IN THE SUPREME COURT OF OHIO

City of Elyria, et al.,	)	
	)	
Appellants,	)	Case Nos. 06-2293
	)	06-2389
v.	)	06-2390
	)	
Lorain County Budget Commission, et al.,	)	On Appeal From The
	)	Ohio Board of Tax Appeals
Appellees.	)	

MERIT BRIEF OF APPELLEES LORAIN COUNTY, LORAIN COUNTY BOARD OF COUNTY COMMISSIONERS, CITY OF LORAIN AND LORAIN COUNTY BUDGET COMMISSION

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STATEMENT OF THE CASE AND OF THE FACTS

This consolidated appeal concerns the allocation of the 2004, 2005, and 2006 Lorain County Undivided Local Government Fund ("LGF") and Undivided Local Government Revenue Assistance Fund ("RAF"). The Lorain County Budget Commission ("Budget Commission") allocated these funds pursuant to an alternative method adopted in 2003 to govern allocations for tax year 2004 and thereafter (the "2004 Formula"). Appellants challenged this formula. Because they failed to comply with the strict jurisdictional requirement in R.C. 5747.55(C)(3) to accurately identify each subdivision they believed had received more than its proper share of the allocation and to accurately identify the amounts of such over-allocations, the Board of Tax Appeals ("BTA" or "Board") correctly concluded that appellants failed to properly invoke the Board's subject-matter jurisdiction and dismissed the appeals.

The history of the LGF and RAF in Lorain County is important to understand in the context of this appeal. In 1984, a task force of the county subdivisions met, proposed, and attempted to adopt an alternative method by which to allocate the LGF (the "1984 Formula"). When the General Assembly created the RAF in 1989, the county subdivisions attempted to adopt the 1984 Formula to govern its allocation. Until 2002, the Budget Commission allocated both the LGF and RAF using the same percentages that had been allocated to each subdivision in every year since 1984.

In 2002, the Budget Commission allocated the 2003 LGF and RAF using the original percentages from the 1984 Formula. The City of Lorain ("Lorain") appealed this allocation, challenging the validity of the 1984 Formula. As the case progressed, the evidence revealed

significant problems with the 1984 Formula.[1] Because of these problems, the county subdivisions began negotiating to settle Lorain's appeal and to develop a new formula. These negotiations led to the adoption and approval of the 2004 Formula.[2]

Under the agreement to settle Lorain's 2003 tax year appeal, the County – which was not a party to the appeal – paid Lorain $500,000. No other subdivision paid Lorain anything, and none of the 2003 tax year allocations changed for any of the subdivisions.[3] Under the 2004 Formula, Lorain's allocation percentage increased modestly for tax year 2004 and thereafter over what it had been under the old method. Lorain was the only subdivision to receive an increased allocation percentage pursuant to the new formula. The County's percentage allocation and the percentages for the remaining subdivisions, including the four appellants, decreased slightly.

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[1] For example, an alternative formula must be approved by both the county and the most populous city (R.C. 5747.53), and must be in place by the September 1st deadline for the budget commission to complete its work unless that deadline has been extended by the Tax Commissioner. R.C. 5705.27; *Girard v. Trumbull Cty. Budget Comm.* (1994), 70 Ohio St.3d 187, 191-92; *Shawnee Twp. v. Allen Cty. Budget Comm.* (1991), 58 Ohio St.3d 14, 16; *Englewood v. Montgomery Cty. Budget Comm.* (1987), 39 Ohio App.3d 153, 155. Neither Lorain nor Lorain County (the "County") approved the 1984 Formula in time, and there was no evidence that a majority of the remaining subdivisions ever approved it. The same was true in 1989 for the RAF. The County's approval came after the Budget Commission's deadline to act, and again no evidence showed that a majority of the remaining subdivisions ever adopted the formula. Additionally, Lorain limited its approval to tax years 1989 and 1990, which meant that that formula could only govern the RAF allocation for those two years. *See Andover Twp. v. Ashtabula Cty. Budget Comm.* (1977), 49 Ohio St.2d 171, 174-75; *Lancaster v. Fairfield Cty. Budget Comm.* (1999), 86 Ohio St.3d 137. Moreover, the Budget Commission never actually used the 1984 Formula. Instead of employing the factors contained in the formula to adjust its allocations, the Budget Commission used the same subdivision percentages year after year.

[2] Appellants' tortured discussion of why the 2004 Formula was not properly adopted (Brief at 7-8) is irrelevant, because the sole issue for this appeal is whether appellants properly invoked the BTA's subject-matter jurisdiction, not whether there is a valid alternative formula. It is also wrong, because the facts clearly demonstrated that Lorain, the County, and an overwhelming majority of the remaining subdivisions approved the formula within the time required for the Budget Commission to act.

[3] Appellants repeatedly and erroneously state that their 2003 tax year allocation decreased. Brief at 1, 2, 6, 9, 10. The evidence demonstrated that this contention is untrue. Their own admissions and sworn testimony confirmed that each appellant received and kept every dollar that it had been allocated for 2003. Appellants' Responses to Request for Admission 10 and Interrogatory 14 as Amended or Supplemented (Appellees' Supplement at 1-28); Tr. 117, 131, 139-40 (Appellees' Supplement at 32-34).

Because they were not happy with the 2004 Formula, appellants appealed to the BTA.[4] The Revised Code unmistakably specifies that LGF and RAF allocations can be made only pursuant to an alternative formula or, if no alternative exists, pursuant to the statutory formula. Appellants did not ask for a statutory allocation. Instead, their 2004 notice of appeal asked the BTA to take the entire amount they sought from the County. Appellants' Appx. Vol. I, p. 34. Appellants did not make this demand because either the 1984 Formula or the 2004 Formula would require it or because any statutory allocation would cause that result, but because they blamed the County for agreeing to the settlement with Lorain. *Id.*

The BTA held a hearing. As part of its post-hearing brief, Lorain asked the Board to dismiss the appeal for failure to satisfy the prerequisites necessary to invoke the Board's subject-matter jurisdiction. In a thorough and well-reasoned opinion, the BTA agreed. Appx. Vol. I, p. 23. Because appellants' challenges to the 2005 and 2006 tax year allocations presented exactly the same jurisdictional deficiency as the 2004 challenge (*see* Notices of Appeal, Appx. Vol. III, p. 243 and Vol. IV, p. 398), the BTA also dismissed those appeals. *Id.*, Vol. III, p. 237 and Vol. IV, p. 393.

Despite appellants' apparent desire to argue the substantive merits of their case in their brief, this appeal presents only one issue: Did the BTA correctly determine that "appellants have not properly invoked the subject-matter jurisdiction of this Board?" The answer is yes.[5] First,

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[4] The Lorain County Metropolitan Park District also appealed to the BTA, but has not appealed the BTA's decision, and is not an appellant before this Court.

[5] At pages 3 and 11 of their brief, appellants emphasize that the BTA dismissed their appeals "after three years of litigation" during which time no party contended that the notices of appeal were "defective in any respect." Appellants apparently suggest that the right to challenge those appeals had been waived. Appellants are wrong. Any party or the Board can challenge the BTA's subject-matter jurisdiction at ***any*** time. *Shawnee Twp*, 58 Ohio St.3d at 15 (R.C. 5747.55 challenge appropriately raised for the first time on appeal to the Supreme Court because "a party cannot waive subject-matter jurisdiction"); *Painesville v. Lake Cty. Budget Comm.* (1978), 56 Ohio St.2d 282,

the statutory requirements necessary to properly invoke the BTA's subject-matter jurisdiction in LGF or RAF appeals are, and always have been, strictly construed and enforced. Second, no matter how appellants characterize the nature of their appeal – whether from a statutory or alternate formula allocation – R.C. 5747.55 sets out the mandatory requirements they must meet. Finally, because their notices of appeal deliberately excluded Lorain and identified the County as the only over-allocated subdivision when that result was impossible under either the statutory formula or the 1984 or 2004 Formulas, appellants failed to comply with R.C. 5747.55(C)(3). Instead of identifying appellee subdivisions who could conceivably be over-allocated under the allocation methods permitted by Ohio law, appellants sought to create their own, extra-legal formula. Therefore, the BTA's decisions to dismiss appellants' appeals were correct and should be affirmed.

ARGUMENT

This Court must affirm the BTA's decisions to dismiss appellants' appeals, unless the decisions were unreasonable or unlawful. R.C. 5717.04; *Cincinnati v. Budget Comm. of Hamilton Cty.* (1979), 59 Ohio St.2d 43, 46. The BTA's decisions in this case are reasonable and lawful because appellants did not comply with R.C. 5747.55(C)(3) — the statute that establishes the BTA's subject-matter jurisdiction and appellants' right to appeal. To reverse the decisions would dramatically change Ohio law, would contradict the unambiguous provisions of the controlling statutes, and would introduce two different sets of rules for perfecting LGF and RAF appeals from statutory and alternative formula allocations.

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284 (R.C. 5747.55 challenge not waived, even though the BTA had partially distributed the LGF). *See also* the authorities cited in footnote 1 of the BTA's decision. Appx. Vol. I at p. 25.

APPELLEES' PROPOSITION OF LAW NO. 1:

THE STATUTES CONFERRING THE RIGHT TO APPEAL FROM BUDGET COMMISSION ALLOCATIONS OF THE LGF AND RAF REQUIRE EXACTING COMPLIANCE AND MUST BE STRICTLY CONSTRUED.

"Where a statute confers the right of appeal, adherence to the conditions thereby imposed is essential to the enjoyment of the right conferred." *Am. Restaurant & Lunch Co. v. Glander* (1946) 147 Ohio St. 147, syl. ¶ 1 (appeal to the BTA from a sales tax assessment), *superseded by statute on other grounds* as stated in *Hanson Mach. Co. v. Limbach* (1986), 22 Ohio St.3d 209, 210-11; *see also Queen City Valves, Inc. v. Peck* (1954), 161 Ohio St. 579, 583-84 (requiring strict compliance with statute conferring right to appeal tangible personal property tax assessments).

The right to appeal a budget commission's allocation of the LGF or RAF is conferred by statute. R.C. 5747.55; *see also* R.C. 5705.37. The statutes' requirements are mandatory and jurisdictional; if they are not met, the BTA must dismiss the appeal for lack of subject-matter jurisdiction. *Cincinnati*, 59 Ohio St.2d at 44-46 (dismissal affirmed because appellant did not satisfy R.C. 5747.55(C)(3)); *Painesville*, 56 Ohio St.2d at 284 (dismissal affirmed because appellant did not satisfy R.C. 5747.55(A)(2)).

There is no excuse for failing to strictly comply with the statutory prerequisites, even though they present "high jurisdictional hurdles." *Cincinnati*, 59 Ohio St.2d at 45-46. In *Cincinnati*, this Court affirmed the BTA's dismissal of an appeal because the city — like appellants in this case — failed to comply with R.C. 5747.55(C)(3). That section requires an appellant to attach a statement to its notice of appeal that includes "the name of each participating subdivision ... that [appellant] believes received more than its proper share of the allocation, and the exact amount in dollars of such alleged over-allocation." The city's notice of

appeal lacked the required statement because the budget commission had withheld the information. *Id.* at 45. Nonetheless, this Court enforced the strict terms of the statute, ruling that the budget commission's intransigence afforded no excuse for failing to satisfy the requirements R.C. 5747.55. *Id.* at 45-46.

In keeping with these long-standing authorities, strict compliance with the statutory appellate prerequisites has always been the benchmark for deciding challenges to the BTA's jurisdiction. *Bettsville v. Seneca Cty. Budget Comm.* (BTA 1986), 1986 Ohio Tax LEXIS 575 at *2 ("The requirements of [R.C. 5747.55] are precise and strict, and exacting compliance is mandatory to invoke the jurisdiction of the Board of Tax Appeals."). As the BTA explained:

> Revised Code Section 5747.55, does not, by its terms, provide for an allegation of an excuse for noncompliance, whether justified or not, in lieu of compliance. ***This Board is without authority to "overlook" or "waive" any of the express statutory requirements necessary to perfect an appeal, thereby invoking its jurisdiction.*** This Board cannot consider, determine, or grant relief to these appellants . . . even if it were inclined so to do.
>
> * * *
>
> We find no legal authority supporting a proposition that an allegation of an "excuse" effectively negates specific compliance with a statutory requirement to perfect an appeal.

Centerville v. Montgomery Cty. Budget Comm. (BTA 1979), 1979 Ohio Tax LEXIS 434 at *23 (emphasis added).

Notwithstanding this well-settled law, appellants suggest in their third proposition of law that this Court "should not be disposed to deny review by a hyper-technical reading of the notice[s of appeal]." As support for this argument, appellants rely on cases dealing with the general "notice pleading" standards of the Rules of Civil Procedure. Brief at 18-19, citing *Baker v. McKnight* (1983), 4 Ohio St.3d 125 and *Hardesty v. Cabotage* (1982), 1 Ohio St.3d 114. However, general notice pleading principles cannot trump the statutory jurisdictional

requirements imposed by the General Assembly. In an ordinary lawsuit, a complaint may not be dismissable on a pleading "technicality," but in those cases such pleading technicalities do not affect whether the court has subject-matter jurisdiction. In contrast, the General Assembly created the BTA by statute and decided that it would have jurisdiction over LGF and RAF allocation appeals only when explicit statutory requirements are met. Concepts borrowed from "notice pleading" have no place in the analysis.

Appellants' reliance on *Buckeye International, Inc. v. Limbach* (1992), 64 Ohio St.3d 264, and *MCI Telecommunications Corp. v. Limbach* (1994), 68 Ohio St.3d 195, is equally misplaced. Neither case was an appeal from an LGF or RAF allocation. Neither case called for application of the requirements of R.C. 5747.55. Both were assessment cases that applied the general rule that failure to include errors in the notice of appeal results in the BTA's lack of jurisdiction over the errors and the court's inability to review such errors, not whether the BTA lacked jurisdiction over the appeal as a whole. The present case does not concern whether appellants' notices sufficiently described errors, it concerns whether appellants invoked the BTA's jurisdiction in the first place.

Moreover, this case is not about a mere "technical" failure of appellants' notices of appeal that can be overlooked. It is about appellants' failure to satisfy the strict and exacting jurisdictional requirements of R.C. 5747.55(C)(3). That was not an impossible or technical task. Rather than comply with the Revised Code, appellants intentionally chose not to include with their notices the fact that they believed Lorain was over-allocated under the 2004 Formula because they wanted to recoup those over-allocated amounts from the County, not Lorain. It was not a technical failure, but a deliberate, tactical, and ultimately fatal, choice.

APPELLEES' PROPOSITION OF LAW NO. 2:

R.C. 5747.55 GOVERNS ALL APPEALS FROM LGF OR RAF ALLOCATIONS, REGARDLESS OF WHETHER THE BUDGET COMMISSION USED THE STATUTORY METHOD OR AN ALTERNATIVE FORMULA TO MAKE ITS ALLOCATION.

Appellants knew from the beginning of this case that R.C. 5747.55 governs their appeals. Their notices of appeal even said that the appeals were "taken pursuant to Sections 5705.37 ***and 5747.55*** of the Ohio Revised Code." Appx. Vols. I, p. 40, III, p. 249, and IV, p. 405 (emphasis added). Now that the BTA has dismissed their appeals, appellants for the first time argue that R.C. 5747.55 does not apply. They never argued this to the BTA — they only argued that they had complied with R.C. 5747.55. *See* Appellants' Reply to Lorain's Trial Brief at 12-13. Appellants' sudden change of theory is as disingenuous as it is wrong.

Appellants' first and second propositions of law would also create an illogical result — if accepted, appeals from statutory formula allocations would be governed by entirely different rules than appeals from alternative formula allocations, and the two would have very different jurisdictional prerequisites. The applicable statutes, however, do not support appellants' recently-invented contentions.

R.C. 5747.55 applies to ***any*** appeal to the BTA from a budget commission's LGF or RAF allocation regardless of whether the allocation was made by statutory or alternative formula. As a result, appellants' first proposition of law should be rejected. *See* Part A *infra*.

R.C. 5705.37 also applies to those appeals. R.C. 5747.55 states they may be taken "in the manner and with the effect provided in section 5705.37." However, contrary to appellants' suggestion, no case has ever held that R.C. 5705.37 creates an "independent" right to appeal from an LGF or RAF allocation. Accordingly, appellants' second proposition of law should be rejected. *See* Part B *infra*.

A. R.C. 5747.55 GOVERNS ALL LGF AND RAF ALLOCATION APPEALS.

R.C. 5747.55 affords the right to appeal any budget commission allocation of the LGF or RAF, not just statutory allocations. It provides that "***[t]he action*** of the county budget commission ***under sections*** 5747.51 ***and 5747.62*** of the Revised Code may be appealed to the board of tax appeals in the manner and with the effect provided in section 5705.37 of the Revised Code, ***in accordance with the following rules***: ..." (emphasis added).

The "action of the county budget commission" referred to in R.C. 5747.55 is the LGF allocation required by R.C. 5747.51(B). Subsection "B" of R.C. 5747.51 specifies that the budget commission shall make its allocation, ***either*** by the statutory method ***or*** by a properly adopted alternative formula.

> ***The commission***, after extending to the representatives of each subdivision an opportunity to be heard, under oath administered by any member of the commission, and considering all the facts and information presented to it by the auditor, ***shall determine the amount of the undivided local government fund*** needed by and ***to be apportioned to each subdivision*** for current operating expenses, as shown in the tax budget of the subdivision. This determination shall be made ***pursuant to divisions (C) to (I) of this section, unless the commission has provided for a formula pursuant to*** section ***5747.53 of the Revised Code.***

R.C. 5747.51(B) (emphasis added). R.C. 5747.62(B) contains the same provision.

Therefore, any time a budget commission allocates funds, whether using the statutory formula or an alternative formula, it is acting pursuant to R.C. 5747.51(B) and 5747.62(B). The fact that additional rules regarding the adoption and limitations of alternative formulas appear in R.C. 5747.53 (LGF) and R.C. 5747.63 (RAF) is irrelevant. Notably, nothing in those sections requires a budget commission to make an allocation of funds, because the act of allocation is required by and performed pursuant to R.C. 5747.51(B) and R.C. 5747.62(B). As a result, every LGF or RAF allocation by a budget commission is an "action of the county budget commission

under sections 5747.51 and 5747.62 of the Revised Code." Consequently, the right to appeal from those actions is granted and governed by R.C. 5747.55.

