



Board of County Commissioners of  
Lorain County, Ohio

Appellees.

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NOTICE OF APPEAL OF APPELLANTS CITY OF ELYRIA, OHIO,  
CITY OF AVON LAKE, OHIO, CITY OF NORTH RIDGEVILLE, OHIO  
AND AMHERST TOWNSHIP, OHIO

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Notice of Appeal of Appellants City of Elyria, Ohio,  
City of Avon Lake, Ohio, City of North Ridgeville, Ohio and Amherst Township, Ohio

Appellants, City of Elyria, Ohio, City of Avon Lake, Ohio, City of North Ridgeville, Ohio and Amherst Township, Ohio hereby give notice of their appeal as of right, pursuant to R.C. 5717.04, to the Supreme Court of Ohio, from a Decision and Order of the Board of Tax Appeals, journalized in Case No. 2003-T-1533 on November 17, 2006. A true copy of the Decision and Order of the board being appealed is attached hereto and incorporated herein by reference.

The appellants complain of the following errors in the Decision and Order of the Board of Tax Appeals:

1) The Board of Tax Appeals erred in determining that Appellant did not have subject matter jurisdiction.

A. Appellants met the requirements of RC Section 5747.55 (C)(3). RC 5747.55 (C)(3) requires that Appellants set forth which subdivision they “believe” to be over allocated and the exact amount in dollars of the “alleged” amount of the over allocation. Appellants satisfied this requirement by setting forth the subdivision it “believed” to be over allocated and the “alleged” amount. (Emphasis added).

B. Even if Appellees are correct and Appellants somehow violated RC 5747.55 (C)(3), it was a curable defect that Appellants should have been granted leave to amend. Said issue should not be raised approximately three years after said Notice of Appeal was filed.

2) The Board of Tax Appeals erred in substituting *its* determination of the subdivisions which *the Board* believes received more than its proper share of the

allocation and the exact amount in dollars of such alleged over allocation. The Board of Tax Appeals determined *after the fact* what the alleged over allocation should be, in violation of the requirement that the Appellants set forth those political subdivisions which *Appellants* believed received more than its proper share, thereby, in effect, ignoring the requirement that the Appellants only have to have a “belief” of those subdivisions that are over allocated and there is no requirement that in its Notice of Appeal the complaining subdivisions “belief” has to be correct.

3) The Board of Tax Appeals erred in determining that the Appellants’ Notice of Appeal was only under ORC 5747.55 © and not also under ORC 5747.55 (D) and erred in not taking into consideration the requirements of 5747.55 (D) and the effect of the violation of that section on the Appellants as a result of the implementation of a settlement by the Lorain County Budget Commission of BTA Case No. 2002-T-1865 (City of Lorain vs. Lorain County Budget Commission).

4) The Board of Tax Appeals erred in making subsequent findings of fact and determinations of law to determine that the Appellants did not properly invoke the subject matter jurisdiction of the Board of Tax Appeals in this case.

5) The Board of Tax Appeals erred by using all of the factual discovery and evidence presented in the hearing and briefing in making its determination of the lack of subject matter jurisdiction, instead of looking at the Notice of Appeal on its face and making its decision on a procedural basis and not a substantive basis.

6) The Board of Tax Appeals improperly dismissed BTA Case No. 2003-T-1533 and such decision of the dismissal was not supported under the law and the facts as evidenced in the record of BTA Case No. 2003-T-1533, and thus, the decision of the Board of Tax Appeals in Case No. 2003-T-1533 was not reasonable nor lawful.

7) The Board of Tax Appeals erred in concluding that the Appellants failed to list the exact amounts of the over allocation and failed to identify the claimed over allocated subdivisions.

8) The Board of Tax Appeals erred in not concluding that what the Appellants sought in the Notice of Appeal and their appeal were alternative forms of relief, to wit: the violation of ORC 5747.55 (D), and not only one form of relief, to wit: that the County of Lorain bear the burden of the decision of the Lorain County Budget Commission which was appealed in BTA Case No. 2003-T-1533.

9) The Board of Tax Appeals erred in waiting until after the case was submitted on the record and utilizing an issue raised in a reply brief in determining that the Appellants had not properly invoked the subject matter jurisdiction of the Board of Tax Appeals.

