

**IN THE SUPREME COURT OF OHIO**

**Appeal From the Ohio Board of Tax Appeals**

SOUTHSIDE COMMUNITY  
DEVELOPMENT CORPORATION,

Appellant,

v.

WILLIAM W. WILKINS, TAX  
COMMISSIONER OF OHIO,

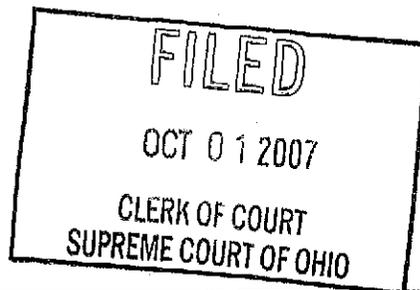
And

YOUNGSTOWN CITY SCHOOL DISTRICT

Appellees.

S. Ct. Case No. 2007-1722

Appeal from Board of Tax Appeals  
Case No. 2006-T-635



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**MOTION TO DISMISS NOTICE OF APPEAL**

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DISTRICT**

IN THE SUPREME COURT OF OHIO

Appeal From the Ohio Board of Tax Appeals

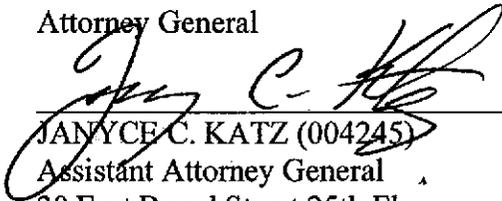
|                                 |   |                                  |
|---------------------------------|---|----------------------------------|
| SOUTHSIDE COMMUNITY             | : | S. Ct. Case No. 2007-1722        |
| DEVELOPMENT CORPORATION,        | : |                                  |
|                                 | : |                                  |
| Appellant,                      | : | Appeal from Board of Tax Appeals |
|                                 | : | Case No. 2006-T-635              |
| v.                              | : |                                  |
|                                 | : |                                  |
| WILLIAM W. WILKINS, TAX         | : |                                  |
| COMMISSIONER OF OHIO,           | : |                                  |
|                                 | : |                                  |
| and                             | : |                                  |
|                                 | : |                                  |
| YOUNGSTOWN CITY SCHOOL DISTRICT | : |                                  |
|                                 | : |                                  |
| Appellees.                      | : |                                  |

MOTION TO DISMISS NOTICE OF APPEAL

Richard A. Levin, successor to William W. Wilkins as Tax Commissioner of Ohio, moves the Ohio Supreme Court to dismiss the Notice of Appeal of Intervenor Mahoning County as there is no right of appeal from an Interim Order of the Board of Tax Appeals ("BTA"). As Mahoning County is appealing from a dismissal of a Motion to Intervene, Mahoning County is not a party under R.C. 5717.04 able to appeal an Interim Order. A Memorandum stating the law and facts follows the Motion.

Respectfully submitted,

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## MEMORANDUM

### A. An Interim Order is not a final, appealable order.

#### 1. The decision of the BTA must be final to be appealed under R.C. 5717.04.

Under Section 3(B)(2), Article IV of the Ohio Constitution, courts of appeals have "such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district." Thus, a litigant has only a statutory, not an inherent, right to appeal a BTA decision. Cf. *Avon Lake School Dist. v. Limbach* (1988), 35 Ohio St.3d 118, 119.

R.C. 5717.04 allows appeals of right to be taken to the Ohio Supreme Court or to an appellate court from a decision of the Board of Tax Appeals ("BTA"). The language, in pertinent part, reads as follows: "[a]ppeals from decisions of the board determining appeals from final determinations by the tax commissioner \* \* \* may be instituted \* \* \*"

There are no published cases from this Court discussing the appealability of the BTA's dismissal of a motion to intervene in a charitable tax exemption case. This Court has not set forth a definition of the phrase in R.C. 5717.04 "appeals from decisions of the board determining appeals from final determinations by the tax commissioner."

However, this Court defined a final decree over one hundred years ago in a manner still pertinent to appeals under R.C. 5717.04. A final decree (or final decision) is "one which determines and disposes of the whole merits of the cause before the court or a branch of the cause which is separate and distinct from the other parts of the case, reserving no further questions or directions for future determination: so that it will not be necessary to bring the cause or that separate branch of the cause again before the court for further decision." *Teaff v. Hewitt*

(1853), 1 Ohio St. 511. The concept of “final orders” is founded on the principle that “the court making an order which is not final is thereby retaining jurisdiction for further proceedings.” *Lantsberry v. Tilley Lamp Co.* (1971), 27 Ohio St.2d 303, 306.

As applied to the wording in R.C. 5717.04, a final decree or final decision would be a decision that ended an appeal. Where a case concerns a charitable tax exemption application, the appeal to the BTA would end when it was no longer possible to determine whether the Tax Commissioner had legally and lawfully made a decision as to the exempt status of the property or the BTA had either affirmed or overturned a decision of the Tax Commissioner.

