

IN THE SUPREME COURT OF OHIO

City of Elyria, et al.,)	
)	
Appellants,)	Case No. 2010-0564
)	
v.)	
)	On Appeal From The
Lorain County Budget Commission, et al.,)	Ohio Board of Tax Appeals
)	
Appellees.)	

MEMORANDUM OF APPELLEE LORAIN COUNTY IN OPPOSITION TO APPELLANTS' MOTION FOR RECONSIDERATION

John T. Sunderland (0010497)
 John B. Kopf (0075060)
 THOMPSON HINE LLP
 41 South High Street, Suite 1700
 Columbus, Ohio 43215
 (614) 469-3200; (614) 469-3361 (fax)
 John.Sunderland@ThompsonHine.com
 John.Kopf@ThompsonHine.com
 COUNSEL FOR LORAIN COUNTY AND
 LORAIN COUNTY BOARD OF COUNTY
 COMMISSIONERS

Gerald A. Innes (0009020)
 Assistant Prosecuting Attorney
 OFFICE OF LORAIN COUNTY
 PROSECUTOR
 Lorain County Justice Center
 225 Court Street, 3rd Floor
 Elyria, Ohio 44035
 (440) 329-5398; (440) 329-5430 (fax)
 jerry.innes@lcprosecutor.org
 COUNSEL FOR LORAIN COUNTY
 BUDGET COMMISSION

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 CLERK OF COURT
 SUPREME COURT OF OHIO

INTRODUCTION

In their motion for reconsideration, appellants question this Court's ruling that they waived their population argument for the 2006 LGF allocation, supposedly because they are concerned that the Court may have labored under "a misapprehension" of the facts in reaching its decision. Lorain County submits that the Court's decision was correct, and that the motion should be denied, for three reasons. First, as the Court ruled, the law of waiver is well-established and the facts of appellants' inaction are clear, so the Court's decision was not wrong. Second, appellants' motion is barred under S. Ct. Prac. R. 11.2(B), because it merely re-argues appellants' position in the underlying case. Third, appellants' argument is factually wrong, and therefore presents no reason for the Court to revise its earlier decision.

ARGUMENT

This Court's ruling, in *Elyria v. Lorain Cty. Budget Comm.*, Slip Opinion No. 2011-Ohio-1482, ¶24, that appellants waived their population issue was correct. The law on waiver is unequivocal: where a party waits until its reply brief to present an argument to a tribunal it is deemed to have waived that argument. *E. Liverpool v. Columbiana Cty. Budget Comm.*, 116 Ohio St.3d 1201, 2007-Ohio-5505, ¶3 (failure to press argument in briefs means argument is deemed to be abandoned); *State ex rel. Evans v. Blackwell*, 111 Ohio St.3d 1, 2006-Ohio-4334, ¶23, fn. 1 (party's delay in raising claim until reply brief justified court of appeals' failure to address claim); *State ex rel. Grounds v. Hocking Cty. Bd. of Elections*, 117 Ohio St.3d 116, 2008-Ohio-566, ¶24 (where party waits until reply brief to assert an argument, court need not address the argument); *Hoskins v. Simones*, 173 Ohio App.3d 186, 2007-Ohio-4084, ¶38 (parties are not permitted to raise new arguments in their reply briefs).

Appellants contend their situation is different, because the parties in the cases this Court cited all played “games” with the opposing parties and attempted to “hide the ball” or “put something over” on someone. But appellants never identify how the conduct in the cited cases differs from their own conduct. In each of those cases, the court decided that an argument had been waived because it was not pressed until its inclusion in a reply brief. There was no other suggestion of improper or deceptive motive. In this case, appellants concede that, after first stating the population issue in their notice of appeal to the BTA, filed on September 22, 2005, they never once mentioned the issue until filing their BTA reply brief on December 14, 2009. In the intervening four-and-one-half years, appellants never discussed the population issue, briefed it with the BTA, asked for any hearing on the question, or offered any evidence. In short, appellants did exactly the same thing the parties in *E. Liverpool, Evans, Grounds, and Hoskins* did, they did nothing to adjudicate the issue they now claim was wrongly decided. This Court properly decided that appellants waived their population percentage issue.

In addition, the Supreme Court’s rules provide that “a motion for reconsideration shall not constitute a reargument of the case.” S. Ct. Prac. R. 11.2(B). Where a party asserted an argument in its merit brief, the rules do not permit that party to attempt to re-argue the same contention in a motion for reconsideration. *State ex rel. Shemo v. Mayfield Hts.*, 96 Ohio St.3d 379, 381, 2002-Ohio-4905, ¶9 (“respondents’ attempted reargument of this contention is not authorized by our Rules of Practice.”).