The only court to consider this issue reached this inevitable conclusion. In *Mogadore v. Summit Cty. Budget Comm.* (1987), 36 Ohio App.3d 42, the BTA dismissed Mogadore's appeal from an alternative formula allocation because Mogadore had not named all participating subdivisions as appellees. *Id.* at 42-43. The BTA reasoned that Mogadore could not rely on the procedure set forth in R.C. 5747.55(C) and (D) — which required Mogadore to name only those subdivisions it believed were over-allocated — because it was appealing from an allocation under R.C. 5747.53, and not under R.C. 5747.51. *Id.* at 43. Mogadore appealed. Emphasizing that R.C. 5747.51(B) required allocations either by the statutory formula or an alternative formula, the Summit County Court of Appeals ruled that the provisions of R.C. 5747.55 applied and reversed the BTA's decision. *Id.* at 44.

Appellants do not even mention this appellate decision. Instead, they argue that R.C. 5747.55 has only been applied in appeals from statutory formula allocations. That is simply not true. For example, appellants' incorrectly state that *Union Township v. Butler Cty. Budget Comm.* (1995), 101 Ohio App.3d 212, involved an appeal from a statutory allocation. The court and the parties agreed that the budget commission's allocation in that case was neither a statutory allocation nor an alternative formula allocation. *Id.* at 214. Ultimately, the *Union Township* court ruled that R.C. 5747.55 applies to appeals from alternative formula allocations. *Id.* at 214. Numerous other cases have applied R.C. 5747.55 to alternate formula appeals. *See Englewood*, 39 Ohio App.3d at 156-57; *Mogadore*, 36 Ohio App.3d at 43-44; *Gasper Twp. v. Preble Cty. Budget Comm.* (BTA 2006), 2006 Ohio Tax LEXIS 120 at *4-8; *Reynoldsburg v. Licking Cty. Budget Comm.* (BTA 2003), 2003 Ohio Tax LEXIS 109 at *9-11; *Union Twp. v. Butler Cty.*

Budget Comm. (BTA 1993), 1993 Ohio Tax LEXIS 1661 at *10-13; *Hubbard v. Trumbull Cty. Budget Comm.* (BTA 1992), 1992 Ohio Tax LEXIS 545 at *1-5; *Ravenna v. Portage Cty. Budget Comm.* (BTA 1989), 1989 Ohio Tax LEXIS 965 at *3-4.

The only authority appellants cite to support their interpretation is a short, aberrational 1989 decision from the BTA, involving another Mogadore appeal from an LGF allocation two years after the Summit County 1987 appellate decision. *Mogadore v. Portage Cty. Budget Comm.* (BTA 1989), 1989 Ohio Tax LEXIS 114.[6] There, the BTA did not even analyze the text of the applicable statutes, but rather summarily concluded that R.C. 5747.55 did not apply because the rules for adopting alternative formulae are found in R.C. 5747.53. *Id.* at *4-5.

The BTA's 1989 *Mogadore* decision is also based on a misunderstanding of R.C. 5747.53(E), which is now codified at R.C. 5747.53(G). The BTA cited Subsection E as supporting its conclusion that R.C. 5747.53 governed appeals from alternative formula allocations. *Id.* at *5. Appellants share this erroneous view, suggesting that "[a]ppeals from allocations pursuant to an alternative formula under R.C. 5747.53 (LGF) and 5747.63 (RAF) are governed by the identical provisions of subsection (G) of both sections." Brief at 14. That subsection does not authorize or grant a right of appeal, nor does it set forth the procedure for taking and perfecting an appeal. Subsection G specifies how an alternate formula is to be adopted and sets forth the standard of review in an alternative formula appeal that is otherwise properly taken under R.C. 5747.55. The right of appeal and the rules controlling the method for taking an appeal are found in R.C. 5747.55.

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[6] It is curious that the BTA's 1989 decision makes no reference to the prior appellate decision on the same legal issue — whether R.C. 5747.55 applies to appeals from alternative formula allocations — particularly when the Summit County Court of Appeals was the only court that had expressly analyzed the issue. However, the 1987 case before the Ninth District involved the Summit County Budget Commission, and the 1989 case before the BTA involved the Portage County Budget Commission. Mogadore argued for R.C. 5747.55's application in the 1987 case, but against it in the 1989 case, even though both cases involved appeals from alternative formula allocations.

The BTA did not mention its stray 1989 *Mogadore* decision in this case because that ruling misstated the law. In contrast, the BTA has repeatedly cited the 1987 *Mogadore* appellate decision for its holding that R.C. 5747.55 governs appeals from both statutory and alternative formula allocations. *E.g. Reynoldsburg*, 2003 Ohio Tax LEXIS 109 at *n.3; *Union Twp.*, 1993 Ohio Tax LEXIS 1661 at *13; *Hubbard*, 1992 Ohio Tax LEXIS 545 at *4; *Ravenna*, 1989 Ohio Tax LEXIS 965 at *4.

The dicta appellants cite from *Shawnee Township*, 58 Ohio St.3d 14, is no more helpful. Brief at 15. That decision applied R.C. 5747.55 to what this Court stated was an appeal from a statutory allocation. *Id.* at 16. This Court did not question whether R.C. 5747.55 applied to appeals from alternative allocations; it did certainly not decide that the statute does not apply to such appeals. Rather, the dicta was included in a general explanation of the statutory scheme concerning allocations of the LGF, and merely pointed out that certain issues raised in appeals from alternative formula allocations have different standards of review. *Id.* Likewise, appellants' reliance on *Union Township*, which recites *Shawnee Township*'s dicta in its own general overview of the law, is unavailing because *Union Township* applied R.C. 5747.55 to an appeal of an allocation that was ***not*** a statutory allocation. 101 Ohio App.3d at 214 (the budget commission's allocation was "not carried out upon the statutory basis of R.C. 5747.51").

Simple logic, the language of the Ohio Revised Code, and the overwhelming weight of authority all support the BTA's conclusion that R.C. 5747.55 applies to appeals from alternative formula allocations. Appellants' first proposition of law should be rejected.

B. R.C. 5705.37 DOES NOT PROVIDE AN "INDEPENDENT" BASIS TO APPEAL A BUDGET COMMISSION'S LGF OR RAF ALLOCATION.

In their second proposition of law, appellants suggest that R.C. 5705.37, and not R.C. 5747.55, controls whether the BTA has jurisdiction over their appeals. Brief at 16. R.C. 5705.37 certainly applies to their appeals. *See* R.C. 5747.55 (providing that allocation actions may be appealed "in the manner and with the effect provided in section 5707.37"). But while R.C. 5705.37 permits subdivisions to appeal an action of a budget commission, the language of the statute is qualified:

> The board of tax appeals . . . may modify any ***action*** of the [budget] commission ***with reference to the budget, the estimate of revenues and balances, the allocation of the library and local government support fund, or the fixing of tax rates***. (Emphasis added).

The unambiguous language of R.C. 5705.37 clearly withholds jurisdiction from the BTA to make any modification to a budget commission's ***actions allocating the LGF and RAF***. Any dissatisfied subdivision must look to a different appeal statute which grants the BTA jurisdiction to modify such allocations.

As explained in Part A, *supra*, R.C. 5747.55 is the only statute authorizing an appeal of an LGF or RAF allocation, and its additional requirements, set forth in subsections (A)-(E), apply to any such appeal. *Id.* (stating that such appeals must be "in accordance with" the remaining provisions of R.C. 5747.55). Only R.C. 5747.55 provides for appeals from the allocation of the local government funds in the manner and with the effect of R.C. 5705.37. *Mogadore*, 36 Ohio App.3d at 44; *Cincinnati*, 59 Ohio St.2d 43. Moreover, R.C. 5747.55 is the only statute that expressly permits the BTA to modify the action of a budget commission allocating local government funds. R.C. 5747.55(E).

Not one of the cases cited under appellants' second proposition of law holds that R.C. 5705.37 affords a right to appeal LGF or RAF allocations separate and apart from section 5747.55, or that R.C. 5747.55 does not govern appeals from allocations made under alternative formulas. Neither *Pal v. Hamilton Cty. Budget Comm.* (1996), 74 Ohio St.3d 196, nor *Berea City School Dist. v. Cuyahoga Cty. Budget Comm.* (1979), 60 Ohio St.2d 50, involved an appeal from an allocation of the LGF or RAF. *Pal* was a taxpayer action concerning a budget commission's decision to roll back a mental health levy. 74 Ohio St.3d at 197-200. *Berea* involved an appeal of an allocation of unvoted property tax millage. 60 Ohio St.2d at 52.

Indeed, far from helping appellants, those decisions suggest that this Court should reach the opposite result. In *Pal*, this Court enumerated the three principal sections providing for appeals from budget commission actions, and identified R.C. 5747.55 as the section allowing appeals of LGF and RAF allocations without making any distinction between statutory and alternative formula allocations. 74 Ohio St.3d at 198-99. In *Berea*, the Court actually read the R.C. 5747.55 rules concerning necessary parties into the standards governing appeals under R.C. 5705.37. *Id.* at 54-55.

Finally, appellants cite *Canton v. Stark Cty. Budget Comm.* (1988), 40 Ohio St.3d 243, for their suggestion that there is a right to appeal an allocation of the LGF or RAF under R.C. 5705.37 that is "independent" of R.C. 5747.55. *Canton* says nothing of the sort. In fact, *Canton* states that such appeals are governed by ***both*** R.C. 5705.37 and R.C. 5747.55. *Id.* at 244.

For all of the foregoing reasons, R.C. 5747.55 governs all appeals of LGF or RAF allocations, and Appellants' first and second propositions of law should be rejected.

APPELLEES' PROPOSITION OF LAW NO. 3:

THE BTA LACKED SUBJECT-MATTER JURISDICTION OVER THESE CASES BECAUSE APPELLANTS DELIBERATELY OMITTED LORAIN'S OVER-ALLOCATION FROM THEIR NOTICES OF APPEAL IN VIOLATION OF R.C. 5747.55(C)(3).

The Revised Code permits only two methods of allocating the LGF and the RAF: the statutory method or a properly adopted alternate formula. In either case, R.C. 5747.55(C)(3) requires a subdivision appealing its allocation to attach to its notice of appeal a statement showing "[t]he name of each participating subdivision . . . 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."

In their brief, appellants offer inconsistent explanations of how they attempted to comply with this requirement. On the one hand, appellants say they omitted Lorain because, although Lorain was the only subdivision whose allocation increased under the 2004 Formula, they claim that "they did not believe the increased allocation to Lorain was open for relitigation." Brief at 21. On the other hand, appellants say they included the County because, even though it received less funding under the 2004 Formula than it had under the 1984 Formula, they "believed" that the County was the only over-allocated subdivision. *Id.* However, the facts and their own actions prove beyond question that appellants "believed" Lorain was over-allocated but, as in *Union Township*, deliberately chose not to identify it as an over-allocated subdivision.

In their notices of appeal, appellants sought to throw out the 2004 Formula. They attacked both its content (Appx. Vol. I, pp. 40-41; Vol. III, pp. 250-51; Vol. IV, pp. 406-08) and the process by which it was adopted (*Id.*, pp. 41, 253-54, 408), and asked the BTA to find the 2004 Formula invalid. *Id.*, pp. 42, 254, 410-11. If the 2004 Formula did not apply to these LGF or RAF allocations, appellants had only two choices: to have the funds allocated under the 1984

Formula, or seek a statutory allocation. In both their notices of appeal and at the BTA hearing, appellants asked the Board to revert to the 1984 Formula. *Id.*; Tr. p. 151-52 (Appellees' Supplement at 35).

If the BTA were to apply the 1984 Formula as appellants requested, then Lorain had to have been identified as an over-allocated subdivision. Lorain's allocation was greater under the 2004 Formula (20.212% of total funds) than under the 1984 Formula (16.82% of the LGF and 16.7% of the RAF). Appx. Vol. I, p. 54; Vol. II, pp. 150-53. It was the only subdivision in the county whose percentage allocation had increased. *Id.* Appellants' notices of appeal even refer to "the increased allocation to Lorain." *Id.*, pp. 41, 252, 407. Therefore, pursuant to the allocation method appellants were asking the BTA to employ, it was logically impossible not to specify Lorain as having been over-allocated. Because appellants deliberately omitted Lorain, they failed to comply with the requirements of R.C. 5747.55(C)(3), and therefore failed to properly invoke the BTA's subject-matter jurisdiction.

Appellants excuse their omission, arguing that they "believed" Lorain's 2004 allocation was "unalterably fixed" and that they were "foreclosed" from attacking it. Brief at 1, 2, 4, 10-11, 21. This excuse lacks merit. First, as this Court decided in *Cincinnati*, R.C. 5747.55 does not provide for allegations of excuses for noncompliance in lieu of compliance with its mandatory jurisdictional requirements. 59 Ohio St.2d at 45. Second, if appellants were to obtain the relief they sought – a finding that the 2004 Formula was invalid – then Lorain's increased allocation could not have been "unalterably fixed." If the formula was not valid, no allocation under it could be valid. It is absurd for appellants to suggest on the one hand that they thought the 2004 Formula was not binding on them or on the County, while on the other hand claiming they "believed" they could not "relitigate" Lorain's allocation under that same formula.

Similarly, it would have been logically impossible for the County to have been identified as an over-allocated subdivision under the 1984 Formula. The County would have received a larger allocation under the 1984 Formula than it received using the 2004 Formula. Appx. Vol. I, p. 54; Vol. II, pp. 150-53. ***Because the County's allocation went down, the County could not have been over-allocated using the 2004 Formula instead of the 1984 Formula.*** Yet the attachments to each of appellants' 2004, 2005, and 2006 notices of appeal identify the County as the sole over-allocated subdivision. Appx. Vol. I, pp. 94-97; Vol. III, pp. 287-90; Vol. IV, pp. 458-61.

Appellants are playing games with their notices of appeal. They identified the subdivision they wanted to recover from (the County), not the subdivision they believed to have been over-allocated (Lorain). Appellants' 2007 notice of appeal epitomizes this gamesmanship. Appellees' Supplement at 36-53.[7] It contains the same attack on the 2004 Formula as the prior notices of appeal and again asks the BTA to revert to allocating the LGF and RAF under the 1984 Formula. However, although nothing else changed, this time appellants claimed that Lorain was over-allocated and that the County was properly allocated. Appellants' flip-flop in their latest notice of appeal proves that their decision to exclude Lorain as an over-allocated subdivision in their previous filings was calculated, deliberate, and disingenuous.

No matter how appellants squirm in their brief, it was factually and logically impossible for them to have believed that the County was over-allocated and Lorain was not. R.C. 5747.55 does not allow appellants to pick and choose which subdivisions they want to pursue to make up

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[7] This court can take judicial notice of appellants' 2007 filing because it is a related proceeding, the statements made in the filing are here offered not for their truth but for the fact they were made, and the fact of the filing is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. *See* Evid. R. 201; *Conopco, Inc. v. Roll Int'l.* (C.A.2, 2000), 231 F.3d 82, n. 3 (taking judicial notice of a notice of appeal in a separate case.)

for an alleged under-allocation. *Union Township*, 101 Ohio App.3d at 218-19 (appellant may not use R.C. 5747.55 to "create its own formula"). Because that is precisely what appellants did, they failed to comply with R.C. 5747.55(C)(3). They therefore failed to invoke the BTA's subject matter jurisdiction.

APPELLEES' PROPOSITION OF LAW NO. 4:

APPELLANT'S LGF AND RAF APPEALS WERE PROPERLY DISMISSED BECAUSE APPELLANTS SOUGHT EQUITABLE RELIEF AND THE BOARD OF TAX APPEALS DOES NOT POSSESS ANY JURISDICTION TO ADJUDICATE EQUITABLE CLAIMS.

Even if every argument asserted in appellants' brief were correct —and, as the forgoing discussion makes clear, none are — this Court must still affirm the BTA's decision to dismiss appellants' appeals. A reviewing court may not reverse a correct judgment merely because the wrong reasons were assigned as the basis for the judgment. *Agricultural Ins. Co. v. Constantine* (1944), 144 Ohio St. 275, 284. *See also, Joyce v. General Motors Corp.* (1990), 49 Ohio St.3d 93. What matters is whether the judgment itself is correct.

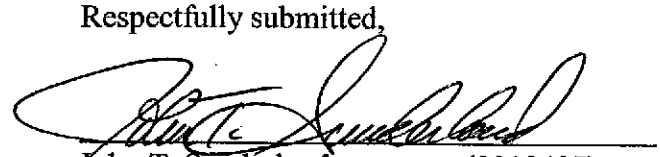
Whether or not appellants complied with R.C. 5747.55, it would have been impossible for the BTA to have granted the relief requested in the body of appellants' notices of appeal, and as incorporated into the attached Exhibits G. The relief they sought was based on appellants' erroneous belief that the BTA had jurisdiction to allocate the funds under some method other than a properly adopted and approved alternate formula or the statutory formula. Appellants were seeking equitable relief for a perceived unfair 2004 allocation that they claim in effect reduced their 2003 allocation. Thus, appellants notices of appeal sounded in equity, and the BTA simply does not possess equity jurisdiction. *General Motors Corp. v. Limbach* (1993), 67 Ohio St.3d 90; *Columbus Southern Lumber Co. v. Peck* (1953), 159 Ohio St. 564. Accordingly,

even if this Court should find that the BTA's reasoning was incorrect, it must nonetheless affirm its decisions because the Board reached the right result in dismissing the appeals.

CONCLUSION

For the foregoing reasons, appellees Lorain County, Lorain County Board of County Commissioners, City of Lorain, and Lorain County Budget Commission submit that the BTA's decision dismissing appellants' 2004, 2005, and 2006 appeals was reasonable and lawful and should be affirmed.