In contrast to the BTA decisions that determine appeals, which R.C. 5717.04 clearly states can be appealed, Ohio Adm. Code 5717-01-10 defines an interim order that the BTA issues as limited in scope and thereby not “final.” Ohio Adm. Code 5717-01-10(A) permits the BTA to delegate to hearing examiners the ability to issue interim procedural orders “on all motions or other pleadings which do not terminate the appeals and may include, but not be limited to, motions to consolidate, to compel discovery, and for sanctions.” (emphasis added). A BTA-issued interim order does not terminate the appeal and is, therefore, not “determining appeals.” Therefore, an interim order only ends a particular issue, not the appeal. As a result, an interim order as permitted under Ohio Adm. Code 5717-01-10 is not an appealable decision under R.C. 5717.04.

Ohio Adm. Code 5717-01-10 does allow for reconsideration by the BTA, so that there is a further administrative process before the BTA after the BTA issues an interim order. When moved to reconsider an interim order, the BTA has the power to modify or reverse it.

Mahoning County moved to intervene in the case titled *Southside Community Development Corporation v. William Wilkins* on June 25, 2007. In an Interim Order dated

August 27, 2007, the BTA denied Mahoning County's Motion to Intervene. The Interim Order did not terminate the case before the BTA into which Mahoning County moved to intervene<sup>1</sup>. That case will proceed once the stay is lifted.

Mahoning County chose not to file a Motion for Reconsideration and, therefore, decided not to use the further administrative proceeding. Instead, Mahoning County appealed to this Court from the Interim Order.

As noted above, an interim order under Ohio Adm. Code 5717-1-10 is not a final order. An interim order is not to terminate an appeal. R.C. 5717.04 only allows appeals from final orders. Mahoning County did not appeal from a decision that terminated the appeal at the BTA. It appealed from an Interim Order, something that the statute does not permit. Cf. *Avon Lake School Dist. v. Limbach*, 35 Ohio St.3d. at 119.

The requirements of Chapter 5717 are jurisdictional; failure to comply with its provisions mandates dismissal of the taxpayer's appeal. *Board of Education v. Board of Revision* (1980), 61 Ohio St. 2d 332; *American Restaurant & Lunch Co. v. Glander* (1946), 147 Ohio St. 147. A decision of the BTA must be final to be appealed under R.C. 5717.04. As an interim order is, by definition, not a final, appealable decision, this Court should dismiss Mahoning County's Notice of Appeal from the BTA's August 27, 2007 Interim Order.

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<sup>1</sup> The BTA correctly encouraged Mahoning County to file an amicus brief as the BTA's hearing is de novo and, for that reason, the BTA is "always receptive to the citation of additional authority that may be germane to the issues raised in an appeal." (Interim Order at 6).

**2. Mahoning County did not own the property in question or have a fee interest in it at the time its previous owner filed for a charitable exemption from taxation. For that reason, the Interim Order dismissing Mahoning County's Motion to Intervene would not qualify as a final order under R.C. 2505.03, even if the statute permitting an appeal from the BTA, R.C. 5717.04 permitted the appeal of interim orders.**

R.C. 5717.04 sets forth the parameters under which an appeal may be taken from a decision of the BTA. As noted above, it limits appeals to "[a]ppeals from decisions of the board determining appeals from final determinations by the tax commissioner." In general, the statute permitting only appeals of final orders/decisions from the BTA comports with R.C. 2505.03(A) that limits the appellate jurisdiction of courts of appeals to the review of final orders, judgments, or decrees. Thus, the General Assembly has not provided either the opportunity to appeal from an interim order of the BTA nor has it created a forum in which an appeal from an interrogatory appeal could be heard.

However, the General Assembly in Chapter 2505 has granted appellate courts the jurisdiction to hear appeals from interlocutory orders under certain limited circumstances. An order styled as interlocutory is treated as a final appealable order if it "affects a substantial right in an action that in effect determines the action and prevents a judgment<sup>2</sup>." R.C. 2505.02(B)(1). R.C. 2505.02(A)(1) defines a "substantial right" as "a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect."

The definition of "substantial right" in R.C. 2505.02(A)(1) evolved out of older decisions of this Court. In the seminal case of *Armstrong v. Herancourt Brewing Co.* (1895), 53 Ohio St.

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<sup>2</sup> R.C. 2505.02(B) sets forth two other means of determining if an order styled as an interlocutory order is, in reality, a final decision – if the order affecting the substantial right was made in a special proceeding or if the order vacates or sets aside a judgment or grants a new trial. Neither of these are applicable. There was no "special proceeding" and the order did not vacate or set aside a judgment or grant a new trial.