10) The Board of Tax Appeals erred by allowing the City of Lorain to raise the lack of subject matter jurisdiction in the City of Lorain's post hearing Reply Brief filed approximately three years after the Appellants' Notice of Appeal was filed and after a substantial amount of litigation including discovery and a hearing and briefing and substantial litigation costs were incurred in processing the appeal by the Appellants and the Appellees.

11) The Board of Tax Appeals erred by making a determination that the Appellants did not properly invoke the subject matter jurisdiction of Board of Tax Appeals without there being before the Board of Tax Appeals any proper Motion to Dismiss on the grounds that the Appellants' Notice of Appeal failed to satisfy mandatory requirements of ORC 5747.55.

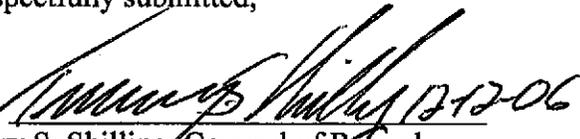
12) The Board of Tax Appeals erred in its determination that the Appellants did not comply with the requirements of ORC 5747.55 (C)(3) and ORC 5747.55.

13) The Board of Tax Appeals erred in its determination that the word “believe” in ORC 5747.55 (C)(3) is mandatory and exact and not an estimate or a probability and, therefore, erred in not allowing for the flexibility that is inherent in the word “believe”. “Believe” goes to the question of good faith of the Appellants in their allegations in their Notice of Appeal. The word “belief” connotes some room for probability and the Board erred in determining that its an exact requirement. The word “alleged” is not an exact word, it’s setting forth in good faith a statement which the maker (Appellants) believe to be true which may ultimately, based upon the evidence, be determined not to be true and, therefore, it is a question for determination of facts and not a question of jurisdiction in determining the merits of the case and the Board of Tax Appeals erred in this case in making that determination and their decision on November 17, 2006.

14) The Board of Tax Appeals erred in its decision denying subject matter jurisdiction by using a hyper technical standard that is not reasonable nor lawful and, thus, denied the Appellants their right to due process of the law in Ohio under ORC 5747.55 (D).

15) The Board of Tax Appeals erred in its decision by not taking into consideration the position and allegations of the Appellants that the Appellants’ Notice of Appeal was also based on the abuse of discretion of the Lorain County Budget Commission and that, as an alternative form of relief, the Appellants’ Notice of Appeal was under ORC 5747.53 and 5747.63.

Respectfully submitted,

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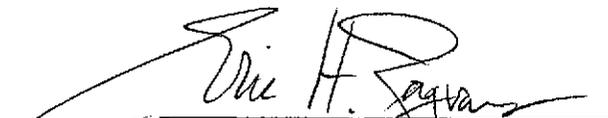
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## OHIO BOARD OF TAX APPEALS

City of Elyria, City of Avon Lake, )  
 City of North Ridgeville, Amherst )  
 Township, and Lorain County )  
 Metropolitan Park District, )

Appellants )

vs. )

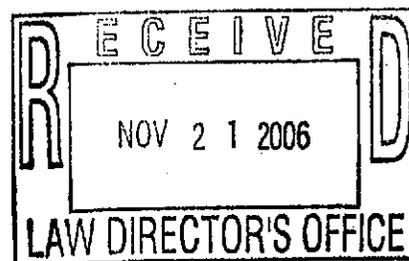
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Appellees. )

CASE NO. 2003-T-1533

(BUDGET COMMISSION)

DECISION AND ORDER



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Entered NOV 17 2006

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

The Board of Tax Appeals considers this matter pursuant to a notice of appeal filed by appellants, city of Elyria, city of Avon Lake, city of North Ridgeville, Amherst Township, and Lorain County Metropolitan Park District. The appeal was brought under the relevant provisions of R.C. 5705.37, 5747.53, 5747.55, and 5747.63 from the actions of the Lorain County Budget Commission. The appeal concerns the apportionment and distribution of the 2004 Undivided Local Government Fund (“ULGF”) and the 2004 Undivided Local Government Revenue Assistance Fund (“ULGRAF”). The appellants argue that the alternative formulas used by the commission to allocate the funds were not legally applicable.