Here, appellants contend that they did not waive the population question because: they raised the issue in their notice of appeal (Motion for Reconsideration at 2); the BTA’s hearing addressed only the 2004 case and the Board’s bifurcation order limited the issues to be presented (*id.*); the population issue was not included within the scope of the bifurcated hearing (*id.*); the

BTA dismissed the 2006 case on jurisdictional grounds (*id.* at 3); and the BTA never gave them a chance to address the population issue. *Id.* at 3-4. In their Supreme Court merit briefing, appellants contended that they did not waive the population question: because they raised the issue in their notice of appeal (Merit Brief at 18, Reply at 8); the BTA's hearing was restricted to the 2004 case and the bifurcation order limited the issues to be presented (Reply at 8); the population issue was not within the scope of the bifurcated hearing (*id.*); the BTA dismissed the 2006 case on jurisdictional grounds (*id.*); and the BTA never gave them a chance to present evidence on the population issue. *Id.* at 9.

A comparison of appellants' motion for reconsideration with appellants' merit and reply briefs demonstrates that the "we didn't waive" argument is exactly the same. The Rules of Practice therefore bar the motion for reconsideration.

Next, appellants mischaracterize what this Court decided and what happened before the BTA. Appellants argue that the Court "may have been relying on a *factual* misapprehension" when it rejected their argument "on the grounds that they failed to raise the issue in the BTA prior to the filing of their Reply Brief before the Board." Motion for Reconsideration at 1. Appellants claim they did not fail to raise the issue in the BTA because they "raised it" in their notice of appeal. *Id.* But the Court held that appellants waived the issue, not because the Court thought the issue was missing from the notice of appeal, but because appellants "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." *Elyria*, 2011-Ohio-1482, ¶24. Appellants did not waive the population issue because they did not raise it in the first place, they waived it because they did not present it for decision to the BTA when the Board was addressing the merits of the case on remand.

Appellants also suggest that the BTA's post-remand invitation to submit briefs prohibited them from asserting the population issue. Motion for Reconsideration at 3. Nothing in the BTA's request for briefs precluded appellants from addressing this issue. Indeed, the parties, as a part of teeing up the cases on remand, had just stipulated that the record presented to the BTA for the 2004 case was to be incorporated into and become a part of the 2005 and 2006 cases, and further "reserve[d] the right to further supplement the record in [the 2005 and 2006 cases] as they deem[ed] necessary." 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, attached as Exhibits A and B (emphasis added). Thus, the record for the 2004 case – the one on which a hearing had been held – now became a part of the 2006 case – the one with the population question – and appellants specifically reserved their ability to add to the 2006 case record as they "deemed necessary." They chose not to submit any additional evidence. Even under appellants' explanation of the procedural history of these cases, the population issue could have been presented to the BTA. Appellants failed to do so.

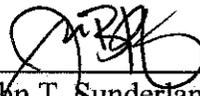
Finally, appellants make the false claim that they raised the population issue in their BTA reply brief because appellees "raised merits issues going beyond the topic of the Court's remand instructions." Motion for Reconsideration at 4. Again, appellants fail to identify what these "merits issues" might be; they certainly could not have involved the population issue because appellees' brief never mentioned the subject. See Appellees' Brief Regarding the Ohio Supreme Court's Instructions Upon Remand to the Board of Tax Appeals, attached as Exhibit C. Moreover, appellants' BTA reply brief never complained that appellees had exceeded the scope of the BTA's request for briefs or asked the Board to disregard any arguments by appellees. This newly discovered belief that the BTA did not want the parties to present merits issues is both

incredible – the BTA was, after all being asked to decide the merits of the cases – and belied by appellants’ conduct below.

CONCLUSION

In this appeal, the Court was confined to its statutorily delineated duty of determining whether the BTA’s decision was reasonable and lawful. *E. Liverpool v. Columbiana Cty. Budget Comm.* (2000), 90 Ohio St.3d 269, 271. For the foregoing reasons, Lorain County submits that the BTA’s decision to decline to address the population issue is neither unreasonable nor unlawful. Appellants’ motion for reconsideration should be denied.

Respectfully submitted,



John T. Sunderland (0010497)
John.Sunderland@ThompsonHine.com
John B. Kopf (0075060)
John.Kopf@ThompsonHine.com
THOMPSON HINE LLP
41 S. High Street, Suite 1700
Columbus, Ohio 43215
(614) 469-3200; (614) 469-3361 (fax)

*Counsel for Lorain County and Lorain County
Board of County Commissioners*

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum of Appellee Lorain County In Opposition To Appellants' Motion For Reconsideration was served by email, pursuant to S. Ct. Prac. R. 14.2(B)(1), upon the following on April 25, 2011:

Terry S. Shilling, tshilling@cityofelyria.org, Counsel for City of Elyria and Amherst Township;

Eric H. Zagrans, eric@zagrans.com, Counsel for City of North Ridgeville;

William J. Kerner Sr., wkerner@avonlake.org, Counsel for City of Avon Lake;

John R. Varanese, jrvlawof@sbcglobal.net, Counsel for City of Lorain;

Gerald A. Innes, jerry.innes@lcprosecutor.org, Counsel for Lorain County Budget Commission;

Eric R. Severs, ersevers@oberlin.net, Counsel for City of Oberlin;

Thomas Smith, tsmith@wickenslaw.com, Counsel for Sheffield Village;

John A. Gasior, jgasior@ssgavonlaw.com, Counsel for City of Avon;

Anthony Pecora, apecora@sheffieldlaw.com, Counsel for City of Amherst; and

Lawrence D. Pratt, lawrence.pratt@ohioattorneygeneral.gov, Counsel for Richard A. Levin, Tax Commissioner of Ohio.