Respectfully submitted,



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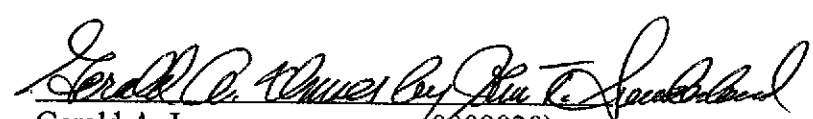

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This is to certify that a true copy of the foregoing Merit Brief of Appellees Lorain County, Lorain County Board of County Commissioners, City of Lorain and Lorain County Budget Commission has been sent electronically to appellants and by regular U.S. mail to the following this 13th day of March, 2007:

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 126TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH MARCH 6, 2007 ***
*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2007 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JANUARY 23, 2007 ***

TITLE 57. TAXATION
CHAPTER 5705. TAX LEVY LAW
BUDGET COMMISSION

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

ORC Ann. 5705.27 (2006)

§ 5705.27. County budget commission; membership; powers; duties

There is hereby created in each county a county budget commission consisting of the county auditor, the county treasurer, and the prosecuting attorney. Upon petition filed with the board of elections, signed by the number of electors of the county equal in amount to three per cent of the total number of votes cast for governor at the most recent election therefor, there shall be submitted to the electors of the county at the next general election occurring not sooner than seventy-five days after the filing of the petition, the question "Shall the county budget commission consist of two additional members to be elected from the county?" Provision shall be made on the ballot for the election from the county at large of two additional members of the county budget commission who shall be electors of the county if a majority of the electors voting on the question shall have voted in the affirmative. In such counties, where the electors have voted in the affirmative, the county budget commission shall consist of such two elected members in addition to the county auditor, the county treasurer and the prosecuting attorney. Such members, who shall not hold any other public office, shall serve for a term of four years. The commission shall meet at the office of the county auditor in each county on the first Monday in February and on the first Monday in August, annually, and shall complete its work on or before the first day of September, annually, unless for good cause the tax commissioner extends the time for completing the work. A majority of members shall constitute a quorum, provided that no action of the commission shall be valid unless agreed to by a majority of the members of the commission. The auditor shall be the secretary of the commission and shall keep a full and accurate record of all proceedings. The auditor shall appoint such messengers and clerks as the commission deems necessary, and the budget commissioners shall be allowed their actual and necessary expenses. The elected members of the commission shall also receive twenty dollars for each day in attendance at commission meetings and in discharge of official duties. Any vacancy among such elected members shall be filled by the presiding judge of the court of common pleas. In adjusting the rates of taxation and fixing the amount of taxes to be levied each year, the commissioners shall be governed by the amount of the taxable property shown on the auditor's tax list for the current year; provided that if the auditor's tax list has not been completed, the auditor shall estimate, as nearly as practicable, the amount of the taxable property for such year, and such officers shall be governed by such estimate.

In any county in which two members of the commission are elected, upon petition filed with the board of elections, signed by the number of electors of the county equal in amount to three per cent of the votes cast for governor at the most recent election therefor, there shall be submitted to the electors of the county at the next general election occurring not sooner than seventy-five days after the filing of the petition, the question "Shall the elected members be eliminated from the county budget commission?" If the majority of the electors voting thereon shall have voted in the affirmative,

the county budget commission shall consist solely of the county auditor, the county treasurer, and the prosecuting attorney.

HISTORY:

GC § 5625-19; 119 v 391, § 19; Bureau of Code Revision, 10-1-53; 127 v 718 (Eff 9-16-57); 133 v S 114 (Eff 11-17-69); 136 v H 920 (Eff 10-11-76); 138 v H 1062 (Eff 3-23-81); 140 v H 260 (Eff 9-27-83); 140 v H 747 (Eff 1-1-86); 146 v H 99. Eff 8-22-95.

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TITLE 57. TAXATION
CHAPTER 5747. INCOME TAX
LIBRARY AND LOCAL GOVERNMENT SUPPORT FUND

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

ORC Ann. 5747.62 (2006)

§ 5747.62. Determination of apportionment of fund; withholding pending compliance

(A) As used in this section and section 5747.63 of the Revised Code, "subdivision" means a municipal corporation, township, park district, or county.

(B) At each annual regular session of the county budget commission convened pursuant to section 5705.27 of the Revised Code, each auditor shall present to the commission the certificate of the commissioner, the annual tax budget and estimates, and the records showing the action of the commission in its last preceding regular session. The commission, after extending to the representatives of each subdivision an opportunity to be heard, under oath administered by any member of the commission, and considering all the facts and information presented to it by the auditor, shall determine the amount of the undivided local government revenue assistance fund needed by and to be apportioned to each subdivision for current operating expenses, as shown in the tax budget of the subdivision. This determination shall be made pursuant to divisions (C) to (H) of this section, unless the commission has provided for a formula pursuant to section 5747.63 of the Revised Code. Nothing in this section prevents the budget commission, for the purpose of apportioning the undivided local government revenue assistance fund, from inquiring into the claimed needs of any subdivision as stated in its tax budget, or from adjusting claimed needs to reflect actual needs. For the purposes of this section, "current operating expenses" means the lawful expenditures of a subdivision, except those for permanent improvements and except payments for interest, sinking fund, and retirement of bonds, notes, and certificates of indebtedness of the subdivision.

(C) The commission shall determine the combined total of the estimated expenditures, including transfers, from the general fund and any special funds other than special funds established for road and bridge; street construction, maintenance, and repair; state highway improvement; and gas, water, sewer, and electric public utilities operated by a subdivision, as shown in the subdivision's tax budget for the ensuing calendar year.

(D) From the combined total of expenditures calculated pursuant to division (C) of this section, the commission shall deduct the following expenditures, if included in these funds in the tax budget:

(1) Expenditures for permanent improvements as defined in division (E) of section 5705.01 of the Revised Code;

(2) In the case of counties and townships, transfers to the road and bridge fund, and in the case of municipalities, transfers to the street construction, maintenance, and repair fund and the state highway improvement fund;

(3) Expenditures for the payment of debt charges;

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(4) Expenditures for the payment of judgments.

(E) In addition to the deductions made pursuant to division (D) of this section, revenues accruing to the general fund and any special fund considered under division (C) of this section from the following sources shall be deducted from the combined total of expenditures calculated pursuant to division (C) of this section:

(1) Taxes levied within the ten-mill limitation, as defined in section 5705.02 of the Revised Code;

(2) The budget commission allocation of estimated county library and local government support fund revenues to be distributed pursuant to section 5747.48 of the Revised Code;

(3) Estimated unencumbered balances as shown on the tax budget as of the thirty-first day of December of the current year in the general fund, but not any estimated balance in any special fund considered in division (C) of this section;

(4) Revenue, including transfers, shown in the general fund and any special funds other than special funds established for road and bridge; street construction, maintenance, and repair; state highway improvement; and gas, water, sewer, and electric public utilities, from all other sources except those that a subdivision receives from an additional tax or service charge voted by its electorate or receives from special assessment or revenue bond collection. For the purposes of this division, where the charter of a municipal corporation prohibits the levy of an income tax, an income tax levied by the legislative authority of such municipal corporation pursuant to an amendment of the charter of that municipal corporation to authorize such a levy represents an additional tax voted by the electorate of that municipal corporation. For the purposes of this division, any measure adopted by a board of county commissioners pursuant to section 322.02, 324.02, 4504.02, or 5739.021 [5739.02.1] of the Revised Code, including those measures upheld by the electorate in a referendum conducted pursuant to section 322.021 [322.02.1], 324.021 [324.02.1], 4504.021 [4504.02.1], or 5739.022 [5739.02.2] of the Revised Code, shall not be considered an additional tax voted by the electorate.

Subject to division (G) of section 5705.29 of the Revised Code, money in a reserve balance account established by a county, township, or municipal corporation under section 5705.13 of the Revised Code shall not be considered an unencumbered balance or revenue under division (E)(3) or (4) of this section. Money in a reserve balance account established by a township under section 5705.132 [5705.13.2] of the Revised Code shall not be considered an unencumbered balance or revenue under division (E)(3) or (4) of this section.

If a county, township, or municipal corporation has created and maintains a nonexpendable trust fund under section 5705.131 [5705.13.1] of the Revised Code, the principal of the fund, and any additions to the principal arising from sources other than the reinvestment of investment earnings arising from such a fund, shall not be considered an unencumbered balance or revenue under division (E)(3) or (4) of this section. Only investment earnings arising from investment of the principal or investment of such additions to principal may be considered an unencumbered balance or revenue under those divisions.

(F) The total expenditures calculated pursuant to division (C) of this section, less the deductions authorized in divisions (D) and (E) of this section, shall be known as the "relative need" of the subdivision, for the purposes of this section.

(G) The budget commission shall total the relative need of all participating subdivisions in the county, and shall compute a relative need factor by dividing the total estimate of the undivided local government revenue assistance fund by the total relative need of all participating subdivisions.

(H) The relative need of each subdivision shall be multiplied by the relative need factor to determine the proportionate share of the subdivision in the undivided local government revenue assistance fund of the county, provided that the maximum proportionate share of a county shall not exceed the following maximum percentages of the total estimate of the undivided local government revenue assistance fund governed by the relationship of the percentage of the population of the county that resides within municipal corporations within the county to the total population of the county as reported in the reports on population in Ohio by the department of development as of the twentieth day of July of the year in which the tax budget is filed with the budget commission:

Forty-one per cent or more but less than eighty-one per cent	Fifty per cent
Eighty-one per cent or more	Thirty per cent

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Where the proportionate share of the county exceeds the limitations established in this division, the budget commission shall adjust the proportionate shares determined pursuant to this division so that the proportionate share of the county does not exceed these limitations, and it shall increase the proportionate shares of all other subdivisions on a pro rata basis. In counties having a population of less than one hundred thousand, not less than ten per cent shall be distributed to the townships therein.

(I) On the basis of such apportionment, the county auditor shall compute the percentage share of each such subdivision in the undivided local government revenue assistance fund and shall at the same time certify to the tax commissioner the percentage share of the county as a subdivision. No payment shall be made from the undivided local government revenue assistance fund, except in accordance with such percentage shares.

Within ten days after the budget commission has made its apportionment, whether conducted pursuant to this section or section 5747.63 of the Revised Code, the auditor shall publish a list of the subdivisions and the amount each is to receive from the undivided local government revenue assistance fund and the percentage share of each subdivision, in a newspaper or newspapers of countywide circulation, and send a copy of such apportionment to the tax commissioner.

The county auditor shall also send by certified mail, return receipt requested, a copy of such apportionment to the fiscal officer of each subdivision entitled to participate in the allocation of the undivided local government revenue assistance fund of the county. This copy shall constitute the official notice of the commission action referred to in section 5705.37 of the Revised Code.

All money received by a subdivision from the county undivided local government revenue assistance fund shall be paid into the subdivision's general fund and used for current operating expenses.

If any public official fails to maintain the records required by sections 5747.61 to 5747.63 of the Revised Code or by the rules issued by the tax commissioner, the auditor of state, or the treasurer of state pursuant to such sections, or fails to comply with any law relating to the enforcement of such sections, the local government revenue assistance fund money allocated to the county shall be withheld until such time as the public official has complied with such sections or such law or the rules issued pursuant thereto.

HISTORY:

143 v H 111 (Eff 7-1-89); 146 v H 86 (Eff 11-1-95); 147 v H 426. Eff 7-22-98; 151 v H 385, § 1, eff. 9-21-06.

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LEXSEE

Village of Bettsville by Carmen Shriver, Fiscal Officer, Bettsville, Appellant, vs. Seneca County Budget Commission, Appellee.

CASE NO. 82-A-826 (BUDGET COMMISSION)

STATE OF OHIO -- BOARD OF TAX APPEALS

1986 Ohio Tax LEXIS 575

February 20, 1986

[*1]

APPEARANCES

For the Appellant - Michael P. Kelbley, 38 South Washington Street, Tiffin, Ohio 44883

For the Appellee - Thomas R. Spellerberg, Seneca County Prosecuting Attorney, 106 East Market Street, Tiffin, Ohio 44883

OPINION:

DECISION AND ORDER

This cause and matter came on to be considered by the Board of Tax Appeals upon a notice of appeal filed herein by the appellant above named. The notice of appeal indicates an appeal from an order of the Seneca County Budget Commission wherein said commission made an allocation of the Local government fund to the various political subdivisions for the fiscal year 1983.

Two days following the filing of said notice of appeal, the Village of Bettsville filed an amended notice of appeal. The amended notice states that appellant is dissatisfied with the action of the budget commission in making an allocation of real estate taxes to the various political subdivisions.

Thereafter, a motion to dismiss this appeal was filed on behalf of the budget commission. The commission contends that several errors and omissions contained within the notices of appeal combine to render them jurisdictionally defective.

An evidentiary hearing was held before the [*2] Board of Tax Appeals with respect to the motion to dismiss. The appellant subsequently filed a brief in opposition to the motion.

Revised Code section 5747.55 governs an appeal from an action of a county budget commission. The requirements of the statute are precise and strict, and exacting compliance is mandatory to invoke the jurisdiction of the Board of Tax Appeals. Painesville v. Lake County Budget Commission (1978), 56 Ohio St. 2d 282; Cincinnati v. Budget Commission (1979), 59 Ohio St. 2d 43.

The Board of Tax Appeals has first examined the original notice of appeal which purports to be an appeal from an allocation of the local government fund. We hereby find and determine the notice of appeal to be jurisdictionally imperfect.

The original notice of appeal fails to comply with several of the mandatory provisions of Revised Code section 5747.55. Specifically, appellant failed to set forth in clear and concise language the error or errors complained of; failed to attach to the notice of appeal a certified copy of the resolution of the village authorizing the fiscal officer to file said appeal; failed to attach to the notice a statement showing the name of the fund [*3] involved, the total amount allocated, and the total amount allocated to participating subdivisions; failed to attach to the notice of appeal a statement of the

amount it believes it should have received; and finally, appellant failed to name each participating subdivision as well as the name and address of the fiscal officer thereof.

Moreover, the Board of Tax Appeals notes the similarity between the original notice of appeal herein, and those notices of appeal found to be jurisdictionally inadequate by the Supreme Court in Painesville, supra, and Cincinnati, supra.

The Board of Tax Appeals now turns its attention to the amended notice of appeal filed by appellant. The second notice of appeal sets forth a cause of action different from that stated by the original. The amended notice of appeal contests the action of the budget commission in making an allocation of real estate taxes. Particularly, appellant challenges the decision of the commission to cut its voted millage and inside millage from approximately 7.2 mills to zero. Appellant has represented that the amended notice of appeal was filed under the authority of Revised Code section 5705.37.

The Board [*4] of Tax Appeals believes the amended notice of appeal to also be jurisdictionally defective. The order from which appellant seeks relief was rendered on August 19, 1982, and the amended notice of appeal was filed on September 22, 1982. Thus, appellant failed to file its notice within the 30-day time period prescribed by Revised Code section 5705.37. We find no authority for appellant's attempt to "relate back" the amended notice of appeal to the date of filing of the original. We also incidentally note that the amended notice of appeal was not made through appellant's fiscal officer ad additionally required by Revised Code section 5705.37.

In sum, the Board of Tax Appeals finds that the appellant's right to appeal an action of the budget commission is a statutory one. As discussed above, the notices of appeal do not comply with statutory requirements. Therefore, this Board lacks subject matter jurisdiction to hear the merits of the appeal.

Therefore, for the foregoing reasons, it is the decision of the Board of Tax Appeals that the appellee's motion to dismiss is well taken and must be granted. The within appeal is hereby dismissed for want of jurisdiction.

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LEXSEE

City of Centerville, Appellant, and City of Englewood, Appellant, vs. Montgomery County Budget Commission, et al., Appellees.

CASE NO. 77-A-91; CASE NO. 77-A-94 (BUDGET COMMISSION LOCAL GOVERNMENT FUND--MOTION TO DISMISS)

STATE OF OHIO -- BOARD OF TAX APPEALS

1979 Ohio Tax LEXIS 434

February 23, 1979

[*1]

APPEARANCES:

For the Appellants - William C. Wilkinson and Thomas E. Palmer, 140 East Town Street, Columbus, Ohio 43215

For the Appellees - Lee C. Falke, Prosecuting Attorney, By: Chris R. Van Schaik, Suite 300 - 41 N. Perry Street, Dayton, Ohio 45402

OPINION:

ENTRY

This cause and matter came on to be considered by the Board of Tax Appeals upon two notices of appeal filed herein by the appellants above named under date of December 5, and December 8, 1977, from an order of the Montgomery County Budget Commission, which order was made by the Budget Commission on October 26, 1977, in which said Budget Commission allocated the Montgomery County Undivided Local Government Fund to the various subdivisions of Montgomery County for the year 1978.

Thereafter under date of December 12, 1978, counsel for the Montgomery County Budget Commission filed a motion to dismiss the appeals filed by the appellants herein.

The body of the two notices of appeal read as follows starting with that of the City of Englewood:

"1. Now comes The City of Englewood, through its fiscal officer, Joan M. Huls, Director of Finance, as provided by law and upon the request of such taxing authority as [*2] evidenced by the City's resolution dated December 6, 1977, a certified copy of which resolution is attached hereto and labeled as 'Exhibit A' and gives notice of appeal to the Board of Tax Appeals as provided by Sections 5705.37 and 5747.55, Revised Code, and Rules 6 and 8 of The Board of Tax Appeals from actions of The Budget Commission of Montgomery County on October 26, 1977, in making the allocation of the Undivided Local Government Fund for the year 1978 to the participating subdivisions of Montgomery County. A listing of each participating subdivision and the amount allocated to each is attached hereto and labeled as 'Exhibit B(1)'. The City of Englewood received notice of the allocation made by the Montgomery County Budget Commission on November 9, 1977, an exact copy of which notice is attached hereto and labeled as 'Exhibit C'.

"2. The Appellant is dissatisfied with the action of the Montgomery County Budget Commission in allocating the amount of proceeds of the Undivided Local Government Fund to be distributed to this Appellant for the fiscal year of 1978, which amount has been fixed at $19,345.25, as shown by the minutes of said Commission. The City of Englewood's [*3] needs have not been adequately or properly considered by said Commission, as those needs are demonstrated in the budget request filed by the Appellant with the Commission on July 20, 1977, an exact copy of which is attached hereto and labeled as 'Exhibit D'; the actual needs of The City being far greater than the need determined by the Budget Commission.

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"3. Furthermore, Appellant believes that the Budget Commission abused its discretion by allocating a certain portion of the Undivided Local Government Fund in an arbitrary fashion, without regard to need, as that term is used in the relevant statutes. This abuse of discretion contributed to the allocation of an amount of the Undivided Local Government Fund to this Appellant, which is far below its lawful needs.

"4. Appellants further state as grounds for this appeal that the Montgomery County Budget Commission has adopted a method for calculating the minimum allocation for the subdivision that is in violation of Section 5747.51 of the Revised Code.

"5. Appellant sets forth in Exhibit B(2) a statement of the name of each subdivision believed to have received more than its proper share of the allocation; the fiscal officer [*4] of each such subdivision; and the exact amount in dollars of alleged over-allocation. Said statement also contains the amount in dollars which Appellant believes it should have received. Appellant states, as an explanation of the magnitude of the amounts shown in Exhibit B(2), that this Notice of Appeal has been prepared without the benefit of use of the form required by Section 5747.52, Revised Code, access to which has been denied by the Montgomery County Auditor, a member of the Montgomery County Budget Commission, and to whose possession the records of the Budget Commission are entrusted. When the Section 5747.52 worksheet forms were requested on December 7, 1977 by Finance Director Huls, Deputy Auditor Taylor stated that the forms had not been prepared and that those calculations were made on an adding machine, not reproduced elsewhere. For this reason, the dollar amounts stated in Exhibit B(2) are shown to satisfy the statutory requirements only, their accuracy being unknown to any party who does not have access to the Section 5747.52 worksheets, if they exist.

