Tax 215.

Moreover, Judge Crabtree's unpublished opinion nonetheless observed that a public purpose is served only when the activity provides "a benefit to the community as a whole, and which at the same time is directly related to the functions of government." County of Essex v. Township of West Orange, p. 16 (quoting Roe v. Kervick, 42 N.J. 191, 207 (1964)). Concluding that the improvement, maintenance, and preservation of the county park system and a historic structure was an essential public and government function, the court found that the Highlawn Pavilion furthered those purposes.

Significantly, here Gourmet Dining is engaging in a for-profit business venture with the Foundation whereupon a fixed percentage of the gross revenues derived from Ursino's operations are paid to Foundation in consideration for permitting Gourmet Dining to use and occupy the subject property. Thus, there is a direct link between the gross revenues derived from Gourmet Dining's for-profit operation of Ursino and the amount remitted to the Foundation. Much the same way an investor would be paid a preferred rate of return on its initial investment, the Foundation is paid a preferred rate of return when the restaurant generates more gross revenues.

It is a well-settled that engaging a private, for profit entity to oversee, or manage a facility or to provide assistance in the performance of a public purpose is permissible. See Walter Reade, Inc., 36 N.J. at 441 (concluding that the New Jersey Highway Authority's operation of a service area, including a restaurant, should be "free of the burden of local taxation whether the Authority achieves the specific public purpose assigned to it by direct operation or through an authorized

contractual arrangement with another . . ."); Blair Academy v. Township of Blairstown, 95 N.J. Super. 583, 590 (App. Div. 1967) (concluding that hiring a private caterer to operate on campus food services to feed the school's faculty and students "cannot be regarded as a commercial activity or business venture of the school."); Borough of Paramus, 27 N.J. Tax at 233 (concluding that the management of a public hospital by a for-profit entity "does not of itself impair the public purpose . . . Rather it assisted the county in providing a higher quality of essential healthcare services to a population in need of care."); County of Bergen v. Borough of Leonia, 14 N.J. Tax 142, 158-59 (Tax 1994) (concluding that the county's lease of riding stables to a for-profit entity "was to carry out a county function previously directly undertaken by the county . . .the two riding facilities in question were open to the public and were part of a comprehensive overall recreation plan in Bergen County."); City of Egg Harbor v. County of Atlantic, 10 N.J. Tax 7, 25 (Tax 1988) (concluding that county property leased to the New Jersey Department of Corrections and operated by a private, for profit entity, for use as a juvenile detention facility "is used for a public purpose, and it is therefore exempt from local property taxation."); Martin v. Borough of Collingswood, 36 N.J. 447, 451 (1962) (concluding that the county was "empowered to furnish the public use either directly or through an arrangement with a private operator" thus, the lease of a portion of a public park to a for-profit entity for operation of a milk bar was exempt from taxation.)

However, a fundamental distinction exists between the foregoing cases and the instant matter. Here, an economic relationship exists between Gourmet Dining and the Foundation that extends beyond the relationship of merely landlord and tenant. Under the terms of the MSA, a direct link exists between Ursino's for-profit business operations and gross revenues, and the consideration paid to Foundation for Gourmet Dining's use and occupancy of the subject property. Thus, as the gross revenues realized by Gourmet Dining from operation, use, and management of

Ursino increases, so does the benefit conferred upon the Foundation. No such interwoven economically beneficial relationship existed in any of the above-cited cases.

Significantly, here Gourmet Dining operates Ursino as a for-profit restaurant. No essential public and governmental function is being served as a result of Gourmet Dining's operation of Ursino. Kean's public purpose and function is to offer a forum for secondary education, and ancillary to that function is furnishing shelter, food, books, heath services, athletics, parking, etc. to its student body, faculty, and administrators. Our Legislature has expressly authorized public universities and colleges to develop, maintain, and operate "dining hall" facilities for its student, administrative, and faculty bodies. See N.J.S.A. 18A:72A-3. However, here, Ursino was not a dining hall, as it did not function as a dining hall, was not identified in Kean's literature as a dining hall, did not participate in any of Kean's meal plans, and did not accept the students' "Cougar Dollars" or "Flex Dollars." Thus, Ursino was not dedicated or devoted to furnishing meals to the student, administrative, or faculty segment of the population envisioned by our Legislature. Any student, administrator, or faculty member who desired to dine in Ursino was required to submit payment like in any other restaurant, by customary means.

b. Scholarships

Gourmet Dining and Kean further argue that Gourmet Dining's operation, use, and management of Ursino on the subject property serves a public purpose because the fixed fee and operations fee paid to Foundation are then used by Foundation to fund Kean scholarships. The court finds this argument unpersuasive. Although the Resolution provides that "a minimum of 10 percent of the restaurant's gross revenues annually be allocated for scholarship purposes," the Management Agreement between Kean and Foundation contains no such provision, and imposes no such obligation or requirement. Moreover, the MSA contains no provision that either the fixed

fee or the operations fee paid by Gourmet Dining to Foundation shall be used for any scholarship purpose. Therefore, although Kean may have initially expressed an intent in the Resolution that a percentage of the monies remitted by Gourmet Dining to the Foundation be used for scholarship purposes, this intent is not manifested in any contractual provision under either the MSA or the Management Agreement. Nonetheless, the court is unpersuaded by the proposition that a private, for-profit entity should be entitled to a local property tax exemption simply because part of its gross revenue stream is remitted to a public entity and then allegedly allocated to further the public entity's purpose.