John B. Kopf

BOARD OF TAX APPEALS
STATE OF OHIO

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CITY OF ELYRIA, et al.,
Appellants,

CASE NO. 2004-T-1166

(Lorain County Budget Commission LGF)

vs.

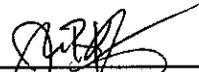
LORAIN COUNTY BUDGET
COMMISSION, et al.,

Appellees.

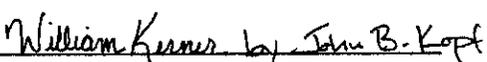
STIPULATION TO INCORPORATE THE RECORD FROM THE 2004 TAX
YEAR LGF AND RAF APPEAL AS A PART OF THE RECORD IN THE 2005,
AND 2006 TAX YEAR APPEALS

The parties hereby stipulate that the record from BTA Case No. 2003-T-1533 is hereby incorporated into and made a part of the record of BTA Case Nos. 2004-T-1166 and 2005-T-1301. The parties reserve the right to further supplement the record in Case Nos. 2004-T-1166 and 2005-T-1301 as they deem necessary.

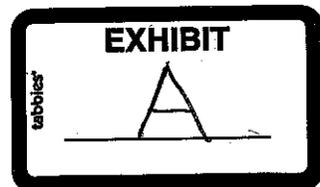
Respectfully submitted,



John T. Sunderland
John B. Kopf, III
Thompson Hine LLP
41 S. High Street, Suite 1700
Columbus, OH 43215
Attorney for Lorain County and the Lorain
County Board of County Commissioners



William Kerner by John B. Kopf
Law Director by written permission
The City of Avon Lake
525 Avon Belden Rd
Avon Lake, OH 44012
Attorney for City of Avon Lake



Terry S. Shilling by John B. Kopf
Terry S. Shilling by permission
Law Director, City of Elyria
Elyria City Hall
131 Court Street, Suite 201
Elyria, OH 44035
*Attorney for City of Elyria and
Amherst Township*

Gerald A. Innes by John B. Kopf
Gerald A. Innes by permission
Assistant Prosecuting Attorney
Lorain County
226 Middle Avenue
Fourth Floor
Elyria, OH 44035
*Attorney for Lorain County Budget
Commission*

Eric H. Zagrans by John B. Kopf
Eric H. Zagrans by permission
Zagrans Law Firm, LLC
474 Overbrook Road
Elyria, OH 44035
Attorney for City of North Ridgeville

John R. Varanese by John B. Kopf
John R. Varanese by permission
85 E. Gay Street, Suite 1000
Columbus, OH 43215
Attorney for City of Lorain

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing *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* was sent to the following by regular U.S. Mail, postage prepaid, on February 25th, 2009:

PITTSFIELD TOWNSHIP
James R. McConnell,
Fiscal Officer
17567 Hallauer Road
Wellington, Ohio 44090

CITY OF AVON
William Logan, Finance Dir.
36080 Chester Road
Avon, Ohio 44011

ROCHESTER
TOWNSHIP
Laura Brady, Fiscal
Officer
52185 Griggs Road
Wellington, Ohio 44090

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

SHEFFIELD TOWNSHIP
Patricia F. Echko, Fiscal
Officer
5166 Clinton Avenue
Lorain, Ohio 44055

NEW RUSSIA
TOWNSHIP
Elaine R. King, Fiscal
Officer
46268 Butternut Ridge
Road

CITY OF OBERLIN
Eric Severs
City Attorney
69 S. Main Street
Oberlin, Ohio 44074

CITY OF VERMILION
Finance Director
5511 Liberty Avenue
Vermilion, Ohio 44089

Oberlin, Ohio 44074
WELLINGTON
TOWNSHIP
Louise Grose, Fiscal
Officer
P. O. Box 425

KIPTON VILLAGE
Thomas Bray, Clerk-
Treasurer
P. O. Box 177
Kipton, Ohio 44049

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

Wellington, Ohio 44090
CITY OF AMHERST
David C. Kukucka,
Auditor
480 Park Avenue
Amherst, Ohio 44001

LAGRANGE TOWNSHIP
Roberta M. Dove Moore,
Fiscal Officer
P. O. Box 565
355 South Center
LaGrange, Ohio 44050

CITY OF SHEFFIELD LAKE
Tamara L. Smith, Finance
Director
609 Harris Road
Sheffield Lake, Ohio 44054

GRAFTON VILLAGE
Linda S. Bales, Clerk-
Treasurer
960 Main Street
Grafton, Ohio 44004

LAGRANGE VILLAGE
Sheila Lanning, Clerk-
Treasurer
P. O. Box 597
LaGrange, Ohio 44050

BRIGHTON TOWNSHIP
Marilyn McClellan, Fiscal
Officer
19996 Baird Road
Wellington, Ohio 44090