"6. If it is true that the worksheets, showing in summary form as indicated by Section 5747.52 of the Revised [*5] Code, the calculations of the 1978 Undivided Local Government Fund for Montgomery County were not prepared, then Appellant cites this failure as a separate ground for appeal of the action of the Budget Commission, which action 'must be based upon some ascertainable and reasonable standard and upon the evidence presented'. Cleveland vs. Budget Commission of Cuyahoga County, 47 Ohio St. 2d 27 (1976)

"7. This Appellant prays that the Board of Tax Appeals set this appeal for immediate hearing to consider the matter of fixing the amount of the allocation to this Appellant from the Undivided Local Government Fund to be distributed to it for fiscal year of 1978; that said Appellant be permitted to support its claims by evidence, and that the Board of Tax Appeals substitute its finding for the finding of the Budget Commission in such manner as it deems just and proper.

"8. It is not the intent of Appellant here to prohibit distribution of the 1978 Undivided Local Government Fund due to this action. To the contrary, Appellant would advocate ordinary distribution of the fund in 1978, provided that an amount of the fund is segregated and held from distribution pending the outcome [*6] of this appeal, to protect the interests of Appellant."

For the City of Centerville, as follows:

"1. Now comes The City of Centerville, through its fiscal officer, William L. Bettcher, Director of Finance as provided by law and upon the request of such taxing authority as evidenced by the City's resolution dated November 21, 1977, a certified copy of which resolution is attached hereto and labeled as 'Exhibit A' and gives notice of appeal to the Board of Tax Appeals as provided by Sections 5705.37 and 5747.55, Revised Code, and Rules 6 and 8 of The Board of Tax Appeals from actions of The Budget Commission of Montgomery County on October 26, 1977, in making the allocation of the Undivided Local Government Fund for the year 1978 to the participating subdivisions of Montgomery County. A listing of each participating subdivision and the amount allocated to each is attached hereto and labeled as 'Exhibit B(1)'. The City of Centerville received notice of the allocation made by the Montgomery County Budget Commission on November 3, 1977, an exact copy of which notice is attached hereto and labeled as 'Exhibit C'.

"2. The Appellant is dissatisfied with the action of the Montgomery [*7] County Budget Commission in allocating the amount of proceeds of The Undivided Local Government Fund to be distributed to this Appellant for the fiscal year of 1978, which amount has been fixed at $21,382.33, as shown by the minutes of said Commission. The City of Centerville's needs have not been adequately or properly considered by said Commission, as those needs are demonstrated in the budget request filed by the Appellant with the Commission on June 23, 1977, an exact copy of which is attached hereto and labeled as 'Exhibit D'; the actual needs of The City being far greater than the need determined by the Budget Commission.

"3. Furthermore, Appellant believes that the Budget Commission abused its discretion by allocating a certain portion of The Undivided Local Government Fund in an arbitrary fashion, without regard to need, as that term is used in

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the relevant statutes. This abuse of discretion contributed to the allocation of an amount of The Undivided Local Government Fund to this Appellant, which is far below its lawful needs.

"4. Appellants further state as grounds for this appeal that the Montgomery County Budget Commission has adopted a method for calculating the [*8] minimum allocation for the subdivision that is in violation of section 5747.51 of The Revised Code.

"5. Appellant sets forth in Exhibit B(2) a statement of the name of each subdivision believed to have received more than its proper share of the allocation; the fiscal officer of each such subdivision; and the exact amount in dollars of alleged over-allocation. Said statement also contains the amount in dollars which Appellant believes it should have received. Appellant states; for an explanation of the magnitude or the amounts shown in Exhibit B(2), that this Notice of Appeal has been prepared without the benefit of use of the form required by Section 5747.52, Revised Code, access to which has been denied by the Montgomery County Auditor, a member of the Montgomery County Budget Commission, and to whose possession the records of the Budget Commission are entrusted. On at least two occasions during the business week of November 28, 1977 through December 2, 1977, Auditor Roderer refused unequivocal inperson requests by attorneys for Appellant to view that form or any similar or equivalent worksheet. Through one of those attorneys, Appellant obtained a Writ of Mandamus commanding [*9] Auditor Roderer to produce said records for inspection. Upon service of that Writ, Auditor Roderer then stated that no such records existed. For this reason, the dollar amounts stated in Exhibit B(2) are shown to satisfy the statutory requirements only, their accuracy being unknown to Appellant who does not have access to the Section 5747.52 worksheets, if they exist.

"If it is true that the worksheets, showing in summary form as indicated by Section 5747.52, Revised Code, the calculations of the 1978 Undivided Local Government Fund for Montgomery County either were not prepared or have been destroyed, then Appellant cites this failure or distruction as a separate ground for appeal of the action of the Budget Commission, which allocation 'must be based upon some ascertainable and reasonable standard and upon the evidence presented'. Cleveland vs. Budget Commission of Cuyahoga County, 47 Ohio St. 2d 27 (1976)

"This Appellant prays that the Board of Tax Appeals set this appeal for immediate hearing to consider the matter of fixing the amount of the allocation to this Appellant from the Undivided Local Government Fund to be distributed to it for fiscal year of 1978; [*10] that said Appellant be permitted to support its clalms by evidence, and that the Board of Tax Appeals substitute its finding for the finding of the Budget Commission in such manner as it deems just and proper.

"8. It is not the intent of Appellant here to prohibit distribution of the 1978 Undivided Local Government Fund due to this action. To the contrary, Appellant would advocate ordinary distribution of the fund in 1978, provided that an amount of the fund is segregated and held from distribution pending the outcome of this appeal, to protect the interests of Appellant."

The body of the motion to dismiss, filed on behalf of the Montgomery County Budget Commission with a memorandum in support thereof attached, reads as follows:

"Now comes the Appellees, the Montgomery County Budget Commission, by and through their counsel, and respectfully moves this Board for an order dismissing the within appeal for the reason that the Board of Tax Appeals lacks jurisdiction to hear and decide the within appeal, said Board lacks jurisdiction over the subject matter of the within appeals, said appeal was not perfected in accordance with the requirements of Section 5747.55 Ohio Revised [*11] Code, or Section 5715-1-09 (c) (2) (d) of the rules governing the practice and procedure before the Board of Tax Appeals."

The memorandum in support of the motion to dismiss, in pertinent part, reads as follows:

"MEMORANDUM

"Section 5747.55 Ohio Revised Code reads in pertinent part as follows:

'The action of the county budget commission under Section 5747.51 of the Revised Code may be appealed to the board of tax appeals in the manner and with the effect provided in Section 5705.37 of the Revised Code, in accordance with the following rules:

'(A) The notice of appeal . . . shall set forth in clear and concise language:

'(1) * * * * *

'(2) * * * * *

'(3) The specific relief sought by the taxing district

'(B) * * * * *

'(1) * * * * *

'(2) * * * * *

'(C) There shall also be attached to the notice of appeal a statement showing:

'(1) The name of the fund involved, the total amount in dollars allocated, and the exact amount in dollars allocated to each participating subdivision;

'(2) The amount in dollars which the complaining subdivision believes it should have received;

'(3) The name of each participating subdivision, as well as the name and address of the fiscal [*12] 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 overallocation.

'(D) * * * * *

'(D) * * * * *'

"Rule 5717-1-09 (C) (2) (d) reads in pertinent part as follows:

'If the appeal is from a local government fund allocation order made by the Budget Commission under Section 5747.51 of the Ohio Revised Code, the Appellant must specifically comply with Section 5747.55 of the Revised Code in perfecting its appeal to the Board of Tax Appeals in the manner and with the effect provided in Section 5705.37 of the Ohio Revised Code.'

"A reading of the above quoted statute and procedural rule of the Board of Tax Appeals makes it quite clear that an appelland must specifically and mandatorily comply with all the requirements contained in both the rule and the statute. It has been repeatedly held by the Supreme Court of Ohio that where a statute confers a right of appeal, strict adherence to the conditions thereby imposed is essential to the enjoyment of the right conferred. American Restaurant and Lunch Company v. Glander, 147 Ohio St. 147 (1946). [*13] Strick compliance with all expressed statutory requirements needed to perfect an appeal have been declared by the Supreme Court to be both mandatory and jurisdictional. Jewelry Co. Inc. v. Bowers, 162 Ohio St. 567 (1955); Clippard Instrument v. Lindley, 50 Ohio St. 2d 121 (1977); Queen City Valves, Inc. v. Peck, 161 Ohio St. 579 (1954); Leiphart Lincoln Mercury, Inc. v. Bowers, 107 Ohio App. 259 (1958).

"Section 5747.55 Ohio Revised Code requires that a subdivision attempting to appeal a budget commission's allocation of the local government fund must attach as an integral part of its notice of appeal all items and documents named in the subdivisions of this section, for example, is required to file with the notice of appeal documents reflecting the fiscal officer's authority to file such an appeal, the specific action of the budget commission appealed from, its budget requests filed with the budget commission, detailed statements showing the name of the fund involved, the total amount in dollars allocated, the exact amount allocated to each participating subdivision, the amount in dollars it believes it [*14] should have received and the exact amount of such over allocation plus other statutorily required items. A reading of the Notices of Appeal filed by the Appellants, City of Centerville and City of Englewood, show that they did not state the exact amount in dollars of alleged over allocations as required by Section 5747.55 (C) (3) Ohio Revised Code. This is indicated by virtue of a reading of paragraph 5 of Appellants' Notices of Appeals and Exhibit B 2 attached to the Appellants' Notices of Appeals. Therefore, the Appellants, City of Centerville and City of Englewood, have failed to comply with the mandatory requirements of Section 5747.55 (C) (3) of the Ohio Revised Code although the Supreme Court has repeatedly made it quite clear that this statute and its various subsections must be mandatorily adhered to if an Appellant is to properly invoke the jurisdiction of the Board of Tax Appeals in an appeal of the action of the Budget Commission. The within Appellants have not properly perfected an appeal and have therefore failed to invoke the jurisdiction of the Board of Tax Appeals to hear this appeal.

"The Appellants attempt to give a reason for not complying with the mandatory [*15] terms of Section 5747.55 (C) (3) doesn't change the fact that the Notice of Appeal is statutorily defective. To allow a proper Notice of Appeal to be filed now or to allow evidence which would 'cure' the within defective Notices of Appeal would be tantamount to allowing the Appellants to attempt a proper appeal after the time within which a proper appeal is to be perfected has elapsed, this in violation of the Supreme Court's holding in the American Restaurant case. Further the statute does not indicate that it is permissible to substitute reasons for noncompliance where mandatory compliance is required. The Appellees

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contend that a review of the existing record shows that as a matter of law the Appellants' Notices of Appeal heretofore filed in these cases do not comply with the requirements of or perfect an appeal pursuant to Section 5747.55 Ohio Revised Code and that the Board of Tax Appeals is without requisite jurisdiction to consider and determine the matters contained in said Notices of Appeal. City of Cincinnati v. Hamilton County Budget Commission, BTA Case No. E-1838 (September, 1978). Based upon the foregoing the Appellees [*16] respectfully request the Board of Tax Appeals to enter an order dismissing the cases of City of Centerville and City of Englewood vs. Montgomery County Budget Commission, BTA Case No. 77-A-91 and 77-A-94 respectively for lack of Jurisdiction."

Thereafter, under date of December 15, 1978, counsel for the appellants filed a memorandum contra the motion to dismiss, which memorandum reads as follows:

"Appellees move to dismiss this Appeal, alleging that in their Notices of Appeal the Appellants 'did not state the exact amount in dollars of alleged over allocations as required by Section 5747.55 (C) (3), Ohio Revised Code.'

"The Revised Code provision in question requires the Notice of Appeal to contain a statement showing:

"1) The name of the fund involved, the total amount in dollars allocated, and the exact amount in dollars allocated to each participating subdivision;

"2) The amount in dollars which the complaining subdivision believes it should have received;

"3) 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 [*17] the exact amount in dollars of such alleged over-allocation.

"Section 5747.55 (C) is satisfied by Exhibit B, which was attached to Appellants' Notice of Appeal. Part 1 of Exhibit B satisfies the requirements of 5747.55 (C) (1). Part 2 of Exhibit B satisfies the requirements of Section 5747.55 (C)(2) and (C)(3).

"Specifically, Exhibit B (2) states an exact amount in dollars of all alleged over-allocations, and the names of subdivisions believed to have received more than their proper share of the allocation. Thus, the statutory requirement is satisfied. The requisite names and numbers appeal in Exhibit B II, and that is all that is required by the statute.

"Appellees may be expected to complain of the accuracy of the calculations contained in Exhibit B(2), since those calculations necessarily indicate that the Budget Commission has erred in allocating of the local government fund. However, the accuracy of those figures is contested in every such appeal, and the accuracy of those claimed over-allocations is the ultimate fact for determination by this Board, wholly unrelated to the question of subject matter jurisdiction. The simple fact that the figures are included [*18] in the Notice of Appeal satisfies the subject matter jurisdiction requirement. It must be emphasized here that the Notices of Appeal were prepared under the hardship of the refusal of the Budget Commission to allow inspection of its public records. (See paragraph 5, Notice of Appeal). The Budget Commission cannot now obtain dismissal of these Appeals by virtue of inaccuracy caused by its own wrongful and unlawful conduct in refusing to allow inspection of public records or in neglecting to prepare such records.

"Appellees' Motion To Dismiss is spurious, clearly without merit, and should be summarily dismissed based upon a review of the information contained in Exhibits B(1) and B(2) to the Notices of Appeal in these actions. In the alternative, Appellants request an oral hearing on this matter."

The matter was submitted to the Board of Tax Appeals upon the notices of appeal, the motion to dismiss and the memorandum filed by counsel for both the appellants and appellees.

Revised Code Section 5747.55 (effective December 20, 1971), reads in pertinent part as follows:

"The action of the county budget commission under section 5747.51 of the Revised Code may be appealed [*19] to the board of tax appeals in the manner and with the effect provided in section 5705.37 of the Revised Code, in accordance with the following rules:

"(A) The notice of appeal shall be signed by the authorized fiscal officer and shall set forth in clear and concise language:

"(1) A statement of the action of the budget commission appealed from, and the date of the receipt by the subdivision of the official certificate or notice of such action;

"(2) The error or errors the taxing district believes the budget commission made;

"(3) The specific relief sought by the taxing district.

"(B) The notice of appeal shall have attached thereto:

"(1) A certified copy of the resolution of the taxing authority authorizing the fiscal officer to file said appeal;

"(2) An exact copy of the official certificate, or notice of the action of the budget commission by the complaining subdivision, with the date of filing noted thereon.

"(C) There shall also be attached to the notice of appeal a statement showing:

"(1) The name of the fund involved, the total amount in dollars allocated, and the exact amount in dollars allocated to each participating subdivision;

"(2) The [*20] amount in dollars which the complaining subdivision believes it should have received;

"(3) 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 overallocation.

"(D) * * *

"(E) * * *"

(underlining emphasis added)

Prior to the enactment of Revised Code Section 5747.55, and the repeal of certain other statutory provisions, any participating subdivision dissatisfied with the allocation made by a county budget commission of the undivided local government fund could appeal to the Board of Tax Appeals by generally alleging, in a notice of appeal, a desire to appeal from such action of the county budget commission. The filing of such an appeal had the effect of substituting the Board of Tax Appeals for the county budget commission for the purpose of making a completely new allocation of the undivided local government fund. The Board of Tax Appeals became, in effect, a "super-county budget commission." City of Brooklyn v. County Budget Comm. (1965), 2 Ohio St. 2d [*21] 181.

The effect of the repeal of Sections 5739.22 to 5739.25, inclusive, of the Revised Code, in conjunction with the enactment of Revised Code Section 5747.55 (1971 H. 475, eff. 12-20-71), was not only to significantly change the requirements for perfecting an appeal involving undivided local government fund allocations, but to effectively limit the nature and scope of such an appeal to those matters properly alleged, as specified in and supported by the required attachments and statements as part of the required notice of appeal.

By way of comparison, the procedural requirements to perfect an appeal pursuant to Revised Code Section 5747.55, are now, in general terms, similar in nature to the procedural requirements to perfect an appeal pursuant to Revised Code Section 5717.02. Both statutes require, to perfect an appeal, that the notice of appeal set forth in clear and concise language the specific error or errors complained of.

However, Revised Code Sections 5747.55 and 5717.02, significantly differ in one respect. In the case of an appeal pursuant to Revised Code Section 5717.02, the tax official is required to subsequently file with the Board of Tax Appeals a certified [*22] transcript of the record of such proceedings before him, together with all evidence considered by him in connection therewith. There is no comparable requirement provided by Revised Code Section 5747.55 that the county budget commission provided such information.

In the case of an appeal pursuant to Revised Code Section 5747.55, the complaining subdivision is required to attach, as a part of its notice of appeal, the specific action of the budget commission appealed from, its budget request filed with the budget commission, and detailed statements showing the name of the fund involved, the total amount in dollars allocated, the exact amount allocated to each participating subdivision, the amount in dollars it believes it should have received, the name and fiscal officer of each participating subdivision which it believes received more than its proper share of the allocation, and the exact amount of such overallocation.

In terms of the instant cases the appellants admit that they have not complied with Revised Code Section 5747.55 for the reason that they could not get the necessary information.

This Board is mindful that the threshold issue in all purported appeals to [*23] it, and here raised by motion, is whether this Board's jurisdiction has been invoked through a properly perfected appeal, in terms of the notice of appeal as filed.

Revised Code Section 5747.55, does not, by its terms, provide for an allegation of an excuse for noncompliance, whether justified or not, in lieu of compliance. This Board is without authority to "overlook" or "waive" any of the express statutory requirements necessary to perfect an appeal, thereby invoking its jurisdiction. This Board cannot consider, determine, or grant relief to these appellants with reference to the budget commission's alleged improper or illegal refusal to supply previously requested work papers or information presumably in the possession of the budget commission, even if it were inclined so to do.

The notices of appeal, as filed, do not comply with subdivision (C)(3), of Revised Code Section 5747.55. We find no legal authority supporting a proposition that an allegation of an "excuse" effectively negates specific compliance with a statutory requirement to perfect an appeal. The fact that the appellants have attempted to shift the burden of obtaining the missing information by way [*24] of requested affirmative relief, as part of the pending action, is without legal effect, in terms of perfecting an appeal to this Board. Strict compliance with all express statutory requirements to perfect an appeal has heretofore been declared by the Supreme Court to be both mandatory and jurisdictional. Clippard Instrument v. Lindley (1977), 50 Ohio St. 2d 121; Fineberg v. Kosydar (1975) 44 Ohio St. 2d 1; Zephyr Room, Inc. v. Bowers (1955), 164 Ohio St. 287; Queen City Valves, Inc. v. Peck (1954), 161 Ohio St. 579; and, American Restaurant & Lunch Co. v. Glander (1946), 147 Ohio St. 147.