Before reviewing the merits of this appeal, we must address a jurisdictional issue raised by appellee, city of Lorain, in its merit brief.<sup>1</sup> The city of Lorain asks us to dismiss this appeal because the appellants failed to comply with R.C. 5747.55(C)(3), which requires an entity appealing from the allocation made by the

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<sup>1</sup> We note that jurisdictional issues cannot be waived and can therefore be raised at any time during the proceedings. *Jenkins v. Keller* (1966), 6 Ohio St.2d 122; *In re Claim of King* (1980), 62 Ohio St.2d 87; and *Baltimore & Ohio Ry. Co. v. Hollenberger* (1907), 76 Ohio St. 177. Nevertheless, the “failure of a litigant to object to subject-matter jurisdiction at the first opportunity is undesirable and procedurally awkward.” *Gates Mills Investment Co. v. Parks* (1971), 25 Ohio St.2d 16, at 19. Here, despite the considerable amount of litigation involved in this appeal, the city of Lorain did not raise the issue of subject-matter jurisdiction until the filing of its post-hearing merit brief. As the court eloquently stated in *Painesville v. Lake Cty. Budget Comm.* (1978), 56 Ohio St.2d 282, at 284, “It may have been more graceful for the commission to file its motion to dismiss before the partial distribution was ordered, but the commission is not barred by its lack of procedural grace from raising the issue of lack of subject-matter jurisdiction.” Similarly, we shall proceed to consider the jurisdictional question raised by the city of Lorain notwithstanding the procedural awkwardness through which it has been introduced.

budget commission to name those subdivisions the appellant believes to be over allocated and to state the amount of the alleged over-allocation.

Prior to the 2004 allocation year, the budget commission had been allocating the ULGF and ULGRAF according to an alternate formula first adopted in 1984 (“old formula”). For the 2003 year, the budget commission made its allocation according to the old formula. The city of Lorain appealed from that action, claiming that the old formula had not been properly adopted. See *City of Lorain v. Lorain Cty. Budget Comm.*, BTA No. 2002-T-1865.<sup>2</sup> Ultimately, the parties resolved the issues among them, and the appeal was voluntarily dismissed. *City of Lorain v. Lorain Cty. Budget Comm.* (Sept. 26, 2003), BTA No. 2002-T-1865, unreported.

Evidently as a consequence of the settlement, a revised alternate formula (“new formula”) was proposed for consideration. In September 2003, the budget commission adopted the new formula and made the 2004 allocations according to it. The instant appeal was filed by the appellants, each of which received less under the new formula than they did with the old formula. In their notice of appeal, appellants claim that the new alternate had not been properly adopted and assert that allocation should be made according to the old formula.

Pursuant to R.C. 5747.55, a subdivision may appeal the commission’s allocation of the ULGF and ULGRAF to the BTA “in the manner and with the effect

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<sup>2</sup> The record in BTA No. 2002-T-1865 has been made a part of the record in this appeal. See *City of Elyria v. Lorain Cty. Budget Comm.* (Interim Order, Dec. 30, 2004), BTA No. 2003-T-1533, unreported. See, also, the stipulation of facts submitted by the parties on January 18, 2006.

provided in section 5705.37 of the Revised Code, in accordance with the following rules \*\*\*." Pursuant to the rule codified by R.C. 5747.55(C)(3), the appealing subdivision must attach to its notice of appeal a statement showing, "The name of each participating subdivision, as well as the name and address of the fiscal officer thereof, that the complaining subdivision believes received more than its proper share of the allocation, *and the exact amount in dollars of such alleged over-allocation.*" (Emphasis added.) An appeal under R.C. 5747.55 may relate to an allocation made under either the statutory formula or an alternative formula. *Mogadore v. Summit Cty. Budget Comm.* (1987), 36 Ohio App.3d 42.

In its review of the notice of appeal, the city of Lorain argues that the appellants have failed to comply with R.C. 5747.55(C)(3) in that the appellants have intentionally omitted naming the over-allocated subdivisions. The city of Lorain represents that, while the appellants claim that the old formula should be applied, the notice of appeal shifts all over-allocations to the county, rather than among other subdivisions, as would be the case if the old formula is applied. See Notice of Appeal at Ex. G. The appellants respond that they listed the amount of over-allocations as they believed them to be at the time of the filing of the notice of appeal, which, represent the appellants, is all that is required by R.C. 5747.55(C)(3). We must, however, concur with the city of Lorain that the appellants failed to list the exact amounts of the alleged over-allocation and, in so doing, failed to identify the claimed over-allocated subdivisions.