The court liberally construes tax exemption statutes in favor of governmental entities, however, to grant an exemption to a private, for-profit entity by virtue of its fee payments to a government organization through a lease or similar vehicle would offend core statutory principles that the use be related to essential functions of the government. Roe v. Kervick, 42 N.J. at 207.

c. Public profile

Gourmet Dining and Kean maintain that Ursino is "used for public purpose" because it "fulfills the University's plan to have a restaurant that raises the public profile of the University." Relying on American Association of University Professors, Bloomfield College Chapter v. Bloomfield College, 129 N.J. Super. 249 (Ch. Div. 1974), aff'd, 136 N.J. Super. 442 (App. Div. 1975)), Gourmet Dining and Kean posit that, "the court must refrain from interfering with the policy-making and administrative processes of [a] college." In Bloomfield College, the court ruled that a college overstepped its authority, as defined by the college's own policies, when it terminated tenured professors under an invalid interpretation of its termination guidelines. Id. at 268. Here however, contrary to Gourmet Dining's assertions, the court is not faced with interpreting the validity of a college or university's exercise of internal policies or administrative

processes. Rather, the court is being asked to discern whether the operation of Ursino by a for-profit private entity is for a public purpose and fulfills an essential government function, to permit tax immunity.

d. Employing students

Gourmet Dining and Kean charge that Ursino is "used for public purpose" because it employs Kean students. In support of such argument, Gourmet Dining submits affidavits from two of Gourmet Dining's general managers stating that several Kean students were employed by Ursino during the 2013 and 2014 tax years. However, no obligation exists under either the Management Agreement or the MSA for Gourmet Dining to employ Kean students. Although Gourmet Dining's employment of Kean students is commendable, it does not serve "as a benefit to the community as a whole, and which, at the time is directly related to the functions of government." Hackensack City v. Bergen County, 405 N.J. Super. at 242. Moreover, Gourmet Dining's employment of Kean students was not associated or affiliated with any Kean work-study program or any academic programs offered by Kean. The court is unconvinced that the temporary employment of Kean students is sufficient to satisfy the criteria of a "use for public purpose" under N.J.S.A. 54:4-3.3. If this court were to conclude, as Gourmet Dining suggests, that the employment of college students serves a public purpose, then any for-profit business operated on, or in close proximity to, a college or university employing students would be entitled to seek a local property tax exemption. Affirmation of such proposition would eviscerate the current system of local property tax assessment and exemptions.

e. Environmental stewardship

Finally, Gourmet Dining and Kean contend that, because Ursino "is integrated into the University mission to promote environmental stewardship in a public and meaningful way," and

"contributes to the University's academic programs by donating compostable material," its operation is a "use for public purposes." Gourmet Dining further submits that Ursino contributes compostable waste material to Kean's science program and sources some of the produce it serves from Liberty Hall Estate, a farm operated by Kean. However, Gourmet Dining has proffered no evidence to show that the produce purchases from, and compost contributions to, Kean are not simply arms-length business transactions entered into for the convenience of Gourmet Dining, or as cost saving mechanisms for Gourmet Dining with regard to the positive image fostered by such transactions. While arms-length transactions between Gourmet Dining and Kean may incidentally further Kean's academic mission of environmental stewardship, the court is unconvinced that providing compostable material to, and purchasing some produce from, Kean in these transactions constitutes a "use for public purpose" on Gourmet Dining's part. Hackensack City v. Bergen County, 405 N.J. Super. at 242, made clear that while "used for a public purpose" is a broad concept, it generally "connotes an activity which serves as a benefit to the community as a whole, and which, at the time is directly related to the functions of government." Here, the alleged environmental stewardship is at best an indirect benefit of arms-length transactions between Gourmet Dining and Kean for services necessary for the operation of Ursino, i.e. the provision of produce and the removal of waste material. Moreover, no obligation exists under the Management Agreement or the MSA for Gourmet Dining to purchase produce from Kean or for Gourmet Dining to furnish compostable waste to Kean's science program. Thus, the court is unpersuaded that the relationship between Gourmet Dining and Kean with respect to this exchange of commodities rises to the level of a "use for public purpose."

For the above stated reasons, the court concludes that neither Gourmet Dining nor Kean, with all inferences drawn in their favor, have established that use of the subject property was a

"use for a public purpose." Therefore, Gourmet Dining is not entitled to local property tax exemption under N.J.S.A. 54:4-3.3.

2. Actual use

N.J.S.A. 54:4-3.6 affords a local property tax exemption for colleges, schools and academies, provided that the property is actually used for a tax-exempt purpose. Specifically, N.J.S.A. 54:4-3.6, states, in part, that:

> [t]he following property shall be exempt from taxation under this chapter . . . all buildings actually used for colleges, schools, academies, or seminaries, provided that if any portion of such buildings are leased to profit-making organizations or otherwise used for purposes which are not themselves exempt from taxation, said portion shall be subject to taxation and the remaining portion only shall be exempt . . .
>
> [N.J.S.A. 54:4-3.6.]

