

ORIGINAL

IN THE SUPREME COURT OF OHIO

CITY OF ELYRIA, <i>et al.</i> ,	:	Case No. 10-0564
	:	
Appellants/Cross-Appellees,	:	On Appeal from the Board of Tax Appeals
	:	Case No. 2003-M-1533
vs.	:	Case No. 2004-M-1166
	:	Case No. 2005-M-1301
LORAIN COUNTY BUDGET COMM.,	:	
<i>et al.</i> ,	:	
	:	
Appellees/Cross-Appellants.	:	

APPELLANTS' MOTION FOR RECONSIDERATION OF
PARAGRAPH 24 OF THE COURT'S OPINION AND ORDER
ENTERED ON APRIL 5, 2011

ERIC H. ZAGRANS (0013108)
(Counsel of Record)
ZAGRANS LAW FIRM LLC
474 Overbrook Road
Elyria, Ohio 44035
(440) 452-7100 (telephone)
eric@zagrans.com (e-mail)

*Counsel for the City of North
Ridgeville, Ohio*

WILLIAM J. KERNER (0006853)
LAW DIRECTOR FOR THE CITY OF AVON LAKE
150 Avon Belden Road
Avon Lake, Ohio 44012
(440) 930-4122 (telephone)
wkerner@avonlake.org (e-mail)

Counsel for City of Avon Lake, Ohio

TERRY S. SHILLING (0018763)
(Counsel of Record)
MICHELLE D. NEDWICK (0061790)
LAW DIRECTOR FOR THE CITY OF ELYRIA, OHIO
Elyria City Hall
131 Court Street, #201
Elyria, Ohio 44035
(440) 326-1464 (telephone)
tshilling@cityofelyria.org (e-mail)

*Counsel for the City of Elyria, Ohio, and
Amherst Township, Ohio*

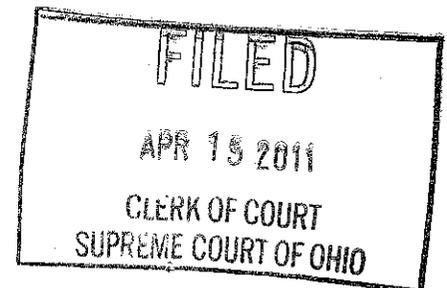


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INTRODUCTION

On April 5, 2011, the Court issued its merit decision in this case affirming the rulings of the Board of Tax Appeals in all respects. *Elyria v. Lorain Cty. Budget Comm.*, Slip Opinion No. 2011-Ohio-1482. The final issue addressed by the Court was Appellants' contention that the Board of Tax Appeals erred in failing to consider the fact that the municipal population of Lorain County had exceeded 81% by 2005, and therefore Appellants' allocations of Local Government Funds for the 2006 distribution year should have reflected that fact. If so, the County's share of such funds would have decreased for the 2006 distribution year from 48.302% to 30% by statute, and Appellants would have shared proportionately in the 18.302% increase in the allocations for the remaining subdivisions.

The Court overruled Appellants' argument on the grounds that they had failed to raise the issue in the Board of Tax Appeals prior to the filing of their Reply Brief before the Board:

Finally, while the four political subdivisions contend that the BTA should have considered their argument that the county received more than its proper share of the 2006 distribution because the municipal population of Lorain County had surpassed 81 percent of the total population, they failed to raise this issue in their initial merit brief on remand from this court and waited until their reply brief to present this issue to the BTA. As we explained in *HealthSouth Corp. v. Levin*, 121 Ohio St.3d 282, 2009-Ohio-584, 903 N.E.2d 1179, "the omission of an argument from a party's brief may be deemed to waive that argument," and the BTA therefore did not commit reversible error when it declined to address this belated argument. *Id.* at ¶ 18, fn. 2, citing *E. Liverpool v. Columbiana Cty. Budget Comm.*, 116 Ohio St.3d 1201, 2007-Ohio-5505, 876 N.E.2d 575, ¶ 3; see also *State ex rel. Grounds v. Hocking Cty. Bd. of Elections*, 117 Ohio St.3d 116, 2008-Ohio-566, 881 N.E.2d 1252, ¶ 24 (tribunal need not address an argument raised for the first time in a reply brief).

Elyria v. Lorain Cty. Budget Comm., Slip Opinion No. 2011-Ohio-1482, ¶ 24. Appellants do not seek reconsideration of the Court's legal conclusions or the precedents on which it relies in so ruling. However, in its ruling, the Court may have been relying on a *factual* misapprehension

regarding the procedural history of the 81% issue, which was limited to only one of the three distribution years, before the Board of Tax Appeals. It is on this issue alone and exclusively on this basis that Appellants respectfully seek the Court to reconsider its decision set forth at Paragraph 24 of the Slip Opinion.

LAW AND ARGUMENT

I. The Court May Have Decided this Case Under a Misapprehension Regarding the Procedural Facts and History Before the Board of Tax Appeals.

Appellants raised the issue that, during 2005, the municipal population of Lorain County had exceeded 81% of the County population when they filed their original Notice of Appeal in the Board of Tax Appeals for the 2006 distribution year. *See* Notice of Appeal, ¶¶ 4(k) and 8, and ¶ (f) of the requests for relief, from the decision of the Lorain County Budget Commission for the 2006 distribution year, filed with the Board of Tax Appeals on or about September 22, 2005, Case No. 2005-M-1301, attached hereto as Exhibit “A” and incorporated by reference herein (the “2006 Appeal”).

