

IN THE SUPREME COURT OF OHIO

Southside Community Development Corporation  
Appellant,  
v.  
William W. Wilkins,  
Tax Commissioner of Ohio  
and  
Youngstown City School District  
Board of Education  
Appellees.

S. Ct. Case No. 2007-1722  
Appeal from the Ohio  
Board of Tax Appeals  
Case No. 2006-T-635  
(DTE Case No. KE4096)

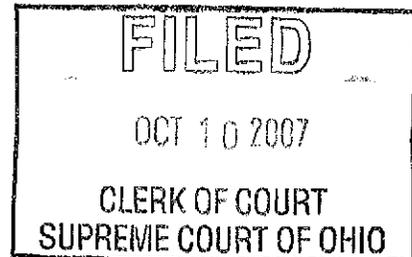
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MAHONING COUNTY'S MEMORANDUM IN OPPOSITION TO  
APPELLEE'S MOTION TO DISMISS

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## MEMORANDUM

### INTRODUCTION AND BACKGROUND

Now comes Mahoning County, by and through the undersigned counsel, and submits its Memorandum in Opposition to Appellee Richard A. Levin's (successor to William W. Wilkins as Tax Commissioner of Ohio) Motion to Dismiss the Notice of Appeal of Intervenor Mahoning County ("Motion").

Mahoning County timely appealed the final Decision and Order (the "Order") of the Ohio Board of Tax Appeals (the "Board"), dated August 24, 2007, which denied Mahoning County's Motion to Intervene in Case No. 2006-T-635 (the "Action"). The Action is an appeal from a Final Determination by the Tax Commissioner, dated April 7, 2006, concerning the exemption status of several parcels of real property located in Mahoning County (the "Property").

The named Appellant in the Action is Southside Community Development Corporation ("SCDC"), the original owner of the Property. During the time it owned the Property, SCDC filed an Application for Exemption from Real Property Tax ("Application"). The Tax Commissioner ruled upon that Application in April of 2007. In the interim, however, SCDC filed for bankruptcy and the Property became an asset of the bankruptcy estate. After the Tax Commissioner issued his Final Determination, the Trustee for the bankruptcy estate, Attorney Andrew Suhar, perfected an appeal from that determination. Only July, 27, 2006, the bankruptcy court approved the sale of the Property to Mahoning County, subject to any taxes. A deed was properly recorded and title vested in Mahoning County.

In his Motion, the Tax Commissioner argues that Mahoning County's Appeal should be dismissed because (1) the Decision and Order ("Order") of the Ohio Board of Tax Appeals ("Board"), dated August 24, 2007, is an interim order; (2) the Board's Order is not final and

appealable under Ohio Revised Code Section 2505.02; and (3) Mahoning County does not have the right to bring an appeal before this Court. For the following reasons, Mahoning County respectfully requests that this Court deny Appellee's Motion.

## LAW AND ARGUMENT

### **I. The Board's Order is Final and Appealable**

The Board's Order is Final and Appealable under Ohio law. Ohio Administrative Code Section 5717-1-10, governing interim procedural orders, does not bar this appeal. Furthermore, Ohio Revised Code §2505.02 applies and the statute accords this Court the power to review this appeal.

#### **A. *The Board's Order is a Final Decree***

As Appellee correctly states, this Court has defined a final order as "one which determines and disposes of the whole merits of the cause ... 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 . . ." *Teaff v. Hewitt* (1853), 1 Ohio St. 511. The instant Appeal fits squarely within this definition.

Appellee argues that Ohio Administrative Code Section 5717-1-10 dictates that the Board's Order was an interim order and, thus, not final. Motion, page 2. Section 5717-1-10, however, merely authorizes the Board to delegate to hearing examiners the power to issue "interim procedural orders." Ohio Admin. Code §5717-1-10. The clause "which do not terminate the appeals," modifies the *type* of orders attorney examiners may issue. *Id.* Nothing in the Section provides that an order denying a Motion to Intervene is an interim order. In fact, the section does not define the term "interim order" at all. Black's Law Dictionary defines the term

as “A temporary ... decree that takes effect until something else occurs.” Black’s Law Dictionary (7th Ed. 2000) 899.