The Board of Tax Appeals finds and determines, upon the existing record and as a matter of law, that appellants' notices of appeal heretofore filed with this Board do not comply with all the requirements of or perfect an appeal pursuant to Revised Code Section 5747.55, and therefore this Board is without the requisite jurisdiction to consider and determine the matters contained in said notice of appeal. Appellee's motion is meritorious and must be granted.

IT IS ORDERED that the above entitled action be, and hereby [*25] is, dismissed.

IT IS FURTHER ORDERED that a certified copy of this decision and order be mailed by certified mail to each of the named parties hereto or to their respective counsel.

LEXSEE

Gasper Township Board of Trustees, Appellant, vs. Preble County Budget Commission; Villages of Camden, College Corner, Eldorado, Gratis, Lewisburg, New Paris, Verona, West Alexandria, West Elkton, and West Manchester; and Dixon Township, Appellees.

CASE NO. 2004-T-1152 (BUDGET COMMISSION: ULGF & ULGRAF)

STATE OF OHIO -- BOARD OF TAX APPEALS

2006 Ohio Tax LEXIS 120

January 31, 2006; January 27, 2006, Entered

[*1]

APPEARANCES:

For the Appellant -- John R. Varanese, Attorney at Law, 85 East Gay Street, Suite 1000, Columbus, Ohio 43215-3118

For the Budget Comm. -- Martin Votel, Preble County Pros. Attorney, James B. Vanzant, Assistant Prosecuting Attorney, 101 East Main Street, Courthouse, 1<st> Floor, Eaton, Ohio 45320; Harold E. Yoder, Preble County Auditor, 101 East Main Street, Eaton, Ohio 45320-0361

For Village of Camden -- Rebecca Wilson, Clerk, 383 Sugar Valley Drive, Camden, Ohio 45311

For Village of College Corner -- Jennifer Woods, Clerk, 209 Main Street, College Corner, Ohio 45003

For Village of Eldorado -- Janet Jones, Clerk, 221 Fedrick Ave., P.O. Box 163, Eldorado, Ohio 45321

For Village of Gratis -- Olivia Hill, Clerk, 20 N. East Street, P.O. Box 466, Gratis, Ohio 45330

For Village of Lewisburg -- Shirley Burkett, Clerk, 119 S.Floyd Street, P.O. Box 454, Lewisburg, Ohio 45338

For Village of New Paris -- Jane Rantanen, Clerk, 31 Washington Square, New Paris, Ohio 45347

For Village of Verona -- Melissa Tiley, Clerk, 220 S. State Street, Brookville, Ohio 45309

For Village of West Alexandria -- Judith C. Myers-Corn, 20 E. Third Street, West Alexandria, Ohio 45381

For Village of West [*2] Elkton -- William T. Crawford, Clerk, 150 S. Main Street, P.O. Box 42, West Elkton, Ohio 45070

For Village of West Manchester -- Leslie Evans, Clerk, P.O. Box 86, 300 N. East Street, West Manchester, Ohio 45382

For Dixon Twp. -- Catherine S. Combs, Clerk, 928 Dove Road, Eaton, Ohio 45320

OPINION:

DECISION AND ORDER

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

The Board of Tax Appeals considers this matter pursuant to a notice of appeal filed by appellant, Gasper Township Board of Trustees. 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 Preble County Budget Commission. The appeal concerns the apportionment and distribution of the 2005 Undivided Local Government Fund (ULGF) and the 2005 Undivided Local Government Revenue Assistance Fund (ULGRAF). Gasper argues that the alternative formulas used by the commission to allocate the funds

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were not legally applicable. In the alternative, Gasper alleges that the commission erred by allocating the funds using alternative formulas that contained typographical errors, which resulted in the miscalculation of Gasper's allocation.

Before reviewing the merits of this appeal, [*3] we must address a jurisdictional issue raised by the commission. At the June 10, 2005 hearing, the commission asserted that Gasper failed to specify as error the proper adoption of the alternative formulas. The commission thus moved us to limit our review to the issue of whether the commission abused its discretion in applying the alternative formulas. Upon review, our attorney examiner denied the motion and permitted Gasper to present evidence regarding the question of whether the alterative formulas used in the 2005 allocation were properly adopted under R.C. 5747.53 and 5747.63. Pursuant to Ohio Adm. Code 5717-1-10, the commission now asks us to reconsider the ruling.

In response, Gasper represents that it properly raised the issue. Gasper points to the language in its notice of appeal that states, "We believe the county budget commission does not have a current resolution showing the approval of the current distribution formula." Gasper also counters that the commission cannot argue that it was surprised by the allegation because other correspondence from Gasper to the commission requested that the auditor provide the township with information concerning the adoption of the formulas. [*4] Gasper also points out that, on February 7, 2005, this board, acting pursuant to 5705.37, requested the auditor to certify the record of the commission's proceedings, including "any materials related to the adoption of any alternate formulae used in [the] allocation * * *." n1

n1 R.C. 5705.37 provides that the county auditor, as secretary of the budget commission, must certify the full and accurate transcript of all proceedings before the commission, together with all evidence received, pertaining to the action from which the appeal is taken. In addition, R.C. 5705.37 mandates that the auditor certify any additional information requested by the BTA. For a discussion of the BTA's authority to order the certification of additional information see *Township of Green v. Gallia Cty. Budget Comm.* (Interim Order, Feb. 26, 1999), BTA Nos. 1996-T-1215, 1216, unreported.

Gasper brought the instant appeal under the provisions of R.C. 5705.37 and 5747.55. Unlike other statutes providing for an appeal to this board, n2 R.C. 5705.37 does not provide a requirement that an appellant specify those errors upon which the appeal is based. However, R.C. 5747.55, which provides for appeals from [*5] the allocation of the local government fund, provides that the "action of the county budget commission under sections 5747.51 and 5747.62 of the Revised Code n3 may be appealed to the board of tax appeals in the manner and with the effect provided in section 5705.37 of the Revised Code," in accordance with several rules. One such rule provides that the "notice of appeal * * * shall set forth in clear and concise language * * * the error or errors the taxing district believes the budget commission made[.]" R.C. 5747.55 (A)(2).

n2 See, for example, R.C. 5717.02, which requires a notice of appeal from a final determination of the tax commissioner to "also specify the errors complained of." Failure to specify such error denies this board subject-matter jurisdiction over the notice of appeal. See *Queen City Valves, Inc. v. Peck* (1954), 161 Ohio St. 579, at the syllabus.

n3 R.C. 5747.51 governs the allocation of the undivided local government fund, while R.C. 5747.62 sets forth the manner for allocating the undivided local government revenue assistance fund.

A reading of R.C. 5747.55 demonstrates that the statute applies to appeals from the allocation [*6] of the local government fund only. Such appeals are to be taken "in the manner" and "with the effect" provided in R.C. 5705.37. An appellant seeking to appeal under R.C. 5747.55 must also comply with the filing requirements of R.C. 5705.37; the notice requirements provided by R.C. 5705.37 must be observed by the commission; and the appeal otherwise proceeds in accordance with that statute. Thus, where a subdivision seeks a review of the allocation of the local government fund, R.C. 5705.37 and 5747.55 must be read in pari materia. *Painesville v. Lake Cty. Budget Comm.* (1978), 56 Ohio St.2d 282; *Budget Comm. of Brown Cty. v. Georgetown* (1986), 24 Ohio St.3d 33.

Generally, "the 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. In this regard, we agree with the commission that Ohio tribunals have clearly established that "* * * where a statue [*7] 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, 581. Nevertheless, we do not find the commission's motion to have merit.

In *City of Reynoldsburg v. Licking Cty. Budget Comm.* (Feb. 7, 2003), BTA Nos. 2001-T-162, 163, 1105 and 1106, unreported, reversed and remanded on other grounds, 104 Ohio St.3d 453, 2004-Ohio-6773, we considered language similar to that contained in the notice of appeal now before us. We found that the city had "sufficiently specified as error the improper adoption of the alternates * * *." Id. at 9. See, also, *Princeton City School Dist. Bd. of Edn. v. Hamilton Cty. Budget Comm.* (Interim Order, Aug. 9, 2002), BTA No. 2002-T-600, unreported. We reach the same conclusion here. The language used in the notice of appeal was sufficient to put the commission on notice that Gasper did not believe the commission had approval for the alternates. In addition, [*8] our February 7, 2005 request should have confirmed that the issue was a subject of inquiry. n4

n4 We note that, to date, the commission has neither supplemented nor offered to supplement the statutory transcript with any information pertaining to the adoption of the formulas at issue.

Finally, although statute does provide specific requirements for the filing of an appeal from the action of a budget commission, the court has determined that R.C. 5747.55 does not limit our authority to deciding only those specific issues raised in the notice of appeal. *Springfield v. Bethel Township* (1980), 61 Ohio St.2d 132, at 133-134. See, also, *Cincinnati v. Hamilton Cty. Budget Comm.* (1986), 25 Ohio St.3d 137, at 141. As the proper adoption of the formulas is fundamental to the allocations before us, we will proceed to consider the merits of Gasper's allegations.

The ULGF and ULGRAF are funds created as a "* * * form of financial state support of the smaller governmental units existing in Ohio." *Andover Twp. v. Ashtabula Cty. Budget Comm.* (1977), 49 Ohio St.2d 171, 173. These funds consist of state-collected [*9] tax money credited under various provisions of the Revised Code. R.C. 5725.24, 5727.45, 5733.12, 5739.21, 5741.03, 5747.03, and 5747.61. The county budget commission is charged with determining the amount of each fund to be apportioned to each subdivision for current operating expenses.

Commonly referred to as the "statutory" method, R.C. 5747.51 and 5747.62 prescribe the manner in which the allocation of each county's ULGF and ULGRAF, respectively, is to be made. Under R.C. 5747.51 and 5747.62, the county budget commission determines each subdivision's relative need, and, based upon these need factors, determines each subdivision's share of the ULGF and ULGRAF. However, in lieu of using the statutory formulas, "* * * the county budget commission may provide for the apportionment of such fund[s] under an alternate method or formula basis as authorized by this section. * * *" R.C. 5747.53(6) and 5747.63(B).

R.C. 5747.53 and 5747.63 require that any alternate method of apportionment needs the approval of (1) the board of county commissioners, (2) the legislative authority of the city, located wholly or partially in the county, with the greatest population, and (3) a majority of the [*10] remaining subdivisions. Approval of the three named units is required before the budget commission can allocate under such a formula. n5

n5 Effective August 29, 2002, both R.C. 5747.53 and 5747.63 were substantially amended by the General Assembly in Sub. H.B. 329. In addition to clarifying the definition of what constitutes the "city, located wholly or partially in the county, with the greatest population," Sub. H.B. 329 provides that, in certain circumstances, two or more participating subdivisions, together having a majority of the population in the county, may adopt resolutions to eliminate the requirement that the legislative authority of the city with the greatest population approve a ULGF or ULGRAF alternate for distribution in the succeeding year. These provisions are not at issue in the present appeal.

When the required subdivisions must approve an alternate, R.C. 5747.53 and 5747.63 "do not require any magic words * * *," *Township of Green v. Gallia Cty. Budget Comm.* (Nov. 30, 2000), Franklin App. No. 99AP-1330, motion to reconsider denied Jan. 25, 2001, and the statutes specify that the action "need not be published." However, R.C. 5747.53 and 5747.63 do require [*11] that approval be made by motion and supported by a majority vote of the members of each subdivision. When the validity of an approval comes into question, it is incumbent upon the parties to demonstrate that the requisite subdivisions properly approved the alternate formula. *Township of Green*, supra; *Perkins Township v. Erie Cty. Budget Comm.* (June 14, 1988), Franklin App. No. 87AP-1078, affirming BTA No. 1985-F-804 (Oct. 8, 1987), unreported.

The record establishes that the commission has allocated the ULGF since 1962, using a percentage-based formula that gives fifty percent of the fund to the county, ten percent to the townships and forty percent to the remaining villages

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and municipalities. In 1971, some adjustment to the percentages given to the municipalities was made by the commission, but the basic distribution remained the same. The ULGRAF has been allocated along the same percentages since that fund became available in 1989. The allocations of both funds are not those prescribed by the statutory methods. R.C. 5747.51 and 5747.62.

At this board's hearing, the Preble County Auditor testified as to the actions of the commission. The auditor [*12] testified that he was elected to office in 1993. H.R. at 33. He testified that the funds were allocated by the commission, of which he is the secretary, according to alternate formulas. H.R. at 34. According to the auditor, the funds are allocated on the 50-40-10 percent ratio described above and have been so allocated throughout his tenure as auditor. H.R. at 34 and 73. However, the commission will then take additional action within each category. For example, with regard to the forty percent allocated to the villages and municipalities, the commission will determine how that portion of the funds is distributed among the entities based upon need. H.R. at 35.

Nevertheless, the record contains no documentary evidence from any period manifesting the formal approval of the necessary subdivisions for the formula used by the commission. Moreover, the auditor did not testify to any approval process of which he might be personally aware.

The record does contain information relative to the actions of the commission in the 1961-1962 period. n6 The documents consist of newspaper articles detailing the city of Eaton's attempt to gain a greater share of the ULGF. The record also contains minutes [*13] of the commission, in which the commission made its initial change in allocating the fund, based not upon any approved formula but upon the "needs' of the subdivisions. None of these documents, however, demonstrate what action, if any, was taken by the subdivisions. n7 No minute of the commission sets forth receipt of the necessary approvals. n8 Similarly, the record contains some information regarding the 1971 redistribution of the forty percent allocated to the municipalities and villages. Again, the record has newspaper articles from the time, but these only set forth meeting dates of the commission. Minutes of the commission meetings provided only disclose that the ULGF was distributed "as authorized by the Revised Code" and based on fiscal need. S.T. With regard to the ULGRAF, there is nothing in the record regarding the adoption of any alternate formula for or after 1989. n9

n6 Several of these documents came to the board through a motion to supplement the record. This motion was granted at the June 2005 hearing before this board, and the documents are now considered a part of the statutory transcript.

n7 The commission has certified the minutes of a county commissioner meeting held September 4, 1962. These minutes evidence that the county commissioners voted to request the budget commission to allocate fifty percent of the fund to the county. However, this is only a request. The minutes do not show any subsequent approval of an alternate by the county.

[*14]

n8 Gasper has also questioned whether this action could be considered an alternate, as it occurred prior to the General Assembly's authorizing county budget commissions to create alternates under former R.C. 5739.232.

n9 The only other evidence concerning alternate methods of apportionment is a July 13, 2004 request by the Preble County Township Association for a new alternate. This request was denied by the commission. See commission minutes dated August 19, 2004 and letter dated August 23, 2004.

There is no question that R.C. 5747.53 and 5747.63 permit a county budget commission to apportion the ULGF and ULGRAF pursuant to a method other than that required by R.C. 5747.51 and 5747.62. However, the statutes require that a specified procedure be followed before the alternates can be implemented; i.e., an alternative formula must first be formally approved by the requisite number of participating political subdivisions.

The record leads us to the conclusion that the alternates used for the 2005 allocations of the ULGF and ULGRAF were established by convention only. We find that there is insufficient substantive evidence to establish that the so-called alternative formulas [*15] utilized to allocate the 2005 funds were adopted in conformity with R.C. 5747.53 and 5747.63. *Perkins*, supra. n10

n10 We reiterate that, on February 7, 2005, we directed the commission to certify all records pertaining to the adoption of the formulas in question. R.C. 5705.37.

In reaching our determination, we wish to stress that it is clear from the record that the budget commission has attempted to conscientiously carry out its duties. The testimony of the auditor shows us that much thought goes into the yearly allocations made by the commission, and it is clear that today's commission members set out to follow the precedent established by their predecessors. Nevertheless, no matter how well-meaning, deviations from the statutory method of allocation can only occur once all the requirements of R.C. 5747.53 and 5747.63 have been met.

As a final matter, we note that R.C. 5747.55(D) provides that "only the participating subdivisions named pursuant to division (C) of this section are to be considered as appellees before the board of tax appeals and no change shall, in any amount, be made in the amount allocated to participating subdivisions not appellees." Thus, although we [*16] have ruled that the statutory method should have been followed by the commission, subsequent proceedings before this board concerning allocation of the 2005 funds under that method will only affect the villages and townships named in the notice of appeal.

In summary, the Board of Tax Appeals finds that no alternative method of apportionment or formula, as authorized by R.C. 5747.53 and 5747.63, was legally effective. The Preble County Budget Commission's apportionment and distribution of the 2005 ULGF and ULGRAF based upon alternate formulas was therefore unreasonable and unlawful.

Pursuant to this board's bifurcation order, it is now ordered that appropriate proceedings be scheduled in accord with this board's rules of practice so that the parties may address issues pertaining to the amount of the ULGF and ULGRAF to be allocated by the statutory method. R.C. 5747.51 and 5747.62.

It is further ordered that this decision and order be certified to the Tax Commissioner of Ohio, the Preble County Auditor, and to each of the parties hereto by and through their respective representatives.

BOARD OF TAX APPEALS

RESULT OF VOTE	YES	NO	DATE
Ms. Margulies			1/25/06
Mr. Eberhart			1/18/06
Mr. Dunlap			11/19/06

[*17]

LEXSEE

The City of Hubbard, Ohio, et al., Appellants, vs. Trumbull County Budget Commission, Appellee.

CASE NOS. 90-E-1482; 90-J-1493; 90-E-1494 (LOCAL GOVERNMENT FUND)

STATE OF OHIO -- BOARD OF TAX APPEALS

1992 Ohio Tax LEXIS 545

May 22, 1992

[*1]

APPEARANCES

For the Appellants - J. Walter Dragelevich, Dragelevich and Blair, 724 Youngstown Road, Niles, Ohio 44446

For the Appellee - Dennis Watkins, Trumbull County Prosecuting, Attorney, By: James J. Misocky, Assistant Prosecuting Attorney, 160 High Street, N.W., Warren, Ohio 44481

OPINION:

ORDER (Dismissing Appeal)

These causes and matters come on to be considered by the Board of Tax Appeals upon a Motion to Dismiss the appeals herein filed by counsel for appellee Trumbull County Budget Commission on September 12, 1991. The body of the motion reads:

"Now comes the named appellee, Trumbull County Budget, in consolidated appeal numbers 90-1482, 90-1493 and 90-1494 who moves that each of these appeals be dismissed since the Board of Tax Appeals lacks jurisdiction to hear these appeals. * * * Appellant has failed to serve a notice of appeal upon the Trumbull County Budget Commission as required by law to invoke jurisdiction of the Board of Tax Appeals."

Attached to appellee's motion to dismiss is an affidavit executed by Edward Bush, Secretary of the Trumbull County Budget Commission, certifying that the Trumbull County Budget Commission was not served a copy of the notice of appeal.