Generally, “[t]he right to appeal an allocation of a local government fund to the Board of Tax Appeals is created by statute. (R.C. 5747.55.) Therefore, if appellant has failed to comply with the appropriate statutory requirements, the board lacks subject-matter jurisdiction to hear the appeal.” *Painesville*, supra, at 284. Ohio tribunals have clearly established that “\*\*\* [w]here a statute confers the right of appeal, adherence to the conditions thereby imposed is essential to the enjoyment of the right conferred.” *American Restaurant and Lunch Co. v. Glander* (1946), 147 Ohio St. 147, 150. See, also, *Queen City Valves, Inc. v. Peck* (1954), 161 Ohio St. 579, and *Olympic Steel, Inc. v. Cuyahoga Cty. Bd. of Revision*, 110 Ohio St.3d 1242, 2006-Ohio-4091, reconsideration denied, 2006-Ohio-5351.

Each section of R.C. 5747.55 “is written to be mandatory upon the appellant in the fulfillment of all the requirements in order to provide the appellate jurisdiction for review by the BTA. \*\*\* [Any] failure to comply with the statutory requirements \*\*\* impairs the BTA’s subject-matter jurisdiction.” *Union Twp. v. Butler Cty. Budget Comm.* (1995), 101 Ohio App.3d 212, at 216, discretionary appeal denied (1995), 72 Ohio St.3d 1551.

Relative to the issue raised by the city of Lorain, that the appellants failed to list the exact amount of over-allocation for each subdivision, we note that the same provisions of R.C. 5747.55(C)(3) have been previously addressed. In *Cincinnati v. Hamilton Cty. Budget Comm.* (1979), 59 Ohio St.2d 43, the court considered a situation in which the city of Cincinnati named every other subdivision in the county as an appellee in its appeal from the actions of the budget commission. Although each

subdivision was named, Cincinnati failed to identify which subdivisions it believed received more and which subdivisions it believed received less than their proper share. On appeal to this board, we dismissed, finding that Cincinnati failed to comply with R.C. 5747.55(C)(3). The Ohio Supreme Court agreed. Noting that "R.C. 5747.55 does not provide for an allegation of an excuse for noncompliance in lieu of compliance with its mandatory jurisdictional requirements," the court concluded that, "[w]hile this places a considerable burden upon the city of Cincinnati, such a restriction upon appellant's right to appeal from an allocation of the funds by the county budget commission is within the General Assembly's intent in enacting R.C. 5747.55." *Id.* at 45.

Subsequently, in *Union Twp*, *supra*, the Tenth District Court of Appeals considered a situation in which the appellant subdivision knew that other townships had received over-allocations but chose not to name them in its appeal. The court found the appeal to be jurisdictionally defective:

"Assuming, *arguendo*, that no alternate formula was properly adopted in the county for the year 1993 distribution of local government funds, the purpose of appeal is to permit a subdivision receiving less than its statutory share to seek to recover that share. The fund developed to accomplish that goal is the over-allocations to the named appellees. The ultimate goal is to reallocate in accordance with the statutory formula in the county where the appellees to an appeal are based. By not including those entities who the complaining party believed to be overallocated, but solely only setting forth those whom they wished to include, the complaining party is creating its own formula, not vindicating the statutory formula. Union Township has named, in its statement under R.C. 5747.55(C)(3), only those subdivisions against whom it chose to seek recovery, not those subdivisions it believed

to be over-allocated. By not complying with the statute conferring the right of appeal, Union Township has not properly invoked the subject-matter jurisdiction of the BTA \*\*\*." Id. at 218.

Turning to the matter before us, we find that the notice of appeal establishes that the appellants claim the 2004 allocations should be made according to the old formula. Appellants confirmed this position when they appeared at this board's hearing, stating, "[W]e are asking the Board to grant relief from the adoption and imposition of the new alternative formula, invalidate the new alternative formula, *and revert the county and all of its subdivisions, including the five Appellant parties, back to the prior alternative formula that was in effect.*" (Emphasis added.) H.R. at 152.