The Order issued by the Board in this case was not temporary in nature. Rather, it completely and finally determined whether Mahoning County could intervene in the Action such that Mahoning County’s cause (the request for intervention) is completely disposed. The Board reserved no jurisdiction as to Mahoning County’s Motion to Intervene for future determination. Upon issuing the Order, the Board effectively ended Mahoning County’s meaningful participation in the Action. (Indeed, even if Mahoning County moved the Board for reconsideration, such a motion would not have continued the then impending hearing, and final evidentiary forum, during which the Board would have heard arguments regarding the exempt status of the Property. Ohio Admin. Code §5717-1-10.)

Since the Order permanently barred Mahoning County from intervening as a real party in interest in the Action, it is not an interim order, but a final decree subject to appeal.

**B. *The Board’s Order is a Final Order Under Ohio Revised Code Section 2505.02***

Ohio Revised Code §2505.02 provides that an order is final and may be reviewed when it “affects a substantial right in an action that in effect determines the action and prevents a judgment” or “grants or denies a provisional remedy” that (1) “determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy” and (2) negates a “meaningful or effective remedy by an appeal following final judgment...” R.C. §2505.02(B)(1), (4). A substantial right is 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.” R.C. §2505.02(A)(1). Additionally, the term “provisional remedy” denotes a “proceeding ancillary to an action.” R.C. §2505.02(A)(3).

In this case, the Board's Order unquestionably affects a substantial right of Mahoning County. Mahoning County is the current title owner and taxpayer for the Property. Under the taxation scheme of Ohio, real property taxes "run with the land" and attach to the real property itself. *Southern Ohio Savings Bank & Trust Co. v. Bolce* (1956), 165 Ohio St. 201, 209, 135 N.E.2d 382. Said taxes become a direct and specific lien on the real property and those liens underlie the owner's interest therein. *Id.* Moreover, according to this Court, a determination that property is taxable affects the substantial rights of the taxpayer. *Pittsburgh Steel Company v. Bowers* (1961), 172 Ohio St. 14, 173 N.E.2d 361. Therefore, Mahoning County has the real and substantial right and interest in the proceedings and outcome of the Action.

Appellee puts great emphasis on the fact that, at the time that SCDC filed the Application, Mahoning County was not the owner of the Property. Motion, page 5. Such emphasis is misplaced. It is true that, when SCDC filed the Application in December of 2004, it was the sole owner of the Property at issue in the Action. Mahoning County concedes that, in December 2004, it could no more intrude upon the Application proceedings than Mr. Richard A. Levin (then *not* successor to Mr. William W. Wilkins) could assert rights as Tax Commissioner. However, now, and since July 27, 2006, Mahoning County is not a random disinterested third party seeking to interfere in the Board's proceedings. Mahoning County is the successor to Southside Community Development Center (and real party in interest to the Action), just as Mr. Richard A. Levin is the successor to Mr. William W. Wilkins.

During the application process, SCDC maintained, as Mahoning County does now, that the Property was used for exempt purposes and should not be subject to real property tax. Now that the Property has been sold to Mahoning County by Southside Community Development Corporation, only Mahoning County has an interest in the determination of whether the real

property is taxed as the tax liens thereon would be the obligation of Mahoning County. See *Cleveland v. Limbach* (1992), 78 Ohio App.3d 189, 190, 604 N.E.2d 209 (confirming decision to remand to Board of Tax Appeals and substitute city for county when city gained title to subject real estate *after* county filed an application for exemption for real property and appealed the decision of the tax commissioner). Notwithstanding the Board's suggestion that Mahoning County file an amicus brief, an order affecting substantial rights of an appellant is reviewable by this Court when a tribunal accords the party a status less than that of a party to the action. *Morris v. Investment Life Ins. Co. of America* (1966), 6 Ohio St.2d 185, 188, 217 N.E.2d 202.