In City of Trenton v. State, Div. of Tax Appeals, 65 N.J. Super. 1 (App. Div. 1960), the court addressed application of N.J.S.A. 54:4-3.6 to Rider College. Rider College was initially established as a for-profit business school, but had re-organized its operating structure to be a university with expanded curricula "in the liberal and fine arts, sciences, economics, education, and journalism." Id. at 7. The court expressed that when determining eligibility for exemption under N.J.S.A. 54:4-3.6 for a college with operational surpluses, "the crucial inquiry is 'Who gets the money?'" Id. at 12. The court further explained that if the money can be traced to "someone's personal pocket" and is the primary reason for the operation, then the entity is not entitled to a tax exemption. Ibid. However, the court cautioned that if surpluses are used for "maintenance, expansion, and development of the school and its facilities," no one was receiving funds in excess of just compensation, and the funds of the institution could not be "diverted to non-institutional uses," then the school was operating without a profit motive. Ibid. In essence, the court sought to

ensure that the "profit goes back into the cause of education, [which] subserve[d] the public need of training our youth." Ibid.

In Pingry Corporation v. Township of Hillside, 46 N.J. 457 (1966), our Supreme Court addressed whether certain buildings owned by a day school for boys were "actually used for school purposes" and thus, eligible for a tax exemption under N.J.S.A. 54:4-3.6. Id. at 462. The buildings in question were used to house the headmaster and other faculty at the school, but not for classroom purposes. Id. at 463. The Court explained that when the academic institution assumes the role of landlord and thus profits from the arrangement, "the purpose to which the buildings are put can be said to only indirectly further the goals of the school and thus the finding of 'actual use' cannot be found." Ibid. The Court distinguished this scenario from one in which the "landlord-tenant relationship is secondary to the primary purpose of providing the housing for the faculty on the campus site and no profit is possible," holding that, in the latter case, an exemption can be justified. Ibid. The Court permitted the exemption because the housing was rented at rates substantially lower than those in the surrounding area and the rental income did not offset the costs and depreciation associated with the building. Id. at 463-64.

In Blair Academy, 95 N.J. Super. 583, the court addressed whether a catering system and other facilities were eligible for local property tax exemption under N.J.S.A. 54:4-3.6. Id. at 589. In that case, in lieu of hiring personnel to prepare and furnish meals, the school paid a caterer an annual fee per person for the catering service. Id. at 590. Observing that Blair Academy found it more efficient to hire a private caterer to operate on campus food services to feed the school's faculty and students, the court found that use of a catering company was not a commercial activity and did not affect the school's nonprofit status. Ibid. Moreover, the court explained that the

catering company's use of school facilities and equipment did not affect the exempt status of the school. Ibid.

Here, Gourmet Dining and Kean assert that operation of Ursino satisfies the actual "use for college purposes" test, entitling Gourmet Dining to exemption. Arguing that as long as the profit from the property "goes back into the cause of education," they maintain the criteria under N.J.S.A. 54:4-3.6 are satisfied. In essence, they claim that because Foundation is first paid a management fee and a percentage of gross revenues, before Ursino realizes any profit, Gourmet Dining is not entitled to all of the profits. Moreover, Gourmet Dining maintains that it makes contributions to "the cause of education" because Kean receives benefits from Ursino.

Conversely, Union Township maintains that Ursino represents a private, profit-making and commercial enterprise, and the payment of the fixed fee and operations fee does not make Ursino "a building used for colleges, schools, academies or seminaries." Significantly, Union Township highlights that Ursino is not actually used for Kean's tax-exempt purposes, and thus N.J.S.A. 54:4-3.6 does not apply.

As expressed by the court in City of Trenton, the test for determining whether an exemption is warranted is: "'Who gets the money?'" 65 N.J. Super. at 12. The court is not satisfied that all of the profit generated by Ursino goes back into the cause of education. Here, the intent and motive of Ursino's operations are to generate a profit. The operation of Ursino generates gross revenues for Gourmet Dining. From these gross revenues, Gourmet Dining pays its expenses of operation. The MSA defines some of these expenses as: "food costs and inventory expenses, liquor costs, supplies, salaries, Manager's salaries (if any), payroll expenses, taxes of every kind and nature (corporate taxes, sales taxes, federal, state and local taxes)." (emphasis added). As explained

above, the MSA also requires that the fixed fee and operations fee be paid to the Foundation by Gourmet Dining.

Profit is defined as "the gross proceeds of a business transaction less the costs of the transaction; i.e. net proceeds . . . Gain realized from business or investment over and above expenditures."[5] Applying this definition, Gourmet Dining's profit from operating Ursino is any money remaining after all expenses are paid. Indeed, Gourmet Dining must pay fees to the Foundation to exclusively use, possess, and occupy the subject property and operate Ursino. Yet, in response to the key question presented in City of Trenton, – "'Who gets the money?'" – the answer in the instant case, principally, is Gourmet Dining. If profit comprises the revenue that remains after all expenses of Ursino's operations are paid, then it must be said that, here, all profit belongs to Gourmet Dining.