Appellants had previously filed notices of appeal for distribution years 2003/2004 (Case No. 2003-M-1533) and 2005 (Case No. 2004-M-1166), so the 2006 Appeal was the third appeal brought before the Board arising out of the same series of events with identical issues (except for the 81% issue) and the third notice of appeal filed with the Board.

The Board decided to hear the 2003/2004 case (Case No. 2003-M-1533) first and then decided to bifurcate the issues to be addressed at the hearing on that appeal held before the Board on January 18, 2006. *See* the Board’s Bifurcation Order entered June 17, 2005, attached hereto as Exhibit “B” and incorporated by reference herein. Obviously, the 81% issue was not addressed at the hearing, no evidence was introduced regarding the issue since it was not relevant to those earlier years, and it played no part in the Board’s dismissal of the 2003/2004 appeal on

jurisdictional grounds. Promptly following that ruling, the Board dismissed the 2005 and 2006 appeals on the same basis.

After this Court reversed the jurisdictional ruling by the Board and issued very specific remand instructions and directions for the Board to follow, *see City of Elyria v. Lorain County Budget Comm.*, 117 Ohio St.3d 403, 2008-Ohio-940, ***the Board did not ask the parties to submit additional briefs on the merits.*** It had already held an evidentiary hearing and had received the parties' merits arguments prior to its dismissal of all of the appeals on jurisdictional grounds. Of course, the merits issues presented concerned the 2003/2004 appeal, Case No. 2003-M-1533, only. The Board never furnished the parties the opportunity to address the separate 81% issue raised in and relevant to only the 2006 Appeal. Instead, on remand from this Court, the Board issued an Order indicating that, based on the state of the record and the arguments already submitted, the Board considered the issues "ripe for decision," and directed the parties (if they chose to do so) to submit their views only as to the correct understanding and interpretation of the Court's remand instructions:

Given the state of the record, which includes "Stipulations of Fact" filed January 18, 2006 and legal argument, ***the board concludes that the matter is ripe for decision. Should the parties wish to provide the board with argument regarding the Ohio Supreme Court's instructions upon remand, briefs may be provided*** by the following dates:

Appellants' briefs will be due October 16, 2009
Appellees' briefs will be due November 13, 2009
Reply briefs, if any, will be due December 4, 2009

See Order Setting Briefing Schedule entered on September 15, 2009, at 4 (emphasis supplied), attached hereto as Exhibit "C" and incorporated by reference herein.

As indicated above, this was not a request for merits briefing, as the foregoing quote clearly indicates. Indeed, the submission of briefs, limited to the Court's "instructions upon

remand,” was entirely discretionary with the parties. Appellants did not have to file any brief at all. Appellants chose to file a brief indicating their understanding of the Court’s remand instructions. That brief addressed only the issues common to all three appeals affected by the Court’s remand instructions because that is what the Board’s Order specified. When Appellees filed their brief a month later, they raised merits issues going beyond the topic of the Court’s remand instructions, and that is why Appellants raised merits issues, including but not limited to the 81% issue, in their Reply Brief. But the Board specifically indicated in its September 15, 2009 Order that briefing on merits issues was entirely unnecessary.

The Board then decided the issues common to the three appeals, ruling in favor of Appellants on the issue affecting the 2003 distribution year based on the lump sum settlement amount, and adverse to Appellants on the alternative formula issues affecting the 2004, 2005 and 2006 distribution years in an identical fashion. But it never addressed the separate and distinct 81% issue that involved the 2006 distribution year only. Given the procedural history of the case, the Board never gave Appellants the opportunity to present evidence and legal arguments on that particular claim – only on the claims affecting all three years identically.

The cases on which the Court’s opinion at ¶ 24 relies are all based on a party’s complete omission of an argument or assignment of error in its original briefing, thus potentially prejudicing the opposing party when the issue is raised for the first time in a reply brief to which the opponent has no opportunity to respond. That was emphatically not the situation here. Appellants had raised the 81% issue in their Notice of Appeal for the 2006 Appeal. They never had another chance to address it. They did not address it in the remand brief to the Board because they understood the Board to be requesting the parties’ views on the Court’s remand instructions only. The Court should not put Appellants in a worse position than they would have been in if they had submitted no briefs with the Board in late 2009 at all. In that circumstance,

where the Board did not allow an opportunity for further hearing, evidence or argument, Appellants should be permitted to raise those omissions as error in this Court.

Unlike the procedural situation in the case law cited by the Court, Appellants played no “games” here with the Board or the opposing parties. There was no attempt to hide the ball or “put something over” on anyone. Nor was the issue somehow “mislaidd” and remembered only belatedly. Instead, Appellants have shown above a legitimate, reasonable and good-faith basis for how and why the issue was treated the way it was in this appeal.

The 81% issue potentially affects the allocation of hundreds of thousands of dollars in Local Government Funds. Appellants respectfully submit that the factual circumstances and procedural histories in the *HealthSouth*, *East Liverpool* and *Hocking County* cases are completely distinguishable, and that the Court should reconsider the application of those precedents to the facts of this case.

CONCLUSION

Accordingly, for the foregoing reasons, Appellants respectfully move the Court to reconsider Paragraph 24 of its decision in this case and, upon reconsideration, vacate Paragraph 24 of the decision, and remand the 81% issue with respect to the 2006 Appeal to the Board for proceedings for the first time on the merits of that issue.