ELYRIA TOWNSHIP
Robert Repos, Fiscal
Officer
42378 Griswold Road
Elyria, Ohio 44035

HENRIETTA TOWNSHIP
Francis J. Knoble, Fiscal
Officer
10413 Vermilion Road
Oberlin, Ohio 44074
Vermilion, Ohio 44089

SHEFFIELD VILLAGE
Tim Pelcic, Treasurer
4820 Detroit Road
Elyria, Ohio 44035

CAMDEN TOWNSHIP
Cheryl Parrish, Fiscal Officer
15374 Baird Road
Oberlin, Ohio 44074

WELLINGTON VILLAGE
Karen J. Webb, Clerk
115 Willard Memorial Sq.
Wellington, Ohio 44090

CARLISLE TOWNSHIP
Marlene Thompson, Fiscal
Officer
11969 LaGrange Road
LaGrange, Ohio 44050

SOUTH AMHERST
VILLAGE
Nancy Gildner, Clerk-
Treasurer
103 West Main Street
South Amherst, Ohio
44001

COLUMBIA TOWNSHIP
Rita Plata, Fiscal Officer
P. O. Box 819
Columbia Station, Ohio
44028

BROWNHELM
TOWNSHIP
Marshal Doane Funk,
Fiscal Officer
1940 North Ridge Road
Vermilion, Ohio 44089

EATON TOWNSHIP
Linda Spitzer, Fiscal
Officer
12043 Avon Belden Road
Grafton, Ohio 44044



Terry S. Shilling by John B. Kopf

Terry S. Shilling
Law Director, City of Elyria
Elyria City Hall
131 Court Street, Suite 201
Elyria, OH 44035

*Attorney for City of Elyria and
Amherst Township*

by permission

Eric H. Zagrans by John B. Kopf

Eric H. Zagrans
Zagrans Law Firm, LLC
474 Overbrook Road
Elyria, OH 44035

Attorney for City of North Ridgeville

by permission

Gerald A. Innes by John B. Kopf

Gerald A. Innes
Assistant Prosecuting Attorney
Lorain County
226 Middle Avenue
Fourth Floor
Elyria, OH 44035

*Attorney for Lorain County Budget
Commission*

by permission

John R. Varanese by John B. Kopf

John R. Varanese
85 E. Gay Street, Suite 1000
Columbus, OH 43215

Attorney for City of Lorain

by permission

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Marilyn McClellan, Fiscal
Officer
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Officer
42378 Griswold Road
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HENRIETTA TOWNSHIP
Francis J. Knoble, Fiscal
Officer
10413 Vermilion Road
Oberlin, Ohio 44074
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Tim Pelcic, Treasurer
4820 Detroit Road
Elyria, Ohio 44035

CAMDEN TOWNSHIP
Cheryl Parrish, Fiscal Officer
15374 Baird Road
Oberlin, Ohio 44074

WELLINGTON VILLAGE
Karen J. Webb, Clerk
115 Willard Memorial Sq.
Wellington, Ohio 44090

CARLISLE TOWNSHIP
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Officer
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SOUTH AMHERST
VILLAGE
Nancy Gildner, Clerk-
Treasurer
103 West Main Street
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Rita Plata, Fiscal Officer
P. O. Box 819
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TOWNSHIP
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1940 North Ridge Road
Vermilion, Ohio 44089
EATON TOWNSHIP
Linda Spitzer, Fiscal
Officer
12043 Avon Belden Road
Grafton, Ohio 44044



OHIO BOARD OF TAX APPEALS

City of Elyria, City of Avon Lake)	CASE NOS. 2003-M-1533
City of North Ridgeville, and Amherst)	2004-M-1166
Township,)	2005-M-1301
)	
Appellants,)	(BUDGET COMMISSION)
)	
vs.)	
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Lorain County Budget Commission et al.,)	
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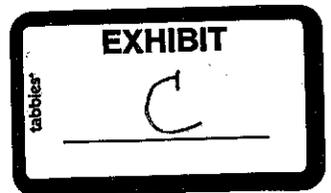
OHIO BOARD OF TAX APPEALS

APPELLEES' BRIEF REGARDING THE OHIO SUPREME COURT'S INSTRUCTIONS UPON REMAND TO THE BOARD OF TAX APPEALS

INTRODUCTION

The Supreme Court has expressly limited what the BTA may address upon remand of these Local Government Fund and Revenue Assistance Fund (collectively "LGF") appeals. Specifically, the BTA lacks jurisdiction to consider any claim that the pre-2004 alternative formula (the "Old Alternative Formula") should be reinstated, or to apply the statutory formula to these allocations. *Elyria v. Lorain Cty. Budget Comm.*, 117 Ohio St.3d 403, 2008-Ohio-940, at ¶¶ 29-30. The sole question before this Board is whether Appellants are "entitled to the specific relief reflected by the figures in Exhibit G of the notices of appeal." *Id.* at ¶ 28.