For the reasons stated above, the court concludes that Gourmet Dining and Kean, with all inferences drawn in their favor, have failed to establish that Gourmet Dining's actual use of the subject property constituted a use for "colleges, school, academies or seminaries" and thus, is not entitled to summary judgment under N.J.S.A. 54:4-3.6.

3. New Jersey Educational Facilities Authority

The NJEFA is "a vehicle to carry out the governmental function of educating the State's citizens." New Jersey Educational Facilities Authority v. Gruzen Partnership, 125 N.J. 66, 71 (1991). The NJEFA is "deemed to be a 'political subdivision of the state established as an instrumentality exercising public and essential governmental functions.'" Id. at 72 (quoting N.J.S.A. 18A:72A-4(a)).

[5] Black's Law Dictionary 1211 (6th ed. 1990).

The New Jersey educational facilities authority law, N.J.S.A. 18A:72A-2 to -83 (the "Act"), defines what an educational facility and a project are, including the tax exemptions afforded the NJEFA and its agents. The Act defines an "educational facility" as:

> a structure suitable for use as a dormitory, dining hall, student union, administration building, academic building, library, laboratory, research facility, classroom . . . and other structures or facilities related thereto or required or useful for the instruction of students or the conducting of research or the operation of an institution for higher education. . . .
>
> [N.J.S.A. 18A:72A-3.]

N.J.S.A. 18A:72A-3 defines "project" as a "dormitory or an educational facility or any combination thereof. . . ."

N.J.S.A. 18A:72A-18 states, in part, that:

> [T]he operation and maintenance of a project by the authority or its agent will constitute the performance of an essential public function, neither the authority nor its agent shall be required to pay any taxes or assessments upon or in respect of a project or any property acquired or used by the authority or its agent under the provisions of this chapter or upon the income therefrom, . . .
>
> [N.J.S.A. 18A:72A-18 (emphasis added).]

Here, it is undisputed that the NJCSTM Building is an "educational facility" as defined in N.J.S.A. 18A:72A-3, and a NJEFA project, financed by issuance of NJEFA bonds.[6] The NJCSTM Building and the land on which it is located, is owned by NJEFA and leased to Kean. Thus, the NJEFA and its agents are exempt from the payment of any taxes or assessments on the NJCSTM Building.

[6] Ascribing plain meaning to the term "educational facility" under N.J.S.A. 18A:72A-3, as a facility that is "useful for the instruction of students," the court finds that the NJCSTM Building is an "educational facility." The NJCSTM Building houses classrooms and research laboratories, and is a "structure or facility required or useful for the instruction of students." See N.J.S.A. 18A:72A-3.

Thus, the court's examination centers on whether Gourmet Dining, by its operation of Ursino, and use of the subject property within a portion of the NJCSTM Building, is as an "agent" of the NJEFA, as contemplated under N.J.S.A. 18A:72A-18, and qualifies for exemption from local property tax.

Although the Act contains provisions that address the leasing and subleasing of certain "revenue producing" properties to and from the NJEFA, they pertain to sales and leases of land with dormitories and "student unions and parking facilities," and not the leasing of a portion of an NJEFA project for use as a for-profit restaurant. See N.J.S.A. 18A:72A-26; N.J.S.A. 18A:72A-27; N.J.S.A. 18A:72A-27.1. Moreover, the court's research has not disclosed any precedent defining the legal relationship that exists between the NJEFA and the educational institutions for which the NJEFA obtains loan financing.

Here, the contractual agreements are between Gourmet Dining and Foundation, and do not involve transactions, sales, or leases with the NJEFA. Furthermore, Gourmet Dining's business arrangement with Foundation does not involve "revenue producing dormitories" as set forth under N.J.S.A. 18A:72A-26 and -27. Thus, N.J.S.A. 18A:72A-26, N.J.S.A. 18A:72A-27, and N.J.S.A. 18A:72A-27.1 do not apply to Gourmet Dining's business arrangement with Foundation.

NJEFA asserted that neither Kean nor Foundation are agents of the NJEFA, as such term is contemplated under N.J.S.A. 18A:72A-18. Moreover, NJEFA maintained that no agency relationship exists between Gourmet Dining and the NJEFA. Specifically, the NJEFA emphasized that it did not enter into any agreements whatsoever with Gourmet Dining. NJEFA stated that the agreements entered into between NJEFA and Kean, as well as any other public college or university, are in their respective capacity as independent contractors. Additionally, NJEFA highlighted that public colleges and universities, including Kean, are accorded their own enabling

and exemption statute, N.J.S.A. 54:4-3.3. Therefore, it did not follow that Kean or Gourmet Dining should also be entitled to an exemption based on the tax exemption afforded the NJEFA under N.J.S.A. 18A:72A-18. Finally, the NJEFA offered that as an authority purely engaged in financing, it was not in the position to assume any of the burdens or potential obligations of the many public colleges and universities which it provides financing for, including local property tax.