Appellee [*2] also raised as grounds for dismissal, failure to join necessary parties and failure to provide the exact amount of over-allocation as required by R.C. 5747.55(C)(3).

This matter was submitted to the Board of Tax Appeals upon the purported notices of appeal of the cities of Hubbard, Niles and Girard, the motion to dismiss (and memorandum and affidavit in support thereof) and appellants' memorandum contra said motion. Evidentiary hearing on the motion was waived by agreement of the parties.

The appellants in these consolidated appeals do not claim that each corresponding notice of appeal was, in fact, served upon the appellee Budget Commission. Instead, appellants contend that because they allege the appellee abused its discretion in adopting an "alternate method" to apportion the county undivided local government fund pursuant to R.C. 5747.53 (as well as for the distribution of the local government revenue assistance funds under R.C. 5747.63), appellants are not required to serve the appellee with the notices of appeal in order to invoke the jurisdiction of the Board of Tax Appeals. (See appellants' "Response to Motion To Dismiss"). Appellants further contend that even though they [*3] denominated their notices of appeal as made pursuant to R.C. 5747.55, this statute has no bearing on an appeal from an alternative formula. We do not accept either contention.

R.C. 5705.37 establishes the jurisdiction of the Board of Tax Appeals to accept an appeal from actions of a county budget commission. R.C. 5705.37 reads in pertinent part:

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"The taxing authority of any subdivision that is dissatisfied with any action of the county budget commission may, through its fiscal officer, appeal to the board of tax appeals within thirty days after the receipt by the subdivision of the official certificate or notice of the commission's action. * * * An appeal under this section shall be taken by the filing of a notice of appeal, either in person or by certified mail, with the board and with the commission."

R.C. 5705.37 expressly requires that notices of appeals filed thereunder shall be filed with the Board of Tax Appeals and the budget commission whose action is challenged thereby. R.C. 5747.55 ("Appeal of Action of County Budget Commission") requires that appeals from actions of the budget commission comply with R.C. 5705.37 ("Appeal to Board of Tax Appeals"), and then provides [*4] certain rules as to the form of the notice of appeal.

Although appellants challenge adoption of alternative method of apportionment and R.C. 5747.53 limits the issues which may be raised upon appeal, that statute does not change the procedural requisites of an appeal to this Board. Those jurisdictional requirements are found in R.C. 5705.37.

R.C. 5747.55 sets forth the requirements of content of an appeal to this Board, and applies to appeals under R.C. 5747.51, R.C. 5747.62 and R.C. 5747.53. Mogadore v. Summit County Budget Commission (1987), 36 Ohio App. 3d 42. n1 R.C. 5747.53 and R.C. 5705.37 are not mutually exclusive, but must be read in pari materia with R.C. 5747.55.

n1 After examining the pertinent provisions of R.C. 5747.55, the Court in Mogadore held that "* * * an appeal of a budget commission's action may relate to allocation under either the statutory method (R.C. 5747.51 (C) to (I)) or an alternative formula (R.C. 5747.53)." Supra, at 42.

Strict compliance with R.C. 5705.37 is essential to vest jurisdiction upon this Board. City of Cincinnati v. Budget Commission of Hamilton County (1988), 35 Ohio St. 3d 252; Budget Commission of [*5] Brown County v. Georgetown (1986), 24 Ohio St. 3d 33. As appellee has offered evidence of non-filing which has not been rebutted, this Board finds that the subject appeals of the actions of the Budget Commission were not filed as prescribed by law. Although we deem the result of these cases unfortunate, we must conclude the Board of Tax Appeals lacks subject matter jurisdiction.

Given our disposition as to appellant's failure to serve the notices of appeal upon the Budget Commission, we find it unnecessary to address the remaining allegations raised by appellees.

Based upon the foregoing, it is the Order of the Board of Tax Appeals that the above styled matters must be and hereby are dismissed.

LEXSEE

City of Ravenna, Appellant, vs. Portage County Budget Commission, et al., Appellees.

CASE NO. 88-C-745 (BUDGET COMMISSION TAXATION)

STATE OF OHIO -- BOARD OF TAX APPEALS

1989 Ohio Tax LEXIS 965

October 20, 1989

[*1]

APPEARANCES:

For the Appellant - Frank J. Cimino, Law Director, City of Ravenna, 109 E. Main Street, Ravenna, Ohio 44266

For the Appellees - David W. Norris, Portage County Prosecuting Attorney, By: Peter Stackelberg, Assistant, 466 South Chestnut Street, P.O. Box-671, Ravenna, Ohio 44266-0671

and

Louis Myers, P.O. Box-671, Ravenna, Ohio 44266

OPINION:

ORDER (Overruling Motion to Dismiss)

This cause and matter comes on before the Board of Tax Appeals upon appellees' motion to dismiss which was filed herein on October 17, 1988. The motion, reads in part as follows:

"1. The Appellee (sic) fails to state a claim upon which relief can be granted.

"2. The Board of Tax Appeals lacks jurisdiction over the subject matter of Appellant's appeal.

"3. The appeal was not filed with the tribunal (Portage County Budget Commission) from which the appeal was taken within thirty days (30) days, as required by law.

"4. The appeal does not comply with Ohio Administrative Code 51715-0-09 (sic).

"5. The decision of the Portage County Budget Commission with regard to the alternative method of apportioning funds by the County Budget Commission is final except as to issues of abuse of discretion and [*2] failure to comply with the formula, neither of which are alleged by the Appellant."

On January 10, 1989, this Board convened a non-record hearing in the matter to consider appellees' motion to dismiss. All parties were afforded an opportunity to present arguments for and against the motion to dismiss. Also, pursuant to this Board's order, appellees filed a supporting brief with this Board on February 1, 1989. Thereafter, on February 24, 1989, appellant filed a brief in opposition to the motion to dismiss.

We have considered appellees' motion to dismiss as well as appellees' brief which was filed herein on February 1, 1989. We overrule appellees' motion to dismiss and find that this Board has jurisdiction of this appeal. Our reasoning is set forth below.

The appellant filed its appeal with this Board within thirty days after receipt of notice of the action of the Budget Commission. The appellant did not serve a copy of its notice of appeal on the Budget Commission and other political subdivisions within said thirty days. Appellees argue that appellant is required to serve its notice of appeal on the Budget Commission within thirty days. We disagree.

This appeal is taken [*3] pursuant to R.C. section 5705.37 which provides in part:

"The taxing authority of any subdivision which is dissatisfied with any action of the budget commission may through its fiscal officer, appeal to the board of tax appeals within thirty days after the receipt by such subdivision of the official certificate or notice of such action of said commission."

Clearly, appellant complied with R.C. section 5705.37. There is no requirement that the notice of appeal be served on any one other than this Board within thirty days.

Appellees contend that this appeal should be dismissed because appellant failed to comply with former Ohio Administrative Code 5715-1-09 (sic) (rescinded effective, March 24, 1989). By its own language, 5717-1-09 applies to appeals filed pursuant to R.C. section 5705.341. This appeal was taken pursuant to R.C. section 5705.37. Accordingly, appellees' reliance on the foregoing rule is misplaced.

The appellant did not name each subdivision entitled to participate in the subject undivided local government fund as appellees in this matter. As such, appellees assert that such failure requires this Board to dismiss this appeal. We disagree.

R.C. section 5747.55(C)(3) [*4] and (D) provide as follows:

"(C) There shall also be attached to the notice of appeal a statement showing:

"(3) 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.

"(D) Only the participating subdivisions named pursuant to division (C) of this section are to be considered as appellees before the board of tax appeals and no change shall, in any amount, be made in the amount allocated to participating subdivisions not appellees."

Therefore, these pertinent provisions of R.C. section 5747.55 mandate that appellant is required to name, as appellees, only those subdivisions it believes received more than their proper share of the local government fund. Appellant was not required to name every subdivision as claimed by appellees. In accord: Village of Mogadore v. Summit County Budget Commission (1987), 36 Ohio App. 3d 42.

We find that appellant named as appellees all parties specified in R.C. section 5747.55(C)(3). Therefore, we have jurisdiction of this appeal. [*5]

We have reviewed appellant's notice of appeal in light of the other contentions raised by appellees in their motion to dismiss. We find that the remaining arguments in support of the motion to dismiss are without merit and, therefore, are overruled.

Giving effect to the foregoing, we hereby overrule appellees' motion to dismiss and order this matter to be scheduled for a merit hearing. It is further ordered that a certified copy of this Order be certified to all appellees.

LEXSEE

City of Reynoldsburg, Appellant, vs. Licking County Budget Commission; the Townships of Bennington, Bowling Green, Burlington, Eden, Etna, Fallsbury, Franklin, Granville, Hanover, Harrison, Hartford, Hopewell, Jersey, Liberty, Licking, McKean, Madison, Mary Ann, Monroe, Newark, Newton, Perry, St. Albans, Union, and Washington; the Villages of Alexandria, Buckeye Lake, Granville, Gratiot, Hanover, Hartford, Hebron, Johnstown, Kirkersville, St. Louisville, and Utica; the Cities of Heath, Newark, and Pataskala; and Licking County, Appellees.

CASE NOS. 2001-T-162; 2001-T-163; 2001-T-1105; 2001-T-1106 (BUDGET COMMISSION) (ULGF & ULGRAF)

STATE OF OHIO -- BOARD OF TAX APPEALS

2003 Ohio Tax LEXIS 109

February 7, 2003

[*1]

APPEARANCES:

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For Licking Cty Budget Comm. And Licking Cty. - Rich, Crites & Wesp, James R. Gorry, 20 East Broad Street, Third Floor, Columbus, Ohio 43215

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OPINION:

DECISION AND ORDER

Mr. Johnson, Ms. Jackson, and Ms. Margulies concur.

The Board of Tax Appeals considers this matter pursuant to four notices of appeal filed by appellant, City of Reynoldsburg. These appeals were brought under the relevant provisions of R.C. 5705.37, 5747.53, 5747.55, and 5747.63 from the actions of the Licking County [*4] Budget Commission. They concern the apportionment and distribution of the 1997-2002 Undivided Local Government Fund (ULGF) and the 1997-2002 Undivided Local Government Revenue Assistance Fund (ULGRAF). Reynoldsburg specifies error in its notices of appeal to the effect that the commission either (a) erred by failing to allocate the funds according to the statutory formulas provided in R.C. 5747.52 and 5747.62, i.e., that the commission distributed the ULGF and ULGRAF under improperly promulgated methods or formulae of apportionment or (b) abused its discretion and failed to comply with the formula by improperly calculating Reynoldsburg's distribution under the alternative methods or formulae promulgated under R.C. 5747.53 and 5747.63.

The parties have agreed to waive hearing in this matter and permit the board to consider the merits upon the record and the briefs. In addition, the parties had previously requested that the board enter into the record certain testimony, exhibits, statutory record, and other evidence contained in the record of *City of Reynoldsburg v. Licking Cty. Budget Comm.*, BTA No. 1996-T-1436, et al. The referenced appeal is a previous matter before this board [*5] that involved issues similar to ones now before us. The earlier appeal was ultimately remanded to the commission pursuant to the parties' request. *Reynoldsburg v. Licking Cty. Budget Comm.*, (May 26, 2000), BTA No. 1996-T-1436, et al., unreported. In an order dated September 6, 2002, we accepted the parties' stipulation and entered the record in *City of Reynoldsburg v. Licking Cty. Budget Comm.*, BTA No. 1996-T-1436, et al., into the record as evidence in the current matter.

The record indicates that the budget commission purportedly adopted an alternative method of apportionment for the ULGF in 1972 for the 1973 distribution. See R.C. 5747.53. It thereafter purportedly adopted an alternative formula for the ULGRAF in 1989. See R.C. 5747.63. Distribution under both funds has continued under these alternative methods, without modification. The city of Reynoldsburg is partially located within the geographic boundary of Licking County. Reynoldsburg did not participate in the processes that led to the adoption of the two alternates, nor did it file a budget with the commission in 1972 or 1989. Reynoldsburg first filed a budget in 1996 for budget year 1997, and has filed each year [*6] thereafter.

Originally, the commission concluded that Reynoldsburg was excluded from participation under the alternative method and formula because Reynoldsburg failed to file a budget in the adoption years. As a result, Reynoldsburg filed an appeal with this board, seeking inclusion in the 1997 and 1998 distribution of both funds. *City of Reynoldsburg v. Licking Cty. Budget Comm.*, BTA Nos. 1996-T-1436, et al. We did not consider all the merits in that original appeal. Instead, we concluded that both alternates were invalid, as the Revised Code required the annual renewal of the alternative methods and formulae. n1 *Reynoldsburg v. Licking Cty. Budget Comm.* (Nov. 6, 1998), BTA Nos. 1996-T-1436, et al., unreported. On appeal, the court reversed our decision in *Reynoldsburg v. Licking Cty. Budget Comm.* (1999), 86 Ohio St.3d 559, and certified the matter to this board for further action.

n1 Our determination was based upon our decision in *City of Lancaster v. Fairfield Cty. Budget Comm.* (May 8, 1998), BTA Nos. 1997-D-1172, 1173, unreported. *Lancaster* was subsequently reversed by the Supreme Court, which found that alternates need not be annually approved where the governments have not limited their approvals to a specific period of time. *Lancaster v. Fairfield Cty. Budget Comm.* (1999), 86 Ohio St.3d 137.

[*7]

Prior to the board's ruling on the remaining issues, the budget commission filed a "Stipulation that Appellant is Entitled to participate in Distribution of the LGF and LGRAF Funds:"

> "Both Appellees hereby acknowledge and stipulate that the City of Reynoldsburg is legally entitled to participate in the allocation and distribution of the Licking County Local Government Fund and the Local Government Revenue Assistance Fund for the years for which the appeals herein were filed. Accordingly, the Budget Commission hereby agrees to give Reynoldsburg a share of both funds for such years. By making this stipulation, Appellees thereby settle and remove the only remaining issue in these appeals."

With the stipulation, the commission also filed a motion to remand. This board subsequently granted the motion, remanding the matter back to the commission and ordering the commission to "* * * proceed (a) to allocate a share of the 1996 and 1997 ULGF and ULGRAF to Reynoldsburg and (b) to incorporate Reynoldsburg as a participant under the County's alternate ULGF method and its alternate ULGRAF formula." *Reynoldsburg v. Licking Cty. Budget Comm.* (May 26, 2000), BTA Nos. 1996-T-1436, et al., [*8] unreported.

Upon remand, the commission, in an action dated January 19, 2001, allocated to Reynoldsburg a portion of the ULGF and ULGRAF for distribution years 1997, 1998, 1999, 2000, and 2001. Reynoldsburg appealed that allocation to this board. BTA Nos. 2001-T-162, 163. On June 23, 2001, the commission made its allocation of both funds for distribution year 2002, which Reynoldsburg has now appealed in BTA Nos. 2001-T-1105, 1106. For each of the years in question, Reynoldsburg maintains that allocation under the alternate method and formula was improper and that statu-

tory methods should have been utilized by the commission to determine Reynoldsburg's allocation of the ULGF and ULGRAF.

Before addressing the merits, the commission n2 has asserted that this board lacks jurisdiction to consider Reynoldsburg's specifications of error. The commission raises three challenges to our authority: (1) The commission asserts that Reynoldsburg has waived its right to challenge the legality of the alternative method and formula because Reynoldsburg failed to specify this issue in the notices of appeal filed in the older appeals, i.e., in *Reynoldsburg v. Licking Cty. Budget Comm.*, BTA Nos. 1996-T-1436, [*9] et al. The commission also asserts that Reynoldsburg's contentions of errors in the current appeals fail to properly specify error, as the contention raised in the notices of appeal is merely that the commission "* * had not properly adopted the alternative method of apportionment pursuant to * * *" statute. (2) The commission also asserts that, as the allocations in question were made as the result of this board's remand order in BTA Nos. 1996-T-1436, et al., the only issues that can be now appealed are those that relate to the remand. Questions concerning the validity of the alternate formula and method, the commission states, are beyond the remand and are not proper for consideration. (3) The commission finally maintains that Reynoldsburg has no standing to appeal issues concerning the adoption of the alternates, as it was not entitled to participate in the adoption of the alternates because Reynoldsburg failed to file a tax budget in the adoption years.

n2 A single brief was filed on behalf of the commission and all appellee subdivisions. For clarity, we shall refer only to the commission, unless circumstances require otherwise.

As to the issue of standing, R.C. 5747.55 provides [*10] the right to appeal the allocation of the local government funds. "The action of the county budget commission under sections 5747.51 and 5747.62 of the Revised Code n3 may be appealed to the board of tax appeals in the manner and with the effect provided in section 5705.37 of the Revised Code * * *." *Budget Comm. of Brown Cty. v. Georgetown* (1986), 24 Ohio St.3d 33. However, while R.C. 5747.55 authorizes an appeal from an allocation, the statute does not specify who has standing to initiate an appeal from the action of the budget commission.

n3 R.C. 5747.55 has also been found to apply to appeals taken from alternate methods and formulae. *Village of Mogadore v. Summit Cty. Budget Comm.* (1987), 36 Ohio App.3d 42.

The appeal itself is to be taken "in the manner and with the effect provided" in R.C. 5705.37, which provides that the "taxing authority of any subdivision that is dissatisfied with any action of the county budget commission may, through its fiscal officer, appeal to the board of tax appeals * * *." R.C. 5705.01 contains definitions for the terms "subdivision" and "taxing authority." Thus, only those taxing authorities of subdivisions defined in R.C. 5705.01 have [*11] standing to appeal. *Warren Cty. Park Dist. v. Warren Cty. Budget Comm.* (1988), 37 Ohio St.3d 68, 70. Reynoldsburg is a subdivision under R.C. 5705.01(A), and Reynoldsburg's city council, which authorized the appeal, qualifies as a "taxing authority" under R.C. 5705.01(C). The appeal was taken through Reynoldsburg's city auditor, its fiscal officer. R.C. 5705.01(D). We find that Reynoldsburg has met the standing requirements.

Moreover, the fact that Reynoldsburg did not participate in the purported adoption of the alternates does not deny standing to challenge the allocation of the funds, where Reynoldsburg has filed a tax budget and has received a portion of the local government funds. Reynoldsburg did receive an allocation for the years appealed. As such, Reynoldsburg has standing to appeal where it believes it has been aggrieved by the commission's action. Cf. *Ohio Contract Carriers Assn., Inc. v. P.U.C. of Ohio* (1942), 140 Ohio St. 160.