467, this Court defined a substantial right as one that involved the idea of a legal right, that is, a right enforced and protected by law. *Id.* at 480. Thus, if the law does not recognize the right claimed, the right is not “substantial” for purposes of the order addressing it. *Id.* at 480-481.

For the year in which the Application for Exemption was filed, Mahoning County was not the owner of the property<sup>3</sup>. Under R.C. 5715.27(A), only the owner of property is qualified to file the Application for Exemption. See, *Performing Arts School of Metro. Toledo, Inc. v. Wilkins*, 104 Ohio St.3d 284, 2004-Ohio-6389. Further, Mahoning County was not the owner of the property during the years prior to the filing of the application for exemption. (BTA Interim Order at 3-5). Mahoning County, in its motion to intervene, admits that it did not become the owner of the property until July 27, 2006. The date Mahoning County obtained the property was more than three months after April 7, 2006, the date the Tax Commissioner had issued his Final Determination. It was also after the Notice of Appeal to the BTA from the Final Determination of the Tax Commissioner had been filed.

This case involved an application for a charitable exemption filed by then owner Southside Community Development Corporation. To receive the charitable application, the owner had to prove that the owner’s use of the property was charitable. Mahoning County had no legal standing to file an application for exemption on the property prior to owning it and was not the owner, able to prove that his use of the property qualified as charitable under the law.

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<sup>3</sup> The county auditor is to correct his list annually, adding “the items of property which have been exempted during the year and \* \* \* striking therefrom the items which in the opinion of the auditor have lost their right of exemption and which have been reentered on the taxable list.” R.C. 5713.08(A). Thus, while there is no statute permitting Mahoning County to apply for a charitable exemption for those years prior to its purchase of the property, Mahoning County could have applied for an exemption once it had an ownership interest in the property for the time it owned the property. The exemption would not relate back to the time Mahoning County owned the property, as only the owner can apply for exemption under R.C. 5715.27(A).

Mahoning County lacked standing to be a party. Further, Mahoning County had no legal ownership interest in the property either at the time the Tax Commissioner issued the Final Determination or at the time the Final Determination could be appealed to the BTA. As the BTA pointed out in its Interim Order, Mahoning County, therefore, had no legal right to be part of the application process during the time before it owned the property and was neither a statutory nor necessary party. (Order at 6). For that reason, no “substantial right” of Mahoning County was affected when the BTA denied it intervention.

Without the violation of a substantial right, the Interim Order could not be considered final and thereby appealable under R.C. 2505.02. For this reason also, the Supreme Court should dismiss Mahoning County’s Notice of Appeal.

**B. Mahoning County doesn’t qualify as a party for purposes of an appeal under R.C. 5717.04.**

If the fact that Mahoning County appealed from an Interim Order rather than a final decision is not sufficient basis for this Court to dismiss the appeal, there is a further reason. Mahoning County, a non party to the appeal, seeking by motion to intervene in the BTA proceeding, would not qualify to appeal a decision from the BTA to a court of appeals or the Supreme Court under R.C. 5717.04. That statute clearly states that appeals “may be instituted by any of the persons who were parties to the appeal or application before the board, by any persons to whom the decision of the board appealed from was by law required to be certified, or by any other person to whom the board certified the decision appealed from, as authorized by section 5717.03 of the Revised Code.” As noted above, Mahoning County had no ownership interest in the property until after the Notice of Appeal to the BTA had been filed. Therefore, Mahoning

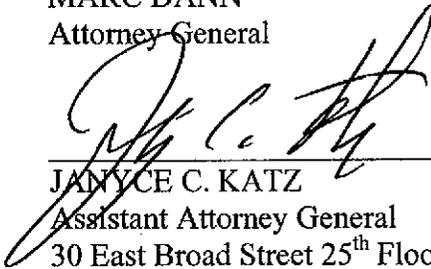
County was not a party to the appeal or to the application before the board. Mahoning County is, therefore, not a "person" with a right to appeal to the Supreme Court from its Motion to Intervene in this BTA hearing under R.C. 5717.04.

### CONCLUSION

For all the above reasons, this Court should dismiss the Notice of Appeal filed by Mahoning County.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Motion to Dismiss was sent by regular U.S. mail to Andrew W. Suhar, Suhar & Macejko, LLC, 1101 Metropolitan Tower, P. O. box 1497, Youngstown, Ohio 44501-1497, attorney for appellant, Linette M. Stratford and Karen Markulin Gaglione, Mahoning County Prosecutor's Office, 21 West Boardman Street, 6<sup>th</sup> Floor, Youngstown, Ohio 44503, attorneys for Mahoning County, and Jackie Lynn Hager, Martin Hughes & Associates, 1550 East Wilson Bridge Road, Suite 300, Worthington, Ohio 43085, attorney for Youngstown City School District Board of Education, on this 15<sup>th</sup> day of October, 2007.

  
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JANCYE C. KATZ  
Assistant Attorney General