Gourmet Dining and Kean contested the position endorsed by the NJEFA. They argued that even if Kean was not a "technical agent" of the NJEFA, the language and intent of N.J.S.A. 18A:72A-18 was to afford both NJEFA and the public universities contracting with the NJEFA an exemption from local property tax under the Act.

The rules of statutory construction require "consideration of [a statute's] plain language." Merin v. Maglaki, 126 N.J. 430, 435 (1992). See also Kimmelman v. Henkels & McCoy, Inc., 108 N.J. 123, 128 (1987); In re Plan for the Abolition of Council on Affordable Housing, 214 N.J. 444, 467-68 (2013). If based upon a plain reading, the statutory language is "'clear and unambiguous,'" the court must "implement the statute as written without resort to judicial interpretation, rules of construction, or extrinsic matters." Bergen Commercial Bank v. Sisler, 157 N.J. 188, 202 (1999) (quoting In re Estate of Post, 282 N.J. Super. 59, 72 (App. Div. 1995)). Conversely, "'[i]f the plain language of a statute creates uncertainties or ambiguities, a reviewing court must examine the legislative intent underlying the statute and 'construe the statute in a way that will best effectuate that intent.'" Musikoff v. Jay Parrino's the Mint, L.L.C., 172 N.J. 133, 140 (2002) (quoting New Jersey State League of Municipalities v. Dep't of Cmty. Affairs, 158 N.J. 211, 224 (1999)). It is of paramount importance for the court to "effectuate the 'fundamental purpose for which the legislation was enacted.'" Township of Pennsauken v. Schad, 160 N.J. 156,

170 (1999) (quoting New Jersey Builders, Owners and Managers Ass'n v. Blair, 60 N.J. 330, 338 (1972)).

In the taxation arena, when faced with an issue of statutory construction, the preferred "approach to [interpreting] the meaning of a tax statute is to give to the words used by the Legislature 'their generally accepted meaning, unless another or different meaning is expressly indicated.'" Public Service Electric & Gas Co. v. Township of Woodbridge, 73 N.J. 474, 478 (1977) (quoting New Jersey Power & Light Co. v. Township of Denville, 80 N.J. Super. 435, 440 (App. Div. 1963)). However, when the generally accepted meaning of a word or words are indeterminate, the courts "sole guidepost" must be to effectuate the intent of our Legislature. Ibid.

The term "agent" is not defined under N.J.S.A. 18A:72A-3 or in any of the statutes governing the NJEFA. Thus, the court must look to the plain meaning of the term "agent" under the statutory scheme. In its most basic form, "agent" means a "person authorized by another (principal) to act for or in place of him; one intrusted [sic] with another's business." Black's Law Dictionary 600 (6th ed. 1990).

Similarly, our Supreme Court has declared that "[a]n agency relationship is created when one party consents to have another act on its behalf, with the principal controlling and directing the acts of the agent." Sears Mortgage Corp. v. Rose, 134 N.J. 326, 337 (1993) (citing Arcell v. Ashland Chem. Co., Inc., 152 N.J. Super. 471, 494 (Law Div. 1977)). Furthermore, "[t]here need not be an agreement," contractual or otherwise, "between parties specifying an agency relationship" exists, instead "'the law will look at their conduct and not to their intent or their words as between themselves but to their factual relation.'" Ibid. (quoting Henningsen v. Bloomfield Motors, 32 N.J. 358 (1960)). To that end, "'[i]mplied authority may be inferred from the nature or extent of the function to be performed, the general course of conducting the business,

or from particular circumstances in the case.'" Id. at 338 (quoting Carlson v. Hannah, 6 N.J. 202, 212 (1951)).

Moreover, even if a person is not actually an agent, he or she may be deemed an agent under the rule of apparent authority, based on the manifestations of authority by the principal. See e.g. C.B. Snyder Realty Co. v. National Newark & Essex Banking Company, 14 N.J. 146, 154 (1953); American Well Works v. Royal Indemnity Co., 109 N.J.L. 104, 108 (E. & A. 1932). In situations involving an "apparent authority" agency relationship, it is important to determine whether any third party has relied on the agent's "apparent authority" to act for the principal. Sears Mortgage Corp., 134 N.J. at 338 (citing N. Rothenberg & Son, Inc. v. Nako, 49 N.J. Super. 372, 382-83 (App. Div. 1958)). Additionally, "direct control of principal over agent by the principal is not absolutely necessary; a court must examine the totality of the circumstances to determine whether an agency relationship existed even though the principal did not have direct control over the agent." Ibid.

The record before the court reveals no relationship, contractual or otherwise, between Gourmet Dining and NJEFA. Additionally, the record is devoid of evidence that any third party perceived Gourmet Dining to have been conferred some authority by the NJEFA, or that any third party relied on any alleged apparent authority they perceived Gourmet Dining to possess on behalf of NJEFA. Accordingly, affording Gourmet Dining all reasonable and legitimate inferences, the court finds that no agency relationship exists between Gourmet Dining and NJEFA.