Exhibit G of the notice of appeal sets forth the name of the appellee subdivisions and the amount of claimed over-allocation. Column No. 1 of Exhibit G sets forth the 2004 allocations made by the budget commission. In column No. 2 of the exhibit, the appellants list the share of the funds "that should have been allocated under the alternative method used prior to settlement in Case No. 02-T-1865." A review of the exhibit, however, discloses that the appellants do not, in fact, claim that all allocations should be reverted to the prior formula. For example, for both the ULGF and the ULGRAF, the appellants claim that the city of Lorain should maintain the allocation it received under the new formula. A cursory review of the old formula, however, establishes that the city of Lorain would receive less under the old formula than under the new. See BTA No. 2002-T-1865 for additional exhibits related to the old formula. In addition, the appellants list the allocation for the county's share of the

funds at an amount below what the county is entitled to under the old formula. The appellants list the county as being the only over-allocated subdivision. Notice of Appeal at Ex. G.

Despite the appellants' claim that they properly listed the alleged over-allocation, we note that the record evidences a deliberate decision to exclude the city of Lorain as an over-allocated subdivision. In the section of their notice of appeal in which the appellants state the relief they seek before this board, they ask us to:

“[A]locate the 2004 LGF and 2004 RAF among the parties to the appeal in accordance with the alternative method used by the LCBC prior to the settlement of Case No. 02-T-1865, but with any increased allocation to Lorain [city] as the result of such settlement borne only by Lorain County from its allocated share and with no reduction suffered by any other participating subdivision.” Notice of Appeal at 9.

R.C. 5747.55 establishes a means by which a subdivision that is receiving less than its proper allocation may seek to recover its share of the local government funds. *Union Twp.*, supra. Under the facts of this case, there could be three possible outcomes. First, that we would find the new formula to be properly adopted and affirm the commission's allocation. Second, that we would find that the allocation should have been made under the old formula. Finally, we could determine that neither alternative formula applies and order allocation pursuant to the statutory method.

The appellants, however, seek something different. They ask that we invalidate the new formula and allocate pursuant to the old formula, yet they also allege that the city of Lorain should retain the increase in allocation it received under

the new formula. Appellants shift the burden for this increase from several subdivisions to the county. In short, the appellants have decided to “pick and choose” which entity should be responsible for any changes in the allocation, rather than seek to have the old formula applied as approved. As in the case of *Union Twp.*, supra, by not identifying all entities the appellants believe are overallocated under the new formula, but only setting forth the county as the sole entity to be responsible for any changes in the amounts allocated among the subdivisions, the appellants have created their own formula, an alternative that is beyond the scope of these proceedings. We must emphasize that any collateral agreement existing among the subdivisions is extraneous to the budget commission’s allocation under one of the alternate formulas.

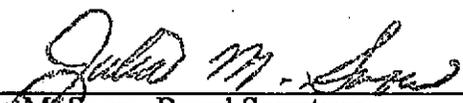
Upon review, we agree with the city of Lorain that the appellants have, in their statement made under R.C. 5747.55(C)(3), identified only those subdivisions from which they seek to recover their share of the funds, not those subdivisions they believe to be overallocated. The appellants’ failure to comply with the mandatory requirements of the statute deprives us of subject-matter jurisdiction. *Union Twp.* and *Cincinnati*, supra.

While this decision may appear technical, we remind the parties of the Supreme Court’s decision in *Cincinnati*, supra, in which the court, recognizing the “considerable burden” placed upon an appealing subdivision, found that “[i]n enacting R.C. 5747.55, the General Assembly established high jurisdictional hurdles \*\*\*\*” upon those challenging a budget commission’s allocation of the ULGF and ULGRAF. *Id.* at

We believe that the General Assembly took seriously the need for an appellant to identify the over-allocated subdivisions, given R.C. 5747.55(C)(3)'s requirement that an appellant list the "exact amount in dollars" of the alleged over-allocation. (Emphasis added.) This requirement places a subdivision on notice that its share of the funds may be in jeopardy. It gives that subdivision the ability to pursue a defense against any reallocation that this board may order. The failure to name a subdivision as being overallocated may lead that subdivision to conclude, erroneously, that its share of the funds is not at risk, and therefore that it need not participate in this board's proceedings. What is more, the failure to name a subdivision believed to be overallocated may result in that subdivision spending the share it has already received. Any subsequent reallocation made by this board could result in a fiscal crisis for such a subdivision, as the over-allocation must be immediately repaid. See *East Liverpool v. Budget Comm.*, 99 Ohio St.3d 137, 2003-Ohio-2760.

Upon review of the matter before us, we conclude that the appellants have not properly invoked the subject-matter jurisdiction of this board. The Board of Tax Appeals therefore dismisses BTA No. 2003-T-1533.

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

  
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Julia M. Snow, Board Secretary