Respectfully submitted,

Eric H. Zagrans (0013108)
(Counsel of Record)
ZAGRANS LAW FIRM LLC
474 Overbrook Road
Elyria, Ohio 44035
(440) 452-7100 (telephone)
eric@zagrans.com (e-mail)

*Counsel for Appellant, City of North Ridgeville,
Ohio*

Terry S. Shilling (0018763)
(Counsel of Record)
Michelle D. Nedwick (0061790)
LAW DIRECTOR FOR THE CITY OF ELYRIA, OHIO
Elyria City Hall
131 Court Street, #201
Elyria, Ohio 44035
(440) 326-1464 (telephone)
tshilling@cityofelyria.org (e-mail)

*Counsel for the City of Elyria, Ohio, and
Amherst Township, Ohio*

William J. Kerner (0006853)
LAW DIRECTOR FOR THE CITY OF AVON LAKE
150 Avon Belden Road
Avon Lake, Ohio 44012
(440) 930-4122 (telephone)
wkerner@avonlake.org (e-mail)

Counsel for City of Avon Lake, Ohio

CERTIFICATE OF SERVICE

I hereby certify that I have served a true copy of the foregoing Appellants' Motion for Reconsideration of Paragraph 24 of the Court's Opinion and Order Entered on April 5, 2011 on all counsel of record this 15th day of April, 2011.


Eric H. Zagrans

September 22, 2005

BOARD OF TAX APPEALS
STATE OF OHIO

CITY OF ELYRIA, OHIO
Thaddeus Pileski, Auditor
131 Court Street
Elyria, Ohio 44035

CASE NO.

and

CITY OF NORTH RIDGEVILLE, OHIO
Chris Costin, Auditor
7307 Avon Belden Road
North Ridgeville, Ohio 44039

(BUDGET COMM. - LGF/RAF)

and

CITY OF AVON LAKE, OHIO
Joseph Newlin, Finance Director
150 Avon Belden Road
Avon Lake, Ohio 44012

NOTICE OF APPEAL

and

AMHERST TOWNSHIP, OHIO
John Koval, Clerk
7530 Oberlin Road
Elyria, Ohio 44035

and

LORAIN COUNTY METROPOLITAN
PARK DISTRICT
Denise Gfell, Treasurer
12882 Diagonal Road
LaGrange, Ohio 44050

Appellants

vs.



LORAIN COUNTY BUDGET
COMMISSION

Mark R. Stewart, Member and Secretary
226 Middle Avenue
Elyria, Ohio 44035

and

LORAIN COUNTY, OHIO

Mark R. Stewart, Auditor
226 Middle Avenue
Elyria, Ohio 44035

and

BOARD OF COUNTY COMMISSION-
ERS OF LORAIN COUNTY, OHIO

226 Middle Avenue
Elyria, Ohio 44035

and

CITY OF AMHERST

David C. Kukucka, Auditor
480 Park Avenue
Amherst, Ohio 44001

and

CITY OF AVON

Robert Hamilton, Finance Director
36080 Chester Road
Avon, Ohio 44011

and

CITY OF LORAIN

Ron L. Mantini, Auditor
200 West Erie Avenue, 6th Floor
Lorain, Ohio 44052-1647

and

CITY OF OBERLIN

Salvatore Talarico, City Auditor
69 S. Main Street
Oberlin, Ohio 44074

and

CITY OF SHEFFIELD LAKE

Tamara L. Smith, Finance Director
609 Harris Road
Sheffield Lake, Ohio 44054

and

CITY OF VERMILION

Laurence Rush, Finance Director
5511 Liberty Avenue
Vermilion, Ohio 44089

and

GRAFTON VILLAGE

Linda S. Bales, Clerk-Treasurer
960 Main Street
Grafton, Ohio 44044

and

KIPTON VILLAGE

Albert Buck, Jr., Clerk-Treasurer
P. O. Box 177
Kipton, Ohio 44049

and

LAGRANGE VILLAGE

Rita K. Ruot, Clerk-Treasurer
P.O. Box 597
LaGrange, Ohio Ohio 44050

and

ROCHESTER VILLAGE

Laura A. Brady, Clerk
52185 Griggs Road
Wellington, Ohio 44090

and

SHEFFIELD VILLAGE

Tamara L. Smith, Finance Director
609 Harris Road
Sheffield Lake, Ohio 44054

and

SOUTH AMHERST VILLAGE

Janice J. Szmania, Clerk-Treasurer
103 West Main Street
South Amherst, Ohio 44001

and

WELLINGTON VILLAGE

Karen J. Webb, Clerk-Treasurer
115 Willard Memorial Square
Wellington, Ohio 44090

and

BRIGHTON TOWNSHIP

Marilyn McClellan, Clerk of Council
19996 Baird Road
Wellington, Ohio 44090

and

BROWNHELM TOWNSHIP

Marsha Doane Funk, Clerk
1940 North Ridge Road
Vermilion, Ohio 44089

and

CAMDEN TOWNSHIP
Cheryl Parrish, Clerk of Council
15374 Baird Road
Oberlin, Ohio 44074

and

CARLISLE TOWNSHIP
Barb VanMeter, Clerk
40835 Banks Road
LaGrange, Ohio 44050

and

COLUMBIA TOWNSHIP
Mary Lou Berger, Clerk of Council/Clerk
25496 Royaltan Road, P.O. Box 819
Columbia Station, Ohio 44028

and

EATON TOWNSHIP
Linda Spitzer, Clerk of Council/Clerk
12043 Avon Belden Road
Grafton, Ohio 44044

and

ELYRIA TOWNSHIP
Barbara Baker, Clerk of Council/Clerk
41835 Earlene Court
Elyria, Ohio 44035

and

GRAFTON TOWNSHIP
Mary Rose Dangelo, Clerk of Council/Clerk
17109 Avon Belden Road
Grafton, Ohio 44044

and

ROCHESTER TOWNSHIP:

Laura Brady, Clerk of Council/Clerk
52185 Griggs Road
Wellington, Ohio 44090

and

SHEFFIELD TOWNSHIP

Patricia F. Echko, Clerk of Council/Clerk
5166 Clinton Avenue
Lorain, Ohio 44055

and

WELLINGTON TOWNSHIP

Bernie Nirode, Clerk of Council/Clerk
44627 State Route 18 E.
Wellington, Ohio 44090

Appellees

1. Appellants, the City of Elyria ("Elyria"), the City of North Ridgeville ("North Ridgeville"), the City of Avon Lake ("Avon Lake"), Amherst Township ("Amherst Twp.") and the Lorain County Metropolitan Park District ("MetroParks"), (Collectively Appellants) hereby appeal from the action taken by the Lorain County Budget Commission ("LCBC") on August 19, 2005, allocating the 2006 Undivided Local Government Funds ("LGF") and Undivided Local Government Revenue Assistance Funds ("RAP") unlawfully. This appeal is taken pursuant to ORC Sections 5705.37 and 5747.55.

2. On or after August 24, 2005, Appellants each received notice of the above-referenced action by LCBC, an exact copy of which is attached hereto as Exhibit "A" and incorporated by reference herein.

3. The fiscal officer of each Appellant is authorized to file this appeal on behalf of each

HENRIETTA TOWNSHIP

Francis J. Knoble, Clerk of Council/Clerk
10413 Vermillion Road
Oberlin, Ohio 44074

and

HUNTINGTON TOWNSHIP

Margaret Harris, Clerk of Council/Clerk
26309 State Route 58
Wellington, Ohio 44090

and

LAGRANGE TOWNSHIP

Roberta M. Dove, Clerk of Council/Clerk
P. O. Box 565
LaGrange, Ohio 44050

and

NEW RUSSIA TOWNSHIP

Elaine R. King, Clerk of Council/Clerk
46268 Butternut Ridge Road
Oberlin, Ohio 44074

and

PENFIELD TOWNSHIP

Eleanor Gmandt, Clerk of Council/Clerk
42760 Peck Wadsworth Road
Wellington, Ohio 44090

and

PITTSFIELD TOWNSHIP

James R. McConnell, Clerk of Council/Clerk
17567 Hallauer Road
Wellington, Ohio 44090

and

such Appellant in accordance with the resolutions adopted by the municipal council of Elyria on September 19, 2005, by the municipal council of North Ridgeville on September 19, 2005, by the municipal council of Avon Lake on September 12, 2005, by the Amherst Twp. Board of Trustees on September 13, 2005, and by the MetroParks Board on September 21, 2005, certified copies of which are attached hereto as Exhibits "B", "C", "D", "E" and "F" respectively.

4. Appellants hereby in the alternative assert that LCBC made the following errors of law in its action taken on August 19, 2005 (See Exhibits A and A-1). See *Springfield City Comm. v. Bethel Twp.*, BTA Case No. 78-F-610 (1982):

(a) LCBC erred by allocating the 2006 LGF and RAF using an alternative formula that fails to include an allocation and distribution to a statutorily-eligible entity;

(b) LCBC abused its discretion when it failed to include an allocation to MetroParks;

(c) LCBC erred by adopting an unlawful alternative method of apportionment of the LGF and RAF which reduces the respective allocable shares of Elyria, North Ridgeville, Avon Lake, Amherst Twp. and MetroParks of such funds resulting from and implementing a settlement of a tax appeal proceeding before this Board brought by Appellee, the City of Lorain ("Lorain"), Case No. 02-T-1865, in which Elyria, North Ridgeville, Avon Lake, Amherst Twp. and MetroParks were not named parties, in violation of the provisions of ORC Section 5747.55(D) and Ohio law;

(d) LCBC erred by allocating the 2006 LGF and RAF using an invalid alternative formula that was not timely and lawfully adopted and approved by LCBC and the

necessary political subdivisions as required by ORC Sections 5747.53(B) and 5747.63(B).

(e) LCBC erred by allocating the 2006 LGF and RAF using an alternative formula that was not timely and lawfully adopted by the necessary political subdivisions as required by ORC Sections 5747.53 (B) and 5747.63 (B).

(f) LCBC erred by allocating the entire 2006 LGF and RAF pursuant to the implementation of a settlement of a tax appeal proceeding before this Board brought by Appellee, the City of Lorain, (Lorain) in Case No. 02-T-1865 in which Appellants were not named parties in violation of the provisions of ORC Section 5747.55(D).

(g) LCBC erred by not allocating to the Appellees only the pro rata portion of the 2006 LGF and RAF that was the subject of Case No. 02-T-1865 which erroneously and effectively reduced the 2006 allocation of the LGF and RAF to the Appellants in violation of the provisions of ORC Section 5747.55(D) and Ohio law.

(h) LCBC erred by not allocating to the Appellants pro rata (percentage) portion of the 2006 LGF and RAF that was not the subject of Case No. 02-T-1865 which erroneously and effectively reduced the 2006 allocation of the LGF and RAF to the Appellants in violation of the provisions of ORC Section 5747.55 (D) and Ohio law.

(i) LCBC erred by finding that the municipal population of Lorain County does not equal 81% or more of the total population of Lorain County.

(j) LCBC erred by not including in the municipal population of Lorain County the inhabitants of those territories in Lorain County comprising part of the township that has been annexed to a municipal corporation but remains part of the original township - AKA "dual jurisdiction territories". See Ohio AG Opinion No. 2005-030.

(k) LCBC erred by not adjusting the allocation of the 2006 LGF and RAF as required under ORC Sections 5747.51 (H) and 5747.53 (E) on the basis that the municipal population of Lorain County is 81% or more of the total population of Lorain County.