As a matter of well-established Ohio law, Appellants are not entitled to the relief they seek. To begin with, there is a valid alternative formula that governs these allocations. The Budget Commission made its determinations pursuant to an alternative method adopted to govern the 2004 and succeeding years' LGF allocations (the "New Alternative Formula"). Although Appellants originally attacked the timing and method by which that formula was adopted, they have abandoned that challenge. Thus, there is no longer any dispute concerning the New Alternative Formula's validity. Because there is no question the Budget Commission



followed the formula in making the 2004, 2005, and 2006 LGF allocations, the New Alternative Formula must govern as a matter of law.

Additionally, Ohio law does not permit the extra-statutory relief Appellants seek. The Revised Code recognizes only two methods for allocating the LGF: the statutory formula set forth in R.C. 5747.51 or an alternative formula adopted pursuant to Section 5747.53.¹ Appellants do not request relief under either of these methods. Instead, they demand a hybrid allocation, reverting all subdivisions except Lorain and Lorain County to their Old Alternative Formula percentages, allowing Lorain to retain its increased allocation under the New Alternative Formula, and insisting that the County pay the entire cost of Lorain's increase.

The statute's command is clear and mandatory; the Budget Commission's allocations "*shall* be made pursuant to [the statutory formula], unless the commission has provided for [an alternative] formula pursuant to section 5747.53 of the Revised Code." R.C. 5747.51(B) (emphasis added). Allocations by any method other than the statutory or a properly adopted alternative formula are invalid as a matter of law. Because the relief they seek falls outside that permitted by the Revised Code, Appellants are not entitled to the "specific relief" reflected by the figures in Exhibit G of their Notices of Appeal.

Finally, the claimed basis for these appeals — that Appellants' allocations in future years cannot be changed by an alternate formula because they were not parties to a previous year's appeal whose settlement led to that formula's adoption — misconstrues R.C. 5747.55(D) and flies in the face of the General Assembly's mandate that counties can adopt alternative methods of allocation. Section 5747.55(D) prevents changes in allocations only for those appeals in which a subdivision was not a party, it does not cast a subdivision's allocations in stone for all

¹ Sections 5747.51 and 5747.53 govern allocation of the Local Government Fund. At the relevant times, sections 5747.62 and 5747.63 provided identical statutory and alternative methods for allocating the Revenue Assistance Fund. The General Assembly has since repealed the Revenue Assistance Fund statutes.

future years. The New Alternative Formula had nothing to do with the 2003 allocation, and Appellants' allocations for that year – the year in which they were not parties to an appeal – DID NOT CHANGE. Appellants' theory would mean that a county could never adopt an alternative allocation formula if any of the formula's proponents were motivated (at least in part) to pass it in order to resolve a prior appeal, even if the formula applied prospectively only – as the New Alternative Formula does – and even if all of the adoption requirements in R.C. 5747.53 were met – as they were here.

RELEVANT FACTS

Before 2003, the Budget Commission allocated the Lorain County LGF according to percentages originally set forth in the Old Alternative Formula. In 2002, the City of Lorain challenged its 2003 allocation, alleging that the Old Alternative Formula had never been properly adopted. The evidence proved Lorain was right, so the county subdivisions began discussing settlement. As part of that settlement, the New Alternative Formula was proposed and submitted to the subdivisions for approval. Lorain County, Lorain — the city having the largest population in the county — and an overwhelming majority of the remaining subdivisions all approved the New Alternative Formula in time for it to control the allocation of the 2004 LGF. The Budget Commission has made its allocations pursuant to the New Alternative Formula ever since.

ARGUMENT

- I. **BECAUSE THE NEW ALTERNATIVE FORMULA WAS ADOPTED USING THE PROCEDURES SET FORTH IN R.C. 5747.53, AND BECAUSE APPELLANTS NO LONGER CHALLENGE THE MANNER IN WHICH THAT FORMULA WAS ADOPTED, THE NEW ALTERNATIVE FORMULA GOVERNS THE LGF ALLOCATIONS AS A MATTER OF LAW.**

Because the Budget Commission has used the New Alternative Formula for all LGF allocations since it was adopted, Appellants must avoid the application of that formula in order to prevail in their appeals. Thus, each of the notices of appeal alleged that that New Alternative

Formula was invalid because it was not lawfully adopted, and the bulk of Appellants' record submissions addressed the method and timing by which that formula was adopted. Appellants have now abandoned their challenge to the New Alternative Formula. Appellants' Brief Regarding Ohio Supreme Court's Instructions to the Board on Remand at p. 6, fn. 3 ("Appellants hereby withdraw on remand their contentions about the manner in which the new alternative method was adopted"). Consequently, there is no longer any dispute that the New Alternative Formula was properly adopted in time to govern the 2004 and succeeding LGF allocations.