Next, the court will examine whether an agency relationship exists between NJEFA and Kean and correspondingly, Foundation. The court remarks however, that no legal precedent or statutory authority exists affording a tax exemption for an agent of an agent of the NJEFA. Nonetheless, it appears that if through some derivative agency theory a third party could perceive

Gourmet Dining as an agent of an agent of the NJEFA, it may be entitled to exemption under N.J.S.A. 18A:72A-18.

The common thread that exists between NJEFA and Gourmet Dining is that both have contractual relationships with Kean. NJEFA has a direct contractual relationship, as Kean leases the NJCSTM Building from NJEFA. Conversely, Gourmet Dining has an indirect relationship, as Kean leases the subject property to Foundation, which then entered into an agreement with Gourmet Dining to possess the subject property, and operate and manage Ursino.

A review of the Lease Agreement between the NJEFA and Kean reveals no provision or term expressly creating an agency relationship between NJEFA and Kean. However, five sections of the Lease Agreement refer to "agents" of the NJEFA: sections 4.04, 4.08, 8.01, 11.02, and 12.01.

Sections 4.04 "Annual Rentals" and 4.08 "Payment of Annual Rentals" address the computation and payment of monies due NJEFA from Kean. Both sections reference the costs of any "Paying Agent" of the NJEFA be included in the Annual Rental amount if not otherwise paid for or provided by Kean. As "paying agents" are agents that accept payments of the issuer of securities (the NJEFA) and distribute those payments to the holders of the securities (the bondholders), it is clear that Kean does not constitute a "paying agent" of NJEFA.

Section 8.01 "Authority's Right to Inspect" provides that Kean authorizes the NJEFA "and the authorized agents and representatives of the [NJEFA]" to enter the project, the NJCSTM Building, "at all times during usual business hours for the purpose of inspecting the same." This language again demonstrates that "authorized agents" of the NJEFA does not include Kean. It would be illogical for Kean to be authorized on behalf of NJEFA to inspect the NJCSTM Building for compliance with NJEFA requirements.

Section 11.02 contains the "Limitation of Liability" provisions between NJEFA and Kean, and states that:

> In the exercise of the powers of the [NJEFA] by its members, officers, employees, consultants and agents (other than [Kean]) and the Trustee under the Bond resolution . . . in the event of default by [Kean], the [NJEFA] and its members, officers, employees, consultants and agents and the Trustee shall not be accountable to [Kean] for any action taken or omitted by it in good faith and believed to be authorized or within the discretion or rights or powers conferred.

While this section seemingly references Kean in the category of "consultants and agents" of the NJEFA, it states that the NJEFA, its members, consultants, and agents shall not be accountable to Kean in the event of a default under the agreement. Again, it would not follow that Kean is authorized to act as an agent adverse to itself in the event of a default under the lease obligations. Thus, the court concludes the language in this section does not imply or establish that Kean is an agent of the NJEFA.

Finally, Section 12.01 "Indemnification" provides, in part, that:

> [Kean] shall, to the extent permitted by law, protect, exonerate, defend, indemnify and save the Authority and its respective members, directors, officers, employees, agents and attorneys (collectively "Indemnified Parties") harmless from and against any and all losses, damages, costs, expenses, or liabilities arising from the use of the Series 2005 B Project by [Kean]. . . .

Again, this section pertains to Kean indemnifying NJEFA and its agents for actions undertaken by Kean. If Kean was an agent of NJEFA, it would seemingly not follow that Kean would be responsible for indemnifying itself.

Thus, the court's review of the Lease Agreement supports NJEFA's contention that Kean and Foundation are not agents of the NJEFA. Therefore, the court finds that neither Kean, nor Foundation are "agents" of NJEFA, as such term is ascribed meaning under N.J.S.A. 18A:72A-

18. Having concluded that Gourmet Dining, Kean, and Foundation are not agents of NJEFA, the court finds that N.J.S.A. 18A:72A-18, affording an exemption to a "project or any property . . . used by the authority or its agent," does not afford Gourmet Dining an exemption from local property tax in the instant matter.

4. Leasehold Taxing Act - N.J.S.A. 54:4-2.3

Gourmet Dining and Kean argue that Gourmet Dining's interest in the subject property is not subject to taxation under N.J.S.A. 54:4-2.3 because it occupies the property as a manager and operator rather than as a tenant or lessee. The pertinent statute provides:

> When real estate exempt from taxation is leased to another whose property is not exempt, and the leasing of which does not make the real estate taxable, the leasehold estate and the appurtenances shall be listed as the property of the lessee thereof, or his assignee, and assessed as real estate.
>
> [N.J.S.A. 54:4-2.3.]

It is important to emphasize that when a tax-exempt entity leases a portion of its tax-exempt property to an entity that is not tax-exempt, the real estate does not become taxable; rather, it is the leasehold interest that is subject to taxation. A tax exemption is not permanent, and a lease or a change in use of a portion of tax-exempt property can result in a loss of the exemption. See County of Essex, 214 N.J. Super. 568. Further, a tax on a parcel of land can be apportioned such that it applies to only the leased portion of the parcel, with the remainder of the parcel enjoying exemption. Id. at 577-78 (citing County of Ocean v. Township of Dover, 3 N.J. Tax 434 (Tax 1981)).