5. Appellants assert that LCBC should have allocated the LGF and RAF for 2006 in accordance with the settlement reached in the tax appeal proceeding in Case No. 02-T-1865 but with no reduction suffered by any Appellant which was not a named party in that tax appeal proceeding. The reductions in the 2006 LGF and 2006 RAF necessitated by the increased allocation to Lorain should have been borne entirely by revised allocation to the Appellees in Case No. 02-T-1865 and not by the allocations to Appellants who were not named parties to Case No. 02-T-1865.

6. As a direct and proximate result of one or more of the errors, violations and abuses of discretion set forth above, LCBC has erroneously determined Elyria's, North Ridgeville's, Avon Lake's, Amherst Twp.'s and MetroParks' allocations of the 2006 LGF and RAF, and has made unlawful and excessive allocations to Appellees listed in Exhibit "G". Exhibit "G" attached hereto and incorporated herein by reference sets forth, at Column 1, the amount allocated to each subdivision from the 2006 LGF (Part I) and 2006 RAF (Part II) as erroneously determined by

LCBC. Exhibit G sets forth, at Column 2, the amount in dollars which the Appellants claim they should have received from the 2006 LGF and 2006 RAF if LCBC had properly allocated such funds pursuant to law. Exhibit "G" sets forth, at Column 3, the amount in dollars overallocated to Appellees and at Column 4 the amount in dollars underallocated to the Appellants.

7. Appellants assert that when the LCBC allocated the 2006 LGF and RAF by the implementation of the settlement reached in Case No. 02-T-1865, the LCBC should have allocated to the Appellants the percentage of the 2006 LGF and RAF fund that is the same percentage of such funds for 2003 that was allocated to the Appellants at the time of the appeal in Case No. 02-T-1865. Further, the LCBC should have only implemented the settlement to that percentage of the 2006 LGF and RAF that is the same percentage of such funds for 2003 that was allocated to the parties in Case No. 02-T-1865 which did not include the Appellants in this case. This allocation is based on the following facts: The 2003 LGF fund was Eighteen Million One Hundred Eighty Five Thousand One Hundred Forty Two Dollars (\$18,185,142.00). The 2003 RAF was Two Million Five Hundred Eighty Eight Thousand Three Hundred Thirty One Dollars (\$2,588,331.00). Of this, the percentage of the LGF fund that was originally allocated to the Appellants before the appeal in Case No. 02-T-1865 was 17.33 percent or Three Million One Hundred Fifty Two Thousand Two Hundred Fifty Five Dollars (\$3,152,255.00) and the percentage of the 2003 RAF was 17.77 percent or Four Hundred Sixty Thousand Sixty Three Dollars (\$460,063.00). It is the Appellants' position that those percentages to Appellants of the 2003 LGF and RAF must remain the same for the 2006 LGF and RAF and the Appellants by law must be allocated 17.33 percent of the 2006 LGF and 17.77 percent of the 2006 RAF. By

implementing the settlement in Case No. 02-T-1865 and using the "invalid" alternative method from that settlement, the Appellants' allocation for 2006 of the LGF and RAF was effectively reduced as detailed in Exhibit H in violation of the provisions of ORC Section 5747.55(D) as said Appellants were not parties to Case No. 02-T-1865.

8. As a direct and proximate result of one or more of the errors, violations and abuses of discretion set forth above, LCBC has erroneously determined the Appellants' allocations of the 2006 LGF and RAF by not finding that the municipal population of Lorain County equals 81% or more of the total population of Lorain County and has made unlawful and excessive allocations to Appellee Lorain County. Exhibit I attached hereto and incorporated herein by reference sets forth, at Column 1, the amount allocated to each Appellant from the 2006 LGF (Part I) and 2006 RAF (Part II) as erroneously determined by LCBC. Exhibit I at Column 2 sets forth the amount in dollars which the Appellants claim they should have received from the 2006 LGF and 2006 RAF if LCBC had properly allocated such funds pursuant to law - ORC Sections 5747.51 (H) and 5747.53 (E). Exhibit I at Column 3 sets forth the amount in dollars overallocated to Appellee Lorain County and at Column 4 the amount in dollars underallocated to each Appellant and the total underallocated to all other subdivisions (Appellees). Exhibit I Part III is a summary of the underallocation to Appellants of the 2006 LGF and 2006 RAF.

9. Copies of the tax budgets of Elyria, North Ridgeville, Amherst Township, Avon Lake and MetroParks are attached hereto as Exhibits "J", "K", "L", "M" and "N", respectively, and incorporated by reference herein.

WHEREFORE, Appellants, Elyria, North Ridgeville, Avon Lake, Amherst Township and Lorain County Metropolitan Park District, hereby pray that the Board of Tax Appeals:

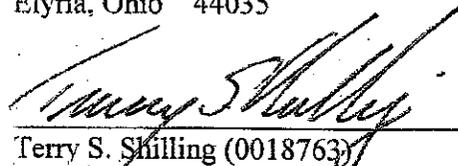
(a) find that the alternative method of apportionment used by LCBC to allocate the 2006