Furthermore, since the Board's Order denied a provisional remedy, Ohio Revised Code §2505.02(B)(4) applies. Specifically, the Order determined an action and prevented a judgment therein in favor of Mahoning County with respect to its request to intervene in order to represent its interests in the Property. Such denial destroys any meaningful or effective remedy by an appeal following the Board's final judgment regarding the Property. See *Boedeker v. Rogers* (2000), 140 Ohio App.3d 11, 18, 746 N.E.2d 625 (holding order denying motion for substitution denied a provisional remedy for which no meaningful relief could be provided pending close of all proceedings). The Board's Order disallowing Mahoning County to intervene as a real party in interest entirely prevents Mahoning County from joining the Action. This eliminates any remedy for Mahoning County because it is the only owner and only party to bear the burden of any taxes determined in the above-referenced case, yet it has no medium for representation in the Action.

Therefore, the Board's Order is final pursuant to both statutory and common law.

## **II. Mahoning County may institute an appeal under R.C. §5717.04.**

Ohio Revised Code Section 5717.04 provides, in pertinent part, that:

Appeals from decisions of the Board of Tax Appeals determining appeal from final determinations by the Tax Commissioner of any . . . determinations, findings, computations, or orders made by the Commissioner *may be instituted by . . . the person in whose name the property is listed* or . . . if the decision appealed from determines the valuation or liability of property for taxation and if any such person was not a party to the appeal or application before the Board, *by the taxpayer or any other person to whom the decision of the Board appealed from was by law required to be certified* . . . Appeals from decisions of the Board upon all other appeals or applications filed with and determined by the Board may be instituted 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.

R.C. §5717.04 (emphasis added).

Ohio Revised Code §5717.03 requires the Board certify its Order to the listed property owner and the taxpayer, among other parties. R.C. §5717.03. Thus, the Board of Tax Appeals was required by law to certify its Order to Mahoning County as the taxpayer and the “person” in whose name the property is listed. R.C. §§5717.03, 5717.04.

Mahoning County became the taxpayer and listed property owner on or about July 27, 2007. The Board entered its decision on August 24, 2007. It certified a copy of its Order to Mahoning County.

Therefore, Mahoning County qualifies as a person who may institute an appeal under Ohio Revised Code §5717.04 in at least two respects.

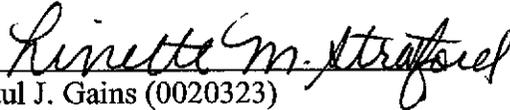
### CONCLUSION

Mahoning County properly appealed the Board’s final Order to this Court. The Order permanently affects a substantial interest of Mahoning County and denies a provisional remedy. Therefore, the Order is final and review by this Court is proper. As such, Mahoning County respectfully requests that this Court deny Appellee’s Motion to Dismiss Notice of Appeal.

Respectfully submitted,



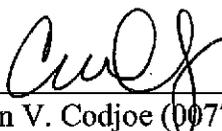
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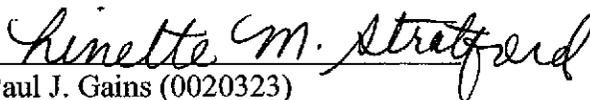
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Certificate of Service

I hereby certify that a true and accurate copy of this Memorandum in Opposition to Appellee's Motion to Dismiss Mahoning County's Notice of Appeal was served via ordinary mail to counsel for Appellee William W. Wilkins, Tax Commissioner of Ohio, **Marc Dann**, Attorney General of Ohio, and **Janyce C. Katz**, Assistant Attorney General, State Office Tower, 25<sup>th</sup> Floor, 30 E. Broad Street, Columbus, Ohio 43215-3428; counsel for Appellee Youngstown City School District Board of Education, **Martin Hughes & Associates, LPA**, **Jackie Lynn Hager**, 150 E. Wilson Bridge Road, Suite 300, Worthington, Ohio 43085-2326; and, counsel for Appellant, Southside Community Development Corporation, **Suhar & Macejko, LLC**, **Andrew W. Suhar**, 1101 Metropolitan Tower, P.O. Box 1497, Youngstown, OH 44501, this 9<sup>th</sup> day of October, 2007.



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