The commission next asserts that Reynoldsburg failed to specify as error the commission's timely adoption of the alternates. A review of the notices of appeal in this matter, however, demonstrates that Reynoldsburg alleges that allocation [*12] should have been made under the statutory methods because both alternates were not "* * * properly adopted * * * by the commission." Other references in the notice of appeal specify that the alternates were "allegedly adopted" in the years in question. The opening paragraphs of the notices of appeal further alleged that the allocation and distribution for the years in issue should have been made under the statutory methods. We find that Reynoldsburg has sufficiently specified as error the improper adoption of the alternates, which includes the alleged failure to adopt in a timely fashion. See *Princeton City Schl. Dist. Bd. of Edn. v. Hamilton Cty. Budget Comm.* (Aug. 9, 2002), BTA No. 2002-T-600, unreported. n4

n4 See, also, *Springfield v. Bethel Township* (1980), 61 Ohio St.2d 132, in which the court determined that R.C. 5747.55 does not limit the BTA's authority to deciding only those specific issues raised in the notice of appeal.

The commission also claims that any error relative to the adoption of either alternate has been waived by Reynoldsburg's failure to raise such issues in the 1996 and 1997 appeals to this board. In the alternative, the commission argues that [*13] any assignment of error concerning the proper adoption of the alternates exceeds the remand order in BTA Nos. 1996-T-1436, et al., and is thus precluded. The commission evidently seeks to apply the doctrine of res judicata to preclude our consideration of Reynoldsburg's assignments of error. Res judicata is composed of two elements, claim preclusion and issue preclusion.

With regard to claim preclusion, claims beyond the scope of a previous remand are generally considered beyond the scope of review following a return of the case from remand. *State ex rel. Natl. Elec. Contrs. Assn., Ohio Conference v. Ohio Bur. Of Emp. Serv.* (2000), 88 Ohio St.3d 577. However, at issue in BTA Nos. 1996- T-1436 et al., was the commission's specific action denying Reynoldsburg participation in the allocation and distribution of the 1996 and 1997 ULGF and ULGRAF. Our remand was for the limited purpose of incorporating Reynoldsburg as a participant under the alternate ULGF method and the alternate ULGRAF formula and to allocate a share of those funds for 1996 and 1997. That remand impacted the commission's action to deny Reynoldsburg a share of the local government funds for the years in question. Reynoldsburg, [*14] however, does not now appeal from the same action. Instead, it appeals from a subsequent action of the commission, an action that concerns the proper allocation of the local government funds to a participating subdivision. Moreover, the court has refused to apply claim preclusion to appeals filed in successive years pursuant to R.C. 5705.37, given that a subdivision must file a notice of appeal to this board in each year that an action is taken by a budget commission. *Girard v. Trumbull Cty. Budget Comm.* (1994), 70 Ohio St.3d 187; *S. Russell v. Geauga Cty. Budget Comm.* (1984), 12 Ohio St.3d 126.

Even if we were to agree that our prior remand precluded claims for the 1996 and 1997 local government funds, the instant matter concerns the commission's subsequent 1998 through 2002 allocations and distributions. These actions were clearly not before this board in BTA Nos. 1996-T-1436, et al. Under *Girard*, supra, claims raised on allocations not previously before this board would not be barred by our remand in BTA Nos. 1996-T-1436, et al.

Issue preclusion, commonly known as collateral estoppel, provides that "* * * a fact or a point that was actually and directly at issue in [*15] a previous action, and was passed upon and determined by a court of competent jurisdiction, may not be drawn into question in a subsequent action between the same parties or their privies, whether the cause of action in the two actions be identical or similar." *Ft. Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd.* (1998), 81 Ohio St.3d 392, 395. The record in BTA Nos. 96-T-1436, et al., evidences that issues concerning the adoption of the alternates, were indeed raised by Reynoldsburg. See, for example, appellants' brief and the hearing record in that prior proceeding. However, we never addressed the merits of these contentions of error. Accordingly, collateral estoppel does not apply.

We note, too, that, as in the instant matter, the commission in BTA Nos. 1996-T-1436, et al., alleged that Reynoldsburg had failed to properly specify errors relative to the adoption of the alternates, including the timely adoption of the alternates, in its notices of appeal. Again, given our remand of that earlier matter, the issue of whether the assignments of error had been properly raised was not addressed by this board. Even so, a ruling that a tribunal lacks jurisdiction is not a ruling [*16] on the merits and has no res judicata effect. *State ex rel. Schneider v. N. Olmsted Contr. Co.* (1988), 39 Ohio St.3d 281; *CTI Audio, Inc. v. Fritkinm-Jones Design Group, Inc.* (2001), 144 Ohio App.3d 449.

Having established that we have jurisdiction, we will proceed to the merits. Reynoldsburg contends that the commission's reliance upon an alternate method purportedly adopted in 1972 and an alternate formula purportedly adopted in 1989 was improper for the allocations and distribution in issue. First, Reynoldsburg contends that neither the alternate ULGF method nor the alternate ULGRAF formula was adopted by the September 1 deadline prescribed by R.C. 5705.27. Thus, Reynoldsburg asserts, the commission should have utilized the statutory methods to determine each subdivision's allocation of the ULGF and ULGRAF.

The ULGF and ULGRAF are funds created as a "* * * form of financial state support of the smaller governmental units existing in Ohio." *Andover Twp. v. Ashtabula Cty. Budget Comm.* (1977), 49 Ohio St.2d 171, 173. These funds consist of state-collected tax money credited under various provisions of the Revised Code. R.C. 5725.24, 5727.45, 5733.12, 5739.21, 5741.03, [*17] 5747.03, and 5747.61. The county budget commission is charged with determining the amount of each fund to be apportioned to each subdivision for current operating expenses.

Commonly referred to as the "statutory" formulas, R.C. 5747.51 and 5747.62 prescribe the method by which the allocation of each county's ULGF and ULGRAF, respectively, are to be made. Under R.C. 5747.51 and 5747.62, the county budget commission determines each subdivision's relative need, and, based upon these need factors, determines each subdivision's share of the ULGF and ULGRAF. However, in lieu of using the statutory formulas, "* * * the county budget commission may provide for the apportionment of such fund[s] under an alternate method or formula basis as authorized by this section. * * *" R.C. 5747.53(A) and 5747.63(A).

In order for an alternate formula to be properly adopted, R.C. 5705.27 provides that the commission must complete its work by September 1 for each year, unless the Tax Commissioner extends the time within which such work may be completed:

> "The commission shall meet at the office of the county auditor in each county on the first Monday in February and on the first Monday in August, annually, [*18] *and shall complete its work on or before the first day of September, annually*, unless for good cause the tax commissioner extends the time for completing the work." (Emphasis added.)

The court of appeals explained the foregoing provision in *Englewood v. Montgomery Cty. Budget Comm.* (1987), 39 Ohio App.3d 153:

> "R.C. 5705.27 succinctly sets forth, in mandatory language, that a budget commission *shall complete* its work on or before September first of each year unless an extension is granted by the Tax Commissioner. If no extension is granted, the budget commission must be prepared to invoke an alternate formula approved prior to September first, pursuant to R.C. 5747.53, or the statutory formula, set forth in R.C. 5747.51, comes into effect by operation of law.
>
> "* * *
>
> "Thus, a budget commission may adopt an alternate formula in lieu of the statutory method of distribution if the alternate formula is approved and ready to be implemented by the September first deadline." Id. at 155. (Emphasis sic.)

In *Shawnee Twp. v. Allen Cty. Budget Comm.* (1991), 58 Ohio St.3d 14, the court held that the effect of failing to adopt an alternate formula by the September 1 deadline [*19] is to render the alternate nonexistent for the next year's allocations. While *Shawnee Twp.* addressed the effectiveness of an alternate for the next year's allocation, it did not address the question of the effectiveness, in subsequent years, of an alternate adopted beyond the September 1 deadline. Then, in *Girard v. Trumbull Cty. Budget Comm.* (1994), 70 Ohio St.3d 187, the court affirmed this board's finding that the untimely adoption of an alternate formula renders the formula invalid, requiring a county budget commission to utilize either a prior alternate formula still in effect or the statutory formula:

> "Appellants misconstrue the import of failing to adopt an alternative formula by the September 1 deadline. The deadline is a statutory precondition to the existence of a purported alternative method of allocation, regardless of its intended longevity. As the BTA aptly explained, were we to find that a multiyear alternative formula, untimely adopted, could become effective in the year following its intended inception 'without any further action by [the] county budget commission, the objectives of the participating subdivisions for the first year, which is clearly invalid, [*20] could be frustrated.' It would then be necessary to determine the intent of the various participating governmental units in approving the adoption of the alternative method formula. Such a contractual analysis, however, is precisely what this court rejected in *Andover, supra*, 49 Ohio St.2d at 174, 3 O.O.3d at 239, 360 N.E.2d at 692. It is this very necessity of ascertaining the intent of the various governmental units that requires the adoption procedure to commence anew in the following year, especially since 'the entire statutory scheme implies an annual determination of the method of distribution.' *Id.* at 175, 3 O.O.3d at 240, 360 N.E.2d at 692.

"Accordingly, we find the alternative methods of apportioning the LGF and LGRAF adopted by the commission on October 1, 1990, to be invalid. Since those methods never came into existence, they cannot be utilized in apportioning the LGF and LGRAF in 1992 or thereafter." Id at 192.

Reynoldsburg first maintains that the commission failed to timely adopt the alternate ULGF method utilized in making the allocations now before this board. The record in this matter discloses that the commission met on August 28, 1972 for purposes of [*21] making the 1973 allocation and distribution of the ULGF. At that meeting, the commission concluded that the "actual needs [of each subdivision] cannot be fairly compared as required by Chapter 5747 of the Revised Code." (Appellant's Exhibit D.) The commission therefore requested the county auditor, who serves as secretary of the commission, to prepare a report showing the allocation of funds for each subdivision for the previous five years and estimate an amount to be allocated in 1973. On October 1, 1972, the commission met again, and the secretary presented a study showing the allocation of the ULGF for 1968, 1969, 1970, 1971, 1972, and an estimate for 1973. At that time, the secretary moved the commission to adopt a formula that incorporated a straight percentage allocation based on the average of the six years shown in the study. However, the commission did not adopt the alternate at the October 1, 1972 meeting. Instead, it asked the secretary to "finalize the percentages and reconvene the commission when the supreme court ruling is announced, at that time, the percentage will be adopted." (Exhibit D.) At the hearing before this board, George D. Buchanan, Licking County Auditor, [*22] testified that the court action referred to involved a challenge to the 1972 real property values, the resolution of which could impact the estimate of resources available for 1973. n5 The decision was therefore made to finalize the percentages after the court ruled. (R. 21-22). n6

n5 The matter apparently referred to is *State ex rel. Park Invest. Co. v. Bd. of Tax Appeals* (1972), 32 Ohio St.2d 28, which involved the assessment of real property by uniform rule. In that matter, the court ultimately ordered this board to correct inequalities in the assessment of real property throughout the state in accordance with certain new statutory provisions but also by employing a method of valuation based on the fair market value that the assessed property would bring if sold on the open market.

n6 All hearing references are to the record prepared in BTA Nos. 1996-T-1436, et al.

The court issued its decision in the referenced matter on November 15, 1972. See *State ex rel. Park Invest. Co. v. Bd. of Tax Appeals* (1972), 32 Ohio St.2d 28. On November 29, 1972, the commission met again to consider the 1973 allocation and distribution. The secretary advised the commission of the outcome [*23] of the court proceedings and then "* * * presented the * * * list of subdivisions and percentage each would receive of the local government fund if the method is approved." The commission then voted to adopt the alternate method of allocation and asked the secretary to request the approval of each subdivision. (Appellee's Exhibit 1.)

Shortly thereafter, the auditor, in his role as secretary of the commission, sent to each subdivision a letter, which (1) informed the subdivision that "the commission proposes an alternative method of apportioning the local government fund," (2) set forth the 1973 allocation the subdivision would receive under the alternate, and (3) asked the subdivision to take formal action to approve the alternate. (Appellant's Exhibit E.) Approvals from the various subdivisions were received between December 1972 and February 1973. (Appellant's Exhibits E and F.)

Upon review, we must conclude that the commission did not complete its work by adopting the new alternate method by the September 1, 1972 deadline for the 1973 allocation and distribution. We note that former R.C. 5705.27, in effect at the time, provided that extensions to the time in which a commission [*24] could complete its work were to be effected by the Board of Tax Appeals. n7 There exists no indication in the record that this board granted an extension to the September 1, 1972 deadline, nor does the auditor recall seeking one. Taking notice of the journals of the actions of the Board of Tax Appeals, we can find no order issued by this board granting the Licking County Budget Commission such an extension. In addition, the record does not indicate that the commission attempted to adopt, by the method outlined in R.C. 5705.27 and 5747.53, a new alternate by September 1 of the following year. During his testimony, the county auditor admitted that the alternate ULGF method has not been repealed or modified since its introduction in 1972. (R. 24.) n8

n7 The commissioner received sole authority to grant the extension after the BTA assumed autonomy from the Department of Taxation. See Am. Sub. H.B. 920, eff. October 11, 1976.

n8 We acknowledge the situation in *Buckeye Lake v. Licking Cty. Budget Comm.* (1986), 21 Ohio St.3d 12, in which the court approved the commission's division of township property and funds when a new village was created from a portion of the township. However, the court expressly found that this was not a modification to the formula in that the commission retained the same formula and merely modified its application as to the township and village. Id. at 14. After *Buckeye Lake*, supra, the commission expressed its intent to continue with the same alternate. (Appellant's Exhibit G.)

[*25]

The commission argues that the September deadline does not apply to an alternate formula unless the formula specifically provides that it is to be effective for a given year. However, we find this argument unavailing. The record demonstrates that the formula was specifically adopted for use in making the 1973 allocation and distribution. As such, the commission had to adopt the formula by September 1, 1972. Nor can we determine that the alternate formula simply became valid for the 1974 allocation and the years thereafter. Under *Girard*, supra, the passage of time cannot cure that which, by operation of law, is a nullity. As the commission did not complete its work by adopting the alternate ULGF method by September 1, 1972, we find that the alternate method utilized by the commission to allocate the ULGF in this matter was not authorized by law. *Girard*, supra. As the alternate method purportedly adopted in 1972 was a nullity, the statutory method remains in effect for the allocations in question.

The ULGRAF was first distributed in 1989. See Am. Sub. H.B. 111, effective July 1, 1989, 143 Ohio Laws, Part II, 2351, at 2630. Section 143 of Am. Sub. H.B. 111 required that each [*26] county budget commission make an apportionment of the ULGRAF for the last six months of 1989. This apportionment was to be made within sixty days of the act's effective date:

"(C) The county budget commission shall meet by the fifteenth day of July, or within sixty days after the effective date of this act, whichever is later, to determine the manner in which the county's undivided local government revenue assistance fund shall be apportioned during the last six months of 1989. After affording all affected subdivisions an opportunity to be heard, the commission shall apportion the proceeds of the undivided local government revenue assistance fund in accordance with the requirements of section 5747.62 or 5747.63 of the Revised Code. * * *" 143 Ohio Laws, Part II, at 2827.

The commission met on August 7, 1989 for purposes of reviewing the new ULGRAF. During the meeting the auditor "* * * suggested that [the commission] try to get the current [i.e., ULGF] formula adopted if the County Commissioners would be willing to accept a reduction in their share." (Appellee's Exhibit 4.) The reduction to the county commissioners was contemplated to take into consideration the needs of villages [*27] incorporated after the ULGF formula had been first applied. n9 The commission did not contemplate a reduction in the ULGF share but wished to apply it to the ULGRAF only. At the conclusion of the August 7 meeting, the secretary was asked to "* * * calculate the amounts necessary and request approval * * *" of the subdivisions. Hearing dates were also set for those who wished to be heard on the issue. (Appellee's Exhibit 4.)

n9 This action was in conformity with R.C. 5747.63's requirement that the apportionment of the new ULGRAF take into consideration the "needs of villages incorporated after January 1, 1980."

Under date of August 24, 1989, the secretary of the commission sent to all subdivisions a letter asking the subdivisions to approve the proposed ULGRAF alternate: "We now need approval of your council or board of trustees to continue receiving the same share of the new money as you receive under the present [ULGF] formula." (Appellee's Exhibit 5.) In the letter, each subdivision was also advised that the commission would proceed to distribute the new fund for the last six months of 1989 under the proposed formula. "However, we will not advertise the 1990 allocations until [*28] the formula has received an approval of the majority." (Appellee's Exhibit 5.) Between September 5, 1989 and October 10, 1989, the various subdivisions issued resolutions approving the proposed formula. (Appellant's Exhibit J.) n10

n10 The county commissioners approved the formula on September 6, 1989, and the city of Newark approved on September 5, 1989.

The commission reconvened on October 6, 1989, at which the secretary advised the commission that the approvals for the proposed ULGRAF alternate had been received, as required by R.C. 5747.63. However, the commission noted

that it had previously allocated the ULGRAF under an "established" alternate but could not publish the allocation until it received the approval of the necessary subdivisions. Having received the approval, the commission moved on October 6, 1989 to "record the approved allocations." (Appellant's Exhibit I.)

In reviewing the adoption of the ULGRAF formula, we note that the commission maintains that it did "adopt" the alternate prior to the September 1 deadline but that approval was not received until October. As such, the commission argues that it has met the requirements of R.C. 5705.27. We disagree.

Initially, [*29] we question whether the commission acted to adopt an alternate prior to September 1, 1989. The record in this matter establishes only that the commission, at the August 7, 1989 meeting, "*suggested* that we try to get the current formula adopted" for purposes of the ULGRAF formula. (Emphasis added.) There is no mention of any formal adoption of the formula. The auditor's August 24, 1989 letter further specifies that it seeks approval of a "proposed" formula. We acknowledge that the August 24, 1989 letter states that the commission would proceed to distribute the last six months of the 1989 ULGRAF under the "proposed new formula" but the record discloses no official action taken by the commission to adopt the formula. The record suggests the county auditor unilaterally took this action. The actual adoption of the formula appears to have taken place at the commission's October 6, 1989 meeting.

Moreover, an alternate formula cannot be adopted by a budget commission and used to make allocations until the alternate has gained the approval of the necessary subdivisions. The commission contends that R.C. 5705.27 does not require allocation prior to September first. It is enough, argues [*30] the commission, that a formula be adopted by the deadline. Approval of the formula and allocation thereunder may occur after. R.C. 5747.63(A) provides that, prior to the commission's allocation of the ULGRAF under an alternate, the "* * * alternative method of apportionment shall have *first* been approved by all of the following governmental units: the board of county commissioners; the legislative authority of the city, located wholly or partially in the county, with the greatest population." The statute clearly provides that approval of the alternate is a condition precedent to its implementation. "Thus, a budget commission may adopt an alternate formula in lieu of the statutory method of distribution *if the alternate formula is approved and ready to be implemented by the September first deadline." Englewood*, supra, 155. (Emphasis added.)