- LGF and RAF is invalid as it specifically relates and is applied to the Appellants;
- (b) allocate the 2006 LGF and RAF among the parties to the appeal in accordance with the alternative method used by the LCBC prior to the settlement of Case No. 02-T-1865, but with any increased allocation to Lorain as the result of such settlement be borne by the Appellees from their allocated shares as provided in Exhibit G and with no reduction suffered by any of the Appellants; and
 - (c) reallocate the 2006 LGF and RAF so that the Appellants' percentage of the 2006 LGF and RAF as shown on Exhibit H not be reduced and that said Appellants not be affected or their allocations of the 2006 LGF and RAF not be reduced by implementation of the settlement in Case No. 02-T-1865.
 - (d) Find that the alternative method of apportionment used by LCBC prior to the settlement in Case No. 02-T-1865 was properly adopted; and
 - (e) Find that the alternative method apportionment used by LCBC to allocate the 2006 LGF and RAF was not properly adopted.
 - f) Find that pursuant to ORC Section 5747.51 (H) the municipal population of Lorain County is 81% or more of the total population of Lorain County and reallocate the 2006 LGF and RAF allocation of each appellant as required under ORC Sections 5747.51 (H) and 5747.53 (E).
 - (g) issue an order for Appellants to recover the costs of these proceedings including reasonable attorney fees from Appellees, the Lorain County Budget Commission and Lorain County, and to receive such other and further relief as the Board may deem to be just and proper.

Respectfully submitted,



Thaddeus Pileski, City Auditor
City of Elyria
131 Court Street
Elyria, Ohio 44035



Terry S. Skilling (0018763)
Elyria City Law Director
131 Court Street
Elyria, Ohio 44035
(440) 326-1464

OHIO BOARD OF TAX APPEALS

City of Elyria, et al.,)	CASE NO. 2003-T-1533
)	
Appellants)	(BUDGET COMMISSION)
)	
vs.)	ORDER
)	
Lorain County Budget Commission, et al.,)	(Bifurcating Proceedings)
)	
Appellees.)	

APPEARANCES:

Terry S. Shilling
Law Director, City of Elyria
328 Broad Street
Elyria, Ohio 44035

John Koval
Clerk, Amherst Township
7530 Oberlin Road
Elyria, Ohio 44035

For Lorain Cty. and Lorain
County Commissioners
Thompson Hine LLP
John T. Sunderland
John B. Kopf
10 West Broad Street
Suite 700
Columbus, Ohio 43215

Ron L. Mantini
Auditor, City of Lorain
20 West Erie Avenue
6th Floor
Lorain, Ohio 44052-1647

Lawrence Rush
Finance Dir., City of Vermilion
5511 Liberty Avenue
Vermilion, Ohio 44089

Eric H. Zagrans
Law Director, City of N. Ridgeville
7307 Avon Beldon Road
North Ridgeville, Ohio 44012

For Lorain Cty. Metro Parks
Davis & Young
Paul D. Eklund
1700 Midland Building
101 Prospect Avenue, West
Cleveland, Ohio 44115

Kenneth S. Stumphauzer
Law Director, City of Amherst
Abraham Lieberman
Assistant Law Director
5455 Detroit Road
Sheffield Village, Ohio 44054

Eric R. Severs
Oberlin City Solicitor
5 South Main Street
Oberlin, Ohio 44074

Linda S. Bales
Clerk, Grafton Village
960 Main Street
Grafton, Ohio 44044

Geoffrey R. Smith
Law Director, City of Avon Lake
150 Avon Beldon Road
Avon Lake, Ohio 44012

For Budget Comm.
Jeffrey H. Manning
Lorain Cty. Prosecuting Attorney
Gerald A. Innes
Assistant Prosecuting Attorney
226 Middle Avenue
3rd Floor
Elyria, Ohio 44035

John A. Gasior
Law Director, City of Avon
36815 Detroit Road
Avon, Ohio 44011

Stanley Zaborski
Treasurer, City of Sheffield Lake
609 Harris Road
Sheffield Lake, Ohio 44054

Rite K. Ruot
Clerk-Treasurer, LaGrange Village
P.O. Box 597
LaGrange, Ohio 44050



Albert Buck, Jr.
Clerk, Kipton Village
42 Court
Kipton, Ohio 44049

Janice J. Szmania
Clerk, South Amherst Village
103 West Main Street
South Amherst, Ohio 44011

Marsha Fink
Clerk, Brownhelm Township
1940 North Ridge Road
Vermilion, Ohio 44089

Mary Lou Berger
Clerk, Columbia Township
25496 Royalton Road
P.O. Box 819
Columbia Station, Ohio 44028

Mary Rose Dangelo
Clerk, Grafton Township
18789 Avon Wooster Road
Grafton, Ohio 44044

Roberta M. Dove
Clerk, LaGrange Township
P.O. Box 565
LaGrange, Ohio 44050

James R. McConnell
Clerk, Pittsfield Township
17567 Hallauer Road
Wellington, Ohio 44090

Bernie Nirode
Clerk, Wellington Township
44627 State Route 18
Wellington, Ohio 44090

Laura Brady
Clerk, Rochester Village
52185 Griggs Road
Wellington, Ohio 44090

Karen J. Webb
Clerk, Wellington Village
Willard Memorial Square
Wellington, Ohio 44090

Cheryl Parrish
Clerk, Camden Township
15374 Baird Road
Oberlin, Ohio 44074-9696

Linda Spitzer
Clerk, Eaton Township
12043 Avon Beldon Road
Grafton, Ohio 44044

Francis J. Knoble
Clerk, Henrietta Township
10413 Vermilion Road
Oberlin, Ohio 44074

Elaine R. King
Clerk, New Russia Township
46268 Butternut Ridge Road
Oberlin, Ohio 44074

Laura Brady
Clerk, Rochester Township
52185 Griggs Road
Wellington, Ohio 44090

For the City of Lorain
John R. Varanese
85 East Gay Street
Suite 1000
Columbus, Ohio 43215-3118

Timothy J. Pelcic
Clerk-Treasurer, Sheffield Village
4820 Detroit Road
Elyria, Ohio 44035