This fact should end the appeals. The Revised Code commands budget commissions to make their allocations pursuant to the statutory formula "unless the commission has provided for an [alternate] formula" R.C. 5747.51(B). Where there is a validly adopted alternative formula, the local government fund distribution must be made pursuant to that alternative formula. *Columbiana Cty. Park Dist. v. Budget Comm. of Columbiana Cty.* (Dec. 19, 1994). BTA Case No. 93-D-1174, 1994 Ohio Tax LEXIS 2053, at *10-11 (a budget commission is "legally required" to comply with a properly adopted alternative formula). *See also East Liverpool v. Columbiana Cty. Budget Comm.*, 90 Ohio St.3d 269, 2000-Ohio-75, at ¶¶ 6-7 (affirming BTA's decision that the budget commission properly allocated funds using a duly approved alternative formula). Here the Budget Commission provided for the New Alternative Formula. Pursuant to Section 5747.51(B), that alternative formula "shall" govern the Budget Commission's allocation determinations. The BTA has already recognized that, if the New Alternative Formula is legally applicable, no other action is necessary on these appeals. *Elyria v. Lorain Cty. Budget Comm.* (June 17, 2005), BTA Case No. 2003-T-1533, 2005 Ohio Tax LEXIS 808, at *4-5. Because the New Alternative Formula remains valid and intact, by law it must be the method that governs the Lorain County LGF allocations.

Allocations pursuant to a validly adopted alternative formula are final. R.C. 5747.53(G). They can be challenged only on the basis that a budget commission failed to follow the formula, or that it abused its discretion. Here the Budget Commission precisely followed the New Alternative Formula, and no party contends otherwise. While Appellants dislike the result the New Alternative Formula produces, they have not shown that the Budget Commission abused its discretion in applying that formula. Abuse of discretion means more than a mere error of judgment; it requires "an unreasonable, arbitrary or unconscionable attitude." *Steiner v. Custer* (1940). 137 Ohio St. 448, syl. ¶ 2. See also *Chester Twp. v. Geauga Cty. Budget Comm.* (1976), 48 Ohio St.2d 372, 374 (citing *Steiner*). An abuse of discretion must also include an element of "perversity of will, passion, prejudice, partiality or moral delinquency." *Minerva v. Carroll Cty. Budget Comm.* (April 28, 1983), BTA Case. No. 80-B-406, 1983 Ohio Tax LEXIS 471, at *9-10 (quoting *Steiner*). Appellants have offered no evidence to prove any such abuse.

In fact, the structure of the New Alternative Formula cannot constitute an abuse of discretion. Section 5747.53(D) provides that an alternative formula may contain "any factor considered to be appropriate and reliable in the sole discretion of the county budget commission." The New Alternative Formula imposes a straight percentage allocation. The Supreme Court has recognized that local governmental units may "adopt an alternative formula that sets forth an agreed-upon method *or percentage* for the distribution of the funds to each governmental unit." *Reynoldsburg v. Licking Cty. Budget Comm.* (2004), 104 Ohio St.3d 453. 2004-Ohio-6773, at ¶ 13 (emphasis added). Alternative formulas based on straight percentage allocations have repeatedly been held to be valid and enforceable. E.g. *Mogadore v. Summit Cty. Budget Comm.* (March 3, 1988), BTA Case No. 83-D-1003, 1988 Ohio Tax LEXIS 311, at *5-6 (alternative method that allocates on straight percentages is "not in contravention of law" because "R.C. 5747.53 does not require the inclusion of any discretionary factor as part of an

authorized alternative method or formula”). See also e.g. *Clay Center v. Budget Comm. of Ottawa Cty.* (Jan. 13, 1989), BTA Case No. 85-D-158, 1989 Ohio Tax LEXIS 2 (affirming alternative allocation based on straight percentages). Thus, nothing in the structure or application of the New Alternative Formula can possibly constitute an abuse of discretion.

The Budget Commission’s actions, taken pursuant to the New Alternative Formula, are therefore final.

II. **BECAUSE THE REALLOCATION APPELLANTS DEMAND IS BASED ON NEITHER THE STATUTORY FORMULA NOR AN ALTERNATIVE FORMULA, THE BTA LACKS AUTHORITY TO GRANT THE RELIEF REQUESTED.**

R.C. 5747.51(B) establishes the exclusive methods by which the LGF can be allocated:

The [county budget] commission ... *shall* determine the amount of the undivided local government fund needed by and to be apportioned to each subdivision This determination *shall* be made pursuant to divisions (C) to (I) of this section [the statutory method], unless the commission has provided for a formula pursuant to section 5747.53 of the Revised Code [an alternative formula].

(Emphasis added.) “Shall” means mandatory, imposing an absolute and unqualified obligation.

Anderson v. Hancock Cty. Bd. of Ed. (1941), 137 Ohio St. 578, 581.