Additionally, the commission's argument ignores the express language of R.C. 5705.27. The statute does not provide that an alternate must be adopted by September first, with allocation to take place after the date. Instead, R.C. 5705.27 requires that the commission "* * * shall complete *its work* on or before the first day of September, [*31] annually * * *." (Emphasis added.) Completing its work necessarily means completing the allocation of the funds. As the *Englewood* court aptly stated:

> "In the facts before this court, the Montgomery County Budget Commission implemented an alternate formula on June 18, 1982, approximately nine months after the statutory September first deadline. Also, beginning in January 1982, six monthly installments of the local government fund were not dispersed and were being held by the budget commission awaiting the majority approval of the requisite number of government subdivisions.
>
> "Public policy demands that townships, municipal corporations, and other government bodies be run in an efficient, orderly manner. Likewise, the government funding that is used to support these government bodies should be available as an operation of law so as not to impede government services. Clearly, withholding monthly government funds for a six-month interval has a prejudicial effect on the government bodies depending on those monies. Basically, the municipalities and townships in Montgomery County that were eligible for the 1982 fund were given the choice to either approve the alternate formula or [*32] survive without the monthly installments from the local government fund. This obviously was not the legislative intent." Id at 155-156.

The commission admits in its meeting minutes and correspondence that it distributed the last six months of the 1989 ULGRAF according to an alternate formula that had not yet received the approval of the subdivisions. However, without approval, the commission was required to make the distribution under the statutory formula. R.C. 5747.62; *Englewood* and *Shawnee Twp.*, supra. In reaching this conclusion, we note that Section 143 of Am. Sub. H.B. 111 required this distribution to be made on or before August 31, 1989, yet approval of the alternate for the 1989 distribution had not been received by this date.

The commission next argues that, regardless of the 1989 allocation, the formula was valid for the 1990 allocation and distribution. The commission implies that the September first deadline of R.C. 5705.27 was not applicable to the ULGRAF because of the recency of the legislation and the sixty-day window granted by Am. Sub. H.B. 111, Section 143, for the last half of the 1989 allocation. We can find no support for this contention. While the [*33] General Assembly provided for the allocation of the ULGRAF for the last half of 1989 after the time in which such an allocation would normally have had to be made, i.e., by September 1, 1988, there is nothing in either the codified or uncodified sections of Am. Sub. H.B. 111 that extended the time in which the commission could make the 1990 allocation.

In essence, the commission argues that R.C. 5705.27 should be read as being directory rather than mandatory. In *Troy v. Miami Cty. Budget Comm.* (1959), 168 Ohio St. 418, the court considered a situation where the General Assembly had passed certain amendments to former R.C. 5739.23, which were not effective until September 16, 1957, after the September first deadline. However, provisions in the amendments specified that they were applicable to the 1958 allocation. The court held that R.C. 5705.27 should be read as directory in order to give effect to the prospective operation of the amendments. However, the courts have subsequently made clear that *Troy* applies only to the first year in which a prospective statutory provision for allocating funds is enacted with an effective date after September first. With regard to all other [*34] provisions, R.C. 5705.27 is mandatory; the commission must finish its work by September first. *Girard, Englewood,* and *Shawnee Twp.* supra. Here, none of the provisions contained in Am. Sub. H.B. 111 pertained to the 1990 allocation. Thus, the deadline applied. n11

n11 Neither do we accept the commission's argument that it could not act on the 1990 allocation of the ULGRAF until it had completed the 1989 allocation. It is fundamental that the commission had concurrent authority to act on both allocations.

The record demonstrates that the commission sought approval of the alternate expressly for the 1990 allocation and distribution. Under the statutory scheme, in order for the alternate ULGRAF formula to become effective, it had to be approved and adopted on or before September 1, 1989, unless that deadline was extended by action of the Tax Commissioner. Mr. Buchanan testified that no such extension was either sought or received. Approval of the formula came after September 1, 1989, with final adoption of the formula being made on October 6, 1989. As the commission did not complete its work by adopting the alternate ULGRAF method by September 1, 1989, we find that the alternate [*35] formula utilized by the commission to allocate and distribute the ULGRAF in this matter was not authorized by law and is a nullity. *Girard*, supra. Consequently, the allocations in question should have been made under the statutory formula provided in R.C. 5747.62.

In summary, the Board of Tax Appeals finds that no alternative method of apportionment or formula, as authorized by R.C. 5747.53 and 5747.63, was legally effective. The Licking County Budget Commission's apportionment and distribution of the 1997-2002 ULGF and the 1997-2002 ULGRAF based upon alternate formulas was therefore unreasonable and unlawful.

It is ordered that the commission's 1997-2002 ULGF and 1997-2002 ULGRAF allocations be, and the same hereby are, vacated. This matter is remanded to the Licking County Budget Commission with orders to make an allocation of the 1997-2002 ULGF and 1997-2002 ULGRAF funds in compliance with the provisions of R.C. 5747.51 and 5747.62. See *Perkins Twp. v. Erie Cty. Budget Comm.* (June 14, 1988), Franklin App. No. 87AP-1078, unreported (BTA has the authority to remand a matter to a budget commission in order for the commission to apply the statutory formula and complete its [*36] work). n12

n12 We note, too, that the commission has previously not objected to a remand. (See 1996-T-1436, R. 70.)

It is further ordered that this decision and order be certified to the Tax Commissioner of Ohio, the Licking County Auditor, and to each of the parties hereto by and through their respective representatives.

LEXSEE

Union Township, Appellant, vs. Butler County Budget Commission, et al., Appellees.

CASE NO. 92-M-1443 (BUDGET)

STATE OF OHIO -- BOARD OF TAX APPEALS

1993 Ohio Tax LEXIS 1661

October 8, 1993

[*1]

APPEARANCES

For the Appellant - Phyllis Brown, Copeland and Brown, 119 East Court Street, Suite 510, Cincinnati, Ohio 45202

For the County Appellees - Harry B. Zornow, Assistant Prosecuting Attorney, 216 Society Bank Building, 6 South Second Street, Hamilton, Ohio 45012-0515

For the City of Oxford - Stephen M. McHugh, McHugh and McHugh, 1400 Society Bank Building, Dayton, Ohio 45402

For the Village of New Miami - Michael T. Gmoser, 720 Society Bank Building, 6 South Second Street, Hamilton, Ohio 45011

For the City of Middletown - Sheldon A. Strand, Law Director, One City Center Plaza, Middletown, Ohio 45042-4099

For the City of Fairfield - John H. Clemmons, Millikin and Filton, Six South Second Street, P.O. Box-598, Hamilton, Ohio 45012

OPINION:

ORDER

This cause and matter comes on to be considered by the Board of Tax Appeals upon a notice of appeal filed herein on November 30, 1992. Appellant, Union Township, appeals the allocation of the 1993 Butler County Undivided Local Government Fund and the 1993 Butler County Undivided Local Government Revenue Assistance Fund, pursuant to R.C. 5747.55 and 5705.37. A number of motions have been presented for this Board's consideration. After [*2] review of the statutory framework, each motion will be considered.

As this Board is a creation of statute, we are strictly limited by the legislative framework under which we exist. Cincinnati v. Budget Comm. of Hamilton County (1988), 35 Ohio St. 3d 252; Budget Comm. of Brown Cty. v. Georgetown (1986), 24 Ohio St. 3d 33. R.C. 5705.37 sets forth both a right of appeal and the general procedural requirements to invoke the jurisdiction of the Board to review actions of county budget commissions. R.C. 5703.02(A)(1). R.C. 5705.37 directs in pertinent part:

"The taxing authority of any subdivision that is dissatisfied with any action of the county budget commission may, through its fiscal officer, appeal to the board of tax appeals within thirty days after the receipt by the subdivision of the official certificate or notice of the commission's action. In like manner, but through its clerk, the board of trustees of any * * * park district may appeal to the board of tax appeals. An appeal under this section shall be taken by the filing of a notice of appeal, either in person or by certified mail, with the board and with the commission. * * *

"The board of tax appeals, [*3] in a de novo proceeding, shall forthwith consider the matter presented to the commission, and may modify any action of the commission with reference to the budget, the estimate of revenues and balances, the allocation of library and local government support fund or the fixing of tax rates. The finding of the board of

tax appeals shall be substituted for the findings of the commission and shall be certified to the tax commissioner, the county auditor, and the taxing authority for the subdivision affected, or to the board of public library trustees affected, as the action of the commission under sections 5705.01 to 5705.47 of the Revised Code."

R.C. 5747.55 sets forth the specific requirements engrafted onto R.C. 5705.37 as to form and content of a notice of appeal to the Board of Tax Appeals from specific actions of a budget commission in the allocation of undivided local government funds and undivided local government revenue assistance funds:

"The action of the county budget commission under sections 5747.51 and 5747.62 of the Revised Code may be appealed to the board of tax appeals in the manner and with the effect provided in section 5705.37 of the Revised Code, in accordance [*4] with the following rules:

"* * *

"(C) There shall also be attached to the notice of appeal a statement showing:

"* * *

"(3) The name of each participating subdivision, * * * 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.

"* * *"

R.C. 5747.55, further limits the parties who must participate in these specific actions and may be affected by this Board's determination of such appeals:

"(D) Only the participating subdivisions named pursuant to division(C) of this section are to be considered as appellees before the board of tax appeals and no change shall, in any amount, be made in the amount allocated to participating subdivisions not appellees."

We now proceed with a review of the motions currently pending before this Board.

I. MOTION TO DISMISS FILED BY BUTLER COUNTY BUDGET COMMISSION

On February 5, 1993, the Butler County Budget Commission requested this Board dismiss that Commission as a party to this appeal. Appellee Butler County Budget Commission claims it is not an "adverse party" in this matter. However, this Board finds it improper to dismiss the Commission [*5] as a party to this appeal. Clearly, R.C. 5705.37 contemplates Butler County Budget Commission will be a necessary party, as evidenced by the requirement of filing the notice of appeal with both this Board and the Budget Commission. Moreover, the statute specifically authorizes this Board to substitute its determination for the findings of the Commission. Such action would be impossible if the Commission were not made a party to this action. City of Cincinnati v. Budget Commission of Hamilton County, et al. (May 4, 1990), B.T.A. Case No. 86-B-1289, unreported.

Accordingly, the Board of Tax Appeals finds Butler County's motion not well taken. Said motion is hereby denied.

II. MOTION FILED BY BUTLER COUNTY TO ADD ADDITIONAL PARTIES.

On March 16, 1993, this Board docketed the following motion:

"The Butler County Park Board and Board of County Commissioners, Butler County, Ohio, move this court for an order granting their leave to appeal the decision of the Butler County Budget Commission and to add additional parties to this appeal. As grounds, appellees state that if this court imposes the statutory formula, then complete relief may not be granted to appellees without [*6] including all the other political subdivisions."

It appears the Butler County Park Board, already a party appellee to this appeal, wishes to file a separate appeal to add additional parties. It further appears the Butler County Commissioners, by joining in the motion for leave to appeal or to add additional parties, wish also to become involved in the present appeal. However, the notice of appeal names Butler County as an appellee in this matter; therefore, the County Commissioners are full participants in these proceedings.

R.C. 5705.37 requires an appeal to be filed within thirty days of notice of a budget commission's findings. R.C. 5747.55 (D) limits the appellees before this Board to those subdivisions which have been named in the notice of appeal. Neither statute makes provisions for the complaining subdivision or a named appellee to expand time for filing or to add subdivisions not originally named in the notice of appeal. It appears that the Park Board and the County Commissioners

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seek to join other Butler County political subdivisions, in the nature of third party practice. n1 It is alleged if the Park Board or County received some improper allocation, over-allocation, [*7] or other impermissible benefit, then all subdivisions receiving allocations should share proportionally in any reduction. Under the statute which prescribes such appeals, this Board has no jurisdictional authority to permit the enlargement of the appeal or the addition of other parties. Moreover, the statute specifically limits any reallocation of funds to subdivisions named by the appellant.

n1 Civ. R. 14 provides for third-party practice. Although the Board adopts the Civil Rules as a guide for its proceedings, the Rules may not under any circumstances be used to enlarge its statutory jurisdiction. See, infra.

Therefore, said motion is denied.

III. MOTION FILED BY UNION TOWNSHIP FOR PARTIAL SUMMARY JUDGEMENT

On May 25, 1993, the appellant made the following motion:

"Pursuant to Civil Rule 56, Ohio Rules of Civil Procedure and the Rules of Practice of the Board of Tax Appeals, Appellant Union Township moves the Board for summary judgment on the issue of whether the Butler County Budget Commission legally adopted an alternative formula as required by Revised Code sections 5747.53 and 5747.63 to allocate the 1993 Butler County Undivided Local Government Fund and the [*8] 1993 Butler County Undivided Local Government Revenue Assistance Fund. Based upon the pleadings before the Board, Requests for Admissions filed pursuant to Rule 36, Ohio Rules of Civil Procedure, the depositions of the Budget Commission designees and the arguments set forth in the attached Memorandum in Support, there is no genuine issue of material fact on this issue, and Union Township is entitled to judgement as a matter of law."

We have reviewed the supporting documentation attached to appellant's motion as well as the memorandum in opposition to said motion filed by appellees Butler County Budget Commission and Butler County Park Board on June 21, 1993 and joined by the appellee City of Oxford on July 12, 1993. In response to said motion, this Board finds it appropriate to schedule an evidentiary hearing.

The Ohio Rules of Civil Procedure prescribe the procedure to be followed "in all courts of this state in the exercise of civil jurisdiction at law or in equity * * *." Civ. R. 1 (A). The Board of Tax Appeals is not a court in this state but rather an independent agency created pursuant to R.C. 5703.02 and possessing both quasi-judicial and administrative powers. Zangerle [*9] v. Evatt (1942), 139 Ohio St. 563. The rules of civil procedure are a guide to the proper procedure to be applied in cases before us. See Parma Bd. of Edn. v. Cuyahoga County Board of Revision (Feb. 14, 1992) B.T.A. Case No. 91-D-89, et al., unreported. Specifically, we apply the rules of civil procedure to issues of discovery. We do not, however, have available to us the summary proceedings under Civil Rule 56. Statutorily, we are required to conduct a de novo proceeding to consider the matters presented to the county budget commission and make findings thereon. R.C. 5705.37. Such motion is therefore denied.

There is, however, precedent for this Board to bifurcate evidentiary hearings where separate and distinguishable issues are presented, one of which constitutes a threshold factual and/or legal issue. The Board may first determine whether a properly promulgated alternative formula existed in Butler County. If the Board determines a defect in the promulgation of the alternative formula, the Board may then take a number of different actions, including remanding the matter to the county budget commission or holding additional hearings. See: Warren County [*10] Park District v. Warren County Budget Commission (November 18, 1988), B.T.A. Case No. 85-D-910, unreported; Windham Township, et al. v. Portage County Budget Comm., et al, (April 23, 1993), B.T.A. Case No. 88-F-10, et seq., unreported. At this juncture we find a fact finding hearing to take testimony on the promulgation of the alternative formula to be appropriate.

IV. MOTION TO DISMISS FILED BY THE CITY OF MIDDLETOWN

On May 28, 1993, the city of Middletown requested this Board dismiss the instant appeal on the ground that we lack subject matter jurisdiction. Appellee city of Middletown claims that Union Township failed to comply with R.C. 5747.55 when it did not include as appellees townships which the appellant believed received an over-allotment of undivided local government funds. Appellee claims Union Township believed that townships not named in appellant's initial appeal received overallocations, but appellant made a conscious political decision to appeal only the funds received by governmental units other than townships. However, we can find no bar to appellant's actions under R.C. 5747.55.

By way of background, in 1965, the Supreme Court determined in [*11] Brooklyn v. Cuyahoga County Budget Comm. (1965), 2 Ohio St. 2d 181, that every subdivision receiving allocations from an undivided local government fund was a necessary party to an appeal to the Board of Tax Appeals concerning an apportionment from that fund. Therefore, if all parties receiving allocations were not properly served, the Board was required to dismiss the appeal as defective. At that time, the Board had promulgated its Rule 6(3), which, as cited by the Court in Brooklyn, provided:

"'(3) If the appeal is from an allocation order made by the budget commission there shall also be attached to the notice of appeal a statement.

'* * *

"(c) Showing the name of each participating subdivision (as well as the name and address of the fiscal officer thereof) which the complaining subdivision believes received more than its proper share of the allocation; and the exact amount in dollars of such alleged over-allocation. Only such named participating subdivisions will be considered as party appellees before the Board of Tax Appeals and no change will, in any event, be made in the amount allocated to participating subdivisions not party appellees as herein provided. [*12] '"

(Emphasis added)

The Supreme Court specifically disapproved such limitation of parties as:

"* * * repugnant to our conclusion as to the operative effect of Sections 5739.25 and 5705.37, Revised Code. Those sections compel the Board, upon appeal, to determine the total allocation of a county local government fund in the place of, and as if it were, the Commission, and it follows that every subdivision entitled to participate in that fund is a necessary party to the appeal to the same extent as it is to the matter originally before the Commission."

Thereafter, the General Assembly amended R.C. 5747.55, effective in 1971, to provide for a limitation of named appellees to those subdivisions which the complaining subdivision believed received an over-allocation. In Berea City School District v. Budget Comm. (1979), 60 Ohio St. 2d 50, the Supreme Court acknowledged this legislative change:

"Consequently, no longer must an appellant to the Board of Tax Appeals in cases involving the allocation of local government funds designate each subdivision within the county as an appellee. Rather, under R.C. 5747.55, only those subdivisions which the appealing party believes were [*13] allocated an excessive share of the fund need be named as parties. The factual similarities between appeals of local fund allocations and the instant appeals lead us to conclude that the legislative rejection of Brooklyn, supra, should be acknowledged and followed in these appeals.

"* * *

"A party appealing an order of the budget commission should be required to name only those subdivisions as appellees which were allegedly allocated a disproportionate share of tax millage. If another subdivision perceives unfair hardship under this rule, that subdivision may bring its own separate appeal."

See, also, Mogadore v. Summit Cty. Budget Comm. (1987), 36 Ohio App. 3d 42.

The City of Middletown alleges that Union Township believed other townships were overallocated. We do not find such allegation, if proved, a statutory basis for dismissal of this appeal. Under R.C. 5747.55, the complaining subdivision is free to identify those subdivisions alleged to have received overallocations. Union Township has identified the parties to the appeal, as is their right. We do not find the exclusion of parties by Union Township to be a jurisdictional defect.

Based upon the [*14] foregoing, the motions made by the appellees are hereby overruled. The Board shall forthwith set an evidentiary hearing, as specified in this order and shall give notice of that hearing to the parties in its usual and customary manner.