Marilyn McClellan
Clerk, Brighton Township
19996 Baird Road
Wellington, Ohio 44090

Barbara VanMeter
Clerk, Carlisle Township
11969 LaGrange Road
LaGrange, Ohio 44050

Barbara Baker
Clerk, Elyria Township
41416 Griswold Road
Elyria, Ohio 44035

Margaret Harris
Clerk, Huntington Township
26309 State Route 58
Wellington, Ohio 44090

Eleanor Gndt
Clerk, Penfield Township
42760 Peck Wadsworth Road
Wellington, Ohio 44090

Angelo J. Marotta
Clerk, Sheffield Township
5166 Clinton Avenue
Lorain, Ohio 44055

Entered **JUN 17 2005**

The Board of Tax Appeals considers this matter following issuance of an order requiring the parties to show cause as to why the proceedings in this matter

should not be bifurcated. Several of the parties hereto have filed memoranda in support of bifurcation.

At issue in this appeal is the applicability of an alternate formula purportedly adopted and applied by the budget commission to the 2004 allocations of the Undivided Local Government Fund and Undivided Local Government Revenue Assistance Fund. Also at issue are the actual allocations received by the appellants under the purported formula. In the event that the formula purportedly adopted for 2004 is found to be invalid, an issue arises as to whether the method employed to allocate the funds in 2003 and years prior is both valid and applicable to 2004. In the event it is not, this board must consider whether the statutory methods of apportionment should have been applied and make an allocation pursuant to statute.

The board finds that if either of the alternative methods of allocation is determined to be legally applicable, the time and effort necessary for making the extensive factual determinations and mathematical calculations required for the application of the statutory formulas would be supererogatory. If, however, the alternative formulas are determined to be inapplicable, only then will it become necessary to present evidence and make the calculations required for apportionment using the statutory formulas. At such time, further action may be scheduled for that purpose.

Thus, upon review, the Board of Tax Appeals orders that the hearing of issues be bifurcated.

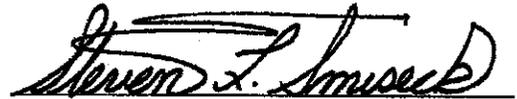
The board orders that these proceedings first be limited to the consideration of the following issues:

1. Whether the 2004 alternative method used by the commission was properly adopted pursuant to statute;
2. Whether allocating the Lorain County Metropolitan Park District, a statutorily eligible subdivision, a "zero" amount of the funds renders the 2004 alternative method invalid;
3. Whether the method implemented as part of a settlement of a 2003 tax year ULGF and ULGRAFF appeal before this board constitutes an impermissible change in the amount allocated to participating subdivisions that were not appellees to that appeal in violation of R.C. 5747.55(D), where the settlement resulted in a change for 2004 in the amounts allocated to those subdivisions that were not appellees in the 2003 appeal;
4. Whether the allocation from the 2004 funds of \$250,000 to Lorain County, in addition to its 48.302 percentage, resulted in a reduction in the amounts allocated to the appellants in this matter for the 2003 fund year so as to constitute an impermissible change in the amount allocated to participating subdivisions that were not appellees in violation of R.C. 5747.55(D);
5. Whether the alternative method used by the budget commission in tax year 2003 and years prior was factually and legally valid and applicable pursuant to statute;
6. Whether this board has the authority to allocate the 2004 ULGF and ULGRAFF pursuant to any method other than the statutory formulas set forth in R.C. 5747.51 and 5747.62 or alternative formulas adopted pursuant to R.C. 5747.53 and 5747.63.

In the event this board determines that the alternate formulas in issue for 2004 and 2003 and years prior are legally inapplicable or improperly applied, further evidentiary proceedings may be ordered to give the parties an opportunity to present additional evidence with respect to the remaining legal and factual issues presented by the appeal.

The parties are advised that, in the event this board determines that the alternates are inapplicable, any further proceedings relative to the apportionment of the local government funds under the statutory methods shall be scheduled on an expedited basis.

On Behalf of the Board of Tax
Appeals, Pursuant to Ohio Adm.
Code 5717-1-10,

A handwritten signature in black ink, reading "Steven L. Smiseck". The signature is written in a cursive style with a horizontal line underneath it.

Steven L. Smiseck
Attorney Examiner

OHIO BOARD OF TAX APPEALS

2009 OCT 14 PM 4:53

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

CASE NOS. 2003-M-1533
2004-M-1166
2005-M-1301

Appellants)

(BUDGET COMMISSION)

vs.)

(Setting Briefing Schedule)

Lorain County Budget Commission, et al.,)

Appellees.)

APPEARANCES:

For the City of Elyria and
Amherst Twp. -
Terry S. Shilling
Law Director, City of Elyria
328 Broad Street
Elyria, Ohio 44035

For City of N. Ridgeville -
Eric H. Zagrans
Attorney at Law
1401 Eye Street, NW
7th Floor
Washington, DC 20005

For City of Avon - ✓
Geoffrey R. Smith
Law Director, City of Avon Lake
150 Avon Beldon Road
Avon Lake, Ohio 44012

Copy to -
John Koval
Clerk, Amherst Township
7530 Oberlin Road
Elyria, Ohio 44035

For Lorain Cty. Metro Parks -
Davis & Young
Paul D. Eklund
1700 Midland Building
101 Prospect Avenue, West
Cleveland, Ohio 44115

For the Budget Comm. -
Dennis Will
Lorain Cty. Prosecuting Attorney
Gerald A. Innes
Assistant Prosecuting Attorney
226 Middle Avenue
3rd Floor
Elyria, Ohio 44035