Ohio’s courts have repeatedly confirmed the mandatory nature of section 5747.51(B). *East Liverpool v. Columbiana Cty. Budget Comm.* (2000), 90 Ohio St.3d 269, 270, 2000-Ohio-75, at ¶ 1 (budget commission “has two options” for distributing local government fund, the statutory method or an alternative formula); *East Liverpool v. Columbiana Cty. Budget Comm.* (2005), 105 Ohio St.3d 410, 2005-Ohio-2283, at ¶ 6 (there are only two methods of allocating the LGF to a county’s political subdivisions: the statutory method specified in R.C. 5747.51 or an alternative method adopted pursuant to R.C. 5747.53); *Englewood v. Montgomery Cty. Budget Comm.* (1987), 39 Ohio App.3d 153, 155, (budget commission must invoke an alternative formula if it is timely approved or the statutory formula “comes into effect by

operation of law”); *Union Twp. v. Butler Cty. Budget Comm.* (1995), 101 Ohio App.3d 212, 216, (assuming no alternate formula was “properly adopted,” then a budget commission must distribute by the statutory method); *Mogodore v. Summit Cty. Budget Comm.* (1987), 36 Ohio App.3d 42, 44, (appeals of budget commission’s action “may relate to allocation under either the statutory formula or an alternative formula”); *Montgomery Cty. Park Dist. v. Montgomery Cty. Budget Comm.* (Dec. 29, 1982), BTA Case No. 80-B-138, 1982 Ohio Tax LEXIS 1, at *7-10 (if budget commission allocates local government fund in any manner not provided for in R.C. 5747.51 — statutory formula or an alternative formula — the allocation is without statutory authority and is in error).

In these appeals, Appellants do not request a statutory formula allocation or seek an allocation pursuant to any alternative formula. The notices of appeal demand a reallocation based upon a construct entirely of Appellants’ own imagination. Exhibit G to the 2004 Notice of Appeal asks the BTA to apply the percentages from the Old Alternative Formula to every subdivision’s allocation except Lorain and the County, award Lorain its New Alternative Formula allocation, and make the County pay the difference to everyone else. Exhibit G to the 2005 and 2006 notices of appeal similarly asks this Board to revert all the subdivisions except Lorain and the County to the Old Alternative Formula’s percentages and again award Lorain its increased New Alternative Formula allocation. This time, the sums Appellants demand the County pay go entirely to them. Thus, in all three appeals, the relief requested is a combination of: (1) percentages from the Old Alternative Formula, (2) Lorain’s allocation from the New Alternative Formula, and (3) a division of “over-allocated amounts” that comes from no formula at all.

Appellants offer no legal authority for their hybrid requests. Section 5747.53 provides the sole mechanism for adopting an alternative to the statutory formula, and sets forth the

requirements for adopting such an alternative. The relief Appellants request was never offered as an alternative formula nor did it receive any of the votes necessary to approve it as such. A comparable request to employ an allocation method of a party's own devising was rejected in *Union Twp.*, 101 Ohio App.3d at 218-19 (affirming dismissal of appellant's attempt to create its own formula).

There are only three possible measures of relief for Appellants. Two — the statutory formula and the Old Alternative Formula — are not available both because that is not the relief sought in Appellants' notices of appeal and because the Supreme Court has ruled that this Board lacks jurisdiction to employ either of these methods. *Elyria*, 2008-Ohio-940 at ¶¶ 29-30. The only option remaining is the New Alternative Formula, but again that is not what Appellants request.

The Supreme Court has already explained its view of what should happen to this case on remand. If the New Alternative Formula was not properly adopted, the BTA would have to reinstate the Old Alternative Formula or use the statutory formula, but because it lacks jurisdiction to do either it would have to dismiss these appeals. *Id.* at ¶ 31. The Court thus confirmed, again, that the LGF can only be allocated using the statutory or a properly adopted alternative formula. The Court did not offer this Board the opportunity to allocate pursuant to Appellants' hybrid theory. Because "the specific relief reflected by the figures in Exhibit G of the notice of appeal" is not permitted by Ohio law, the BTA must affirm the Budget Commission's allocations.

III. AN ALTERNATIVE FORMULA THAT OPERATES PROSPECTIVELY ONLY AND DOES NOT CHANGE A SUBDIVISION'S ALLOCATION FOR ANY PREVIOUS YEAR, DOES NOT RUN AFOUL OF R.C. 5747.55(D), EVEN IF THE IMPETUS FOR ITS ADOPTION WAS THE SETTLEMENT OF A PRIOR YEAR'S APPEAL.

Appellants claim that the New Alternative Formula cannot change their LGF allocations for 2004 and all years thereafter solely because the formula was adopted as a part of a settlement of an appeal of the 2003 LGF and they were not parties to the 2003 appeal. Appellants are wrong. First, the section they rely upon, R.C. 5747.55(D), merely provides that Appellants' allocations cannot be changed for the appeal year where they were not parties. It does not lock in their allocations for all future years, and Appellants have never offered any legal authority to the contrary. Because the New Alternative Formula had nothing to do with the 2003 allocation, section 5747.55(D) does not prevent it from changing any subdivision's allocation for a future year.

Second, R.C. 5747.55(D) is irrelevant to these appeals because Appellants' 2003 allocations never changed. Appellants received exactly the percentage of the 2003 LGF that the Budget Commission allocated to them before the 2003 appeal began. Appellants' Responses to Request for Admission 10 and Interrogatory 14 as Amended or Supplemented: Hearing Tr. 117, 131, 139-40. Because Appellants' 2003 allocations remained intact, R.C. 5747.55(D) never even comes into play.