Gourmet Dining and Kean contend that the MSA is not a lease because: (a) it is "not called 'lease'"; (b) it does not afford Gourmet Dining the rights of a lessee, or any right to the name "Ursino"; (c) Gourmet Dining does not have the exclusive right to occupy or use the subject

property, but rather is permitted only to "manage," use, and operate the subject property as a restaurant/catering facility; and (d) Gourmet Dining has an obligation to manage and operate Ursino in a satisfactory manner, including in its purchase of materials, food and supplies, establishing business hours, prices and menus, advertising, maintaining security, keeping books and records, and maintaining insurance.

A lease is defined as a "contract for exclusive possession of lands, tenements or hereditaments for life, for term of years, at will, or for any interest less than that of lessor, usually for a specified rent or compensation." Black's Law Dictionary 889 (6th ed. 1990). To determine whether an agreement constitutes a lease, the court must consider whether the agreement vests "exclusive possession to use . . . land for any lawful purpose, subject to reservation of a right of possession in the landlord for any purpose or purposes not inconsistent with the privileges granted the tenant." Township of Sandyston v. Angerman, 134 N.J. Super. 448, 451 (App. Div. 1975) (citations and internal quotation marks omitted). "The name that parties give to an agreement is not determinative," and the court must distinguish a lease from a license, which is "an agreement that only gives permission to use the land at the owner's discretion." Van Horn v. Harmony Sand & Gravel, Inc., 442 N.J. Super. 333, 341, 342 (App. Div. 2015). Accordingly, it is the objective effect and characteristics that the court examines in gauging whether an agreement constitutes a lease.

Our Supreme Court has provided further guidance, stating that:

> [W]hether a particular agreement is a lease depends upon the intention of the parties as revealed by the language employed in establishing their relationship, and, where doubt exists, by the circumstances surrounding its making as well as by their course of operation under it . . . And, in situations where the ambiguity or doubt gives rise to a factual question as to the intention of the parties, the burden is on the party asserting it to demonstrate existence of the lessor-lessee relationship. Moreover, in the resolution of ambiguity

> or doubt, absence of (1) a stipulation for rent as such, or other consideration regarded by the parties as constituting payment for the transfer of possession, and (2) a term; and presence of (1) limitations on exclusive possession and control of the premises, and (2) a right in the owner to revoke the permit to use at any time, are factors militating against the existence of a lease.
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> [Thiokol Chemical Corp. v. Morris County Bd. of Taxation, 41 N.J. 405, 417 (1964) (internal citations omitted).]

Thus, if the agreement at issue is a lease, then the leasehold interest in the property may be stripped of the owning entity's tax-exempt status under N.J.S.A. 54:4-2.3. To permit the assessment and taxation of the leasehold interest under N.J.S.A. 54:4-2.3, the court must first decide if the MSA constitutes a lease.

In this case, the MSA contains the requisite features of a lease under the established precedent: (a) it is a contract; (b) for a defined property; (c) delineates a set term of 10 years; and (d) requires Gourmet Dining to pay a fixed annual fee. In other words, under the MSA, Gourmet Dining possesses the "right to operate, manage and control the Facility" for a period of ten years by paying an agreed upon consideration to the Foundation, the entity charged with sole responsibility for overseeing the subject property. Thus, the framework and basic elements of a lease exist under the MSA. Therefore, the question becomes whether the MSA affords Gourmet Dining rights that are akin to that of a lessee, including the right to exclusively occupy the subject property.

In Thiokol Chemical Corp., 41 N.J. 405, the United States entered into a contract with a company called Reaction under which Reaction was permitted to use land and improvements owned by the United States for the purpose of work to be done by Reaction on behalf of the Federal Government. Id. at 409-10. Both parties to the contract asserted, and our Supreme Court agreed, that the agreement was not a lease, but rather was a license. Id. at 419. The Court's decision

focused on the rights that were afforded the parties under the contract at issue. The Court observed that "representatives of the [U.S.] would have the right of inspection of the plant, equipment, work in progress and all records pertaining to use of the facilities and contract performance," that the U.S. "maintained a 'fully staffed' office of about 10 persons on the premises to look after its interests in the products and equipment," and that "the degree of control was such that [Reaction] could not move a piece of equipment from one part of the plant to another without consent." Id. at 412. The Court also considered that the "[u]se of the premises and equipment by Reaction . . . was agreed to be at the pleasure of the [U.S.]," and that "the permission to use could be terminated in whole or in part at any time on written notice to [Reaction]"; notice which "could be made effective immediately." Id. at 412-413.

Thiokol Chemical Corp., provides meaningful insight regarding the required analysis of the MSA. Specifically, the court's inquiry is whether the MSA imposes "limitations on [the] exclusive possession and control of the premises," and establishes "a right in the owner to revoke the permit to use [the property] at any time." 41 N.J. at 417. The court recognizes that under the MSA, Gourmet Dining is required to operate a certain kind of business (a restaurant); does not possess rights to the restaurant's name; is required to meet certain standards in running its business; and cannot change the use of the subject property to something other than a restaurant.