For Lorain Cty. and Lorain
County Commissioners -
Thompson Hine LLP
John T. Sunderland
10 West Broad Street
Suite 700
Columbus, Ohio 43215

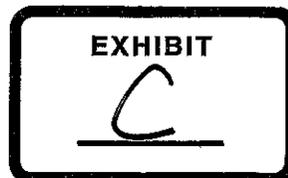
Kenneth S. Stumphauzer ✓
Law Director, City of Amherst
Abraham Lieberman
Assistant Law Director
5455 Detroit Road
Sheffield Village, Ohio 44054

John A. Gasior
Law Director, City of Avon
36815 Detroit Road
Avon, Ohio 44011

For the City of Lorain -
John R. Varanese
85 East Gay Street
Suite 1000
Columbus, Ohio 43215-3118

Eric R. Severs
Oberlin City Solicitor
5 South Main Street
Oberlin, Ohio 44074

Stanley Zaborski
Treasurer, City of Sheffield Lake
609 Harris Road
Sheffield Lake, Ohio 44054



Lawrence Rush
Finance Dir., City of Vermilion
5511 Liberty Avenue
Vermilion, Ohio 44089

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Wellington, Ohio 44090

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Grafton, Ohio 44044

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Wellington, Ohio 44090

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Oberlin, Ohio 44074

Elaine R. King
Clerk, New Russia Township
46268 Butternut Ridge Road
Oberlin, Ohio 44074

Laura Brady
Clerk, Rochester Township
52185 Griggs Road
Wellington, Ohio 44090

Mark R. Stewart
Lorain County Auditor
226 Middle Avenue
2nd Floor
Elyria, Ohio 44035-5640

Rite K. Ruot
Clerk-Treasurer, LaGrange Village
P.O. Box 597
LaGrange, Ohio 44050

Timothy J. Pelcic
Clerk-Treasurer, Sheffield Village
4820 Detroit Road
Elyria, Ohio 44035

Marilyn McClellan
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Entered

SEP 15 2009

On January 29, 2009, following receipt of the Ohio Supreme Court's judgment entry in *Elyria v. Lorain Cty. Budget Comm.*, 117 Ohio St.3d 403, 2008-Ohio-940, and acting pursuant to R.C. 5717.04, this board accepted jurisdiction of the above-captioned matters. On February 25, 2009, certain parties to the appeal filed with the board a "Stipulation to Incorporate the Record from the 2004 Tax Year LGF and RAF Appeal as a Part of the Record in the 2005 and 2006 Tax Year Appeals," through which the parties agree that the record developed in BTA Case No. 2003-M-1533 may be considered as a part of the record in BTA Case Nos. 2004-M-1166 and 2005-M-1301.

The Supreme Court addressed the board's jurisdiction on remand, providing the following:

"{¶ 27} It remains for us to clarify the scope of the BTA's jurisdiction on remand.

"{¶ 28} First, as we have discussed, the BTA has jurisdiction to determine the validity of Elyria's primary claim for relief on the merits. Accordingly, on remand, the BTA will have the authority to decide whether Elyria is entitled to the specific relief reflected by the figures in Exhibit G of the notices of appeal.

"{¶ 29} Second, the BTA on remand will not have jurisdiction to entertain any theory of relief not consistent with Elyria's identification of Lorain County as the only overallocated subdivision. In *Union Twp.*, 101 Ohio App.3d at 218, 655 N.E.2d 260, the court of appeals explained that the "purpose of appeal is to permit a subdivision receiving less than its statutory [or alternative-method] share to seek to recover that share," and it does so from the fund consisting of "the overallocations to the named appellees." By requiring an appellant to name the appellees and identify their potential liability, the statute furnishes notice to those other subdivisions about what they stand to lose and thereby puts them on guard to defend. It

follows that the BTA may not exercise jurisdiction to consider a claim that the earlier alternative method of apportionment should be completely reinstated. As the BTA correctly found, this theory cannot be squared with the notice of appeal because reinstating the earlier formula, with adjustment for the settlement, would mean that Lorain City has been overallocated, but the notice of appeal does not identify that city as being overallocated.

“{¶ 30} Finally, the BTA will not have jurisdiction to apply the statutory method. We understand that the BTA, in the decision under review, has already found that the statutory method is not jurisdictionally before it, and the appeal to this court did not challenge that disposition. See *Dayton-Montgomery Cty. Port Auth.*, 113 Ohio St.3d 281, 2007-Ohio-1948, 865 N.E.2d 22, ¶ 33.

“{¶ 31} These jurisdictional limitations are particularly significant because Elyria asserted an alternative claim that the new apportionment method had not been properly and timely adopted in case Nos. 2006-2293 and 2006-2389. If the BTA finds that this contention is correct in one or more of the appeals before us, it would ordinarily have to either reinstate the former alternative method or determine the proper distribution through the statutory method. But in this case, the BTA will lack jurisdiction to pursue either of these alternatives. It would, upon making such a finding, have to dismiss the appeal.”

Given the state of the record, which includes “Stipulations of Fact” filed January 18, 2006 and legal argument, the board concludes that the matter is ripe for decision. Should the parties wish to provide the board with argument regarding the Ohio Supreme Court’s instructions upon remand, briefs may be provided by the following dates:

Appellants’ briefs will be due October 16, 2009.
Appellees’ briefs will be due November 13, 2009.
Reply briefs, if any, will be due December 4, 2009.

On Behalf of the Board of Tax Appeals,
Pursuant to Ohio Adm. Code 5717-1-10,

A handwritten signature in black ink, appearing to read "Rebecca R. Luok", written over a horizontal line.

Rebecca R. Luok
Attorney Examiner

ohiosearchkeybta