Nonetheless, the court observes that leases for real estate typically require the lessee to use the leased property only for a purpose specifically delineated under the lease, that the lessee comply with certain minimum standards for continued occupancy of the leased property, and affords the lessee control over the business being operated thereon, provided that such operations do not unreasonably interfere with other tenants or occupants, or cause damage to the leased premises.

Under the MSA, Gourmet Dining retains a possessory right in the subject property and control over Ursino's operations, employees, liquor license, income and expenses. The MSA does not financially restrain Gourmet Dining in any manner. The MSA grants Gourmet Dining "the exclusive right to operate, manage and control the Facility . . ." and names Gourmet Dining as "exclusive manager of the Facility," responsible for "all reasonable, necessary and advisable management and operational services . . . and in compliance with all applicable municipal, county, state and federal laws, statutes, ordinances, rules and regulations." Significantly, the MSA does not afford Foundation the unilateral right to terminate the MSA, and Gourmet Dining's possessory, operational, and managerial rights in Ursino without cause. Under the MSA, Gourmet Dining enjoys the right to freely operate Ursino on its own terms, and hence can be said to enjoy the exclusive use, enjoyment, and possession of the subject property.

For the reasons set forth above, Union Township, with the evidence being viewed most favorable to Gourmet Dining, has established that the MSA is functionally a lease. The MSA may not be an optimal agreement from Gourmet Dining's perspective, but a lease with less-than-ideal terms does not cease to be a lease. Further, Gourmet Dining and Kean's assertion that the MSA cannot be a lease because the nomenclature says otherwise is a hollow argument. Examining the rights, powers, and obligations conferred on the parties, the court deems the MSA a lease for legal purposes. Accordingly, Gourmet Dining's leasehold interest in and to the subject property is subject to assessment and taxation under N.J.S.A. 54:4-2.3.

5. Taxation of otherwise exempt property - N.J.S.A. 54:4-1.10

N.J.S.A. 54:4-1.10 imposes an assessment and taxation on otherwise-exempt real property based on the property's use. The statute provides, in relevant part:

> When real property which is exempt from taxation is used by a private party in connection with an activity conducted for profit, and

> the use does not render the real property taxable pursuant to section 1 of P.L.1949, c. 177 (C. 54:4-2.3) or otherwise, the real property shall be assessed and taxed as real property of the private party. The private party is subject to liability for taxation to the same extent as though he owned the property or any portion thereof, unless the owner consents to the taxation thereof. For purposes of this act, "use" means the right or license, express or implied, to possess and enjoy the benefits from any real property, whether or not that right or license is actually exercised.
>
> [N.J.S.A. 54:4-1.10 (emphasis added).]

The goal and "objective of N.J.S.A. 54:4-1.10 was to close a loophole [which exists] in N.J.S.A. 54:4-2.3 by eliminating the artificial distinction between leased property and property used under a non-lease arrangement." New Jersey Highway Auth. v. Township of Bloomfield, 8 N.J. Tax 637, 642 (Tax 1987). Thus, "when a private party uses tax-exempt property in connection with an activity conducted for profit, it is the private party that is subject to liability for taxation to the same extent as though he owned the property . . . ." State v. Eatontown Borough, 366 N.J. Super. 626, 633 (App. Div. 2004) (quoting N.J.S.A. 54:4-1.10).

Gourmet Dining and Kean argue that because Gourmet Dining's use, operation, and management of Ursino served a public purpose, the provisions of N.J.S.A. 54:4-1.10 are inapplicable. Specifically, Gourmet Dining contends that because Ursino may be used by students, faculty, and administrators, raised scholarship funds, enhanced Kean's public profile, and supported academic programs, it was operated for Kean's public purposes. However, as this court has addressed at length herein above, Gourmet Dining's use, operation, and management of Ursino failed to serve a public purpose.

It is well-settled that when "a government property or facility is leased to a private entity and the private entity operates the property or facility in accordance with the agency's statutory purpose, the tax immunity may still apply." Township of Holmdel, 190 N.J. at 88-89. However,

our State statutes do not sanction the grant of tax exemptions where tax-exempt property is leased by public institutions to private entities for a commercial, profit-generating purpose that is unrelated to the institution's tax-exempt mission.

Here, it is undisputed that: (a) Kean is a governmental body of the State of New Jersey under N.J.S.A. 18A:64-45; (b) the NJCSTM Building is exempt from local property tax under N.J.S.A. 18A:72A-18; (c) Kean afforded Foundation the "exclusive right to operate, manage and control" the subject property under the Management Agreement; (d) Foundation entered into the MSA with Gourmet Dining, thereby permitting the latter to use, occupy, operate, and manage the subject property; (e) Gourmet Dining, is a private, for-profit entity; and (f) during the 2013 and 2014 tax years Gourmet Dining conducted for-profit operations on the subject property. However, because Gourmet Dining's use of the subject property failed to satisfy the necessary public purpose requirements, its use of the subject property is subject to taxation under N.J.S.A. 54:4-1.10.

III. Conclusion

For the foregoing reasons, the court grants Union Township's motions for summary judgment and denies Gourmet Dining's and Kean's cross-motions for summary judgment. The court will issue an Order memorializing this opinion.