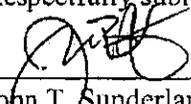
Third, Appellants' argument would mean that no county could ever adopt an alternative formula if it was related in any way to a prior year's appeal. That the New Alternative Formula was adopted as a part of a settlement of the City of Lorain's appeal of its 2003 allocation does not change the facts that the formula did not govern the 2003 allocation — the first year it applied to was 2004 — and that it received all of the approvals required by R.C. 5747.53 to adopt an alternative formula. There is no logical difference between the steps taken to approve the New

Alternative Formula and the steps that would need to be taken today to approve exactly the same allocation method. Appellants erroneously seek to graft onto the alternative formula mechanism a limitation that does not exist anywhere in the statute providing for such formulas.

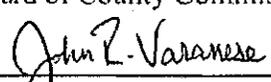
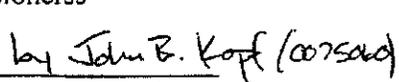
CONCLUSION

Appellants no longer challenge the New Alternative Formula, yet they still seek to impose their own extra-statutory method of allocating the LGF upon the subdivisions of Lorain County. The New Alternative Formula was developed and adopted by the county subdivisions, and therefore must control the 2004, 2005, and 2006 LGF allocations. Moreover, the BTA has no jurisdiction to return to the Old Alternative Formula or to apply the statutory formula to these appeals, and no legal authority to reallocate pursuant to the "method" Appellants demand. Therefore, Appellants are not entitled to the specific relief reflected by the figures in Exhibit G of the notices of appeal, and this Board should affirm the 2004, 2005, and 2006 LGF allocations by the Budget Commission.

Respectfully submitted,



John T. Sunderland
John.Sunderland@ThompsonHine.com
John B. Kopf
John.Kopf@ThompsonHine.com
THOMPSON HINE LLP
41 S. High Street, Suite 1700
Columbus, Ohio 43215
(614) 469-3200; (614) 469-3361 (fax)
Counsel for Lorain County and Lorain County
Board of County Commissioners

 by  (007560)

John B. Varanese by permission
jrvaranese@sbcglobal.net
85 East Gay Street, Suite 1000
Columbus, Ohio 43215
(614) 220-9440; (614) 220-9441 (fax)
Counsel for City of Lorain

Gerald A. Innes by John B. Kopf (0075060)
Gerald A. Innes *by permission*
jerry.innes@lcprosecutor.org
Assistant Prosecuting Attorney
Lorain County Justice Center
225 Court Street, 3rd Floor
Elyria, Ohio 44035
(440) 329-5398; (440) 329-5430 (fax)
Counsel for Lorain County Budget Commission

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing APPELLEES' BRIEF REGARDING THE OHIO SUPREME COURT'S INSTRUCTIONS UPON REMAND TO THE BOARD OF TAX APPEALS was sent to the following by regular U.S. Mail, postage prepaid, on November 23, 2009:

CITY OF ELYRIA
Terry S. (Pete) Shilling
Law Director
131 Court Street
Elyria, Ohio 44035

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

CITY OF SHEFFIELD LAKE
Tamara L. Smith, Finance Director
609 Harris Road
Sheffield Lake, Ohio 44054

KIPTON VILLAGE
Thomas Bray, Clerk-Treasurer
P. O. Box 177
Kipton, Ohio 44049

SHEFFIELD VILLAGE
Luke F. McConville
Waldheger Coyne
Gemini Tower I, Suite 550
1991 Crocker Road
Cleveland, Ohio 44145

CITY OF NORTH RIDGEVILLE
Eric H. Zagrans
Attorney
The Zagrans Law Firm
474 Overbrook Road
Elyria, Ohio 44035
eric@zagrans.com

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

CITY OF VERMILION
Finance Director
5511 Liberty Avenue
Vermilion, Ohio 44089

LAGRANGE VILLAGE
Sheila Lanning, Clerk-Treasurer
P. O. Box 597
LaGrange, Ohio 44050

SOUTH AMHERST VILLAGE
Nancy Gildner, Clerk-Treasurer
103 West Main Street
South Amherst, Ohio 44001

CITY OF AVON LAKE
William J. Kerner, Sr.
Law Director
150 Avon Belden Road
Avon Lake, Ohio 44012

City of Oberlin
Eric R. Severs, Law Director
5 South Main Street
Oberlin, Ohio 44074

GRAFTON VILLAGE
Linda S. Bales, Clerk-Treasurer
960 Main Street
Grafton, Ohio 44004

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

WELLINGTON VILLAGE
Karen J. Webb, Clerk
115 Willard Memorial Sq.
Wellington, Ohio 44090

BRIGHTON TOWNSHIP
Marilyn McClellan, Fiscal Officer
19996 Baird Road
Wellington, Ohio 44090

CARLISLE TOWNSHIP
Marlene Thompson, Fiscal Officer
11969 LaGrange Road
LaGrange, Ohio 44050

ELYRIA TOWNSHIP
Robert Repos, Fiscal Officer
42378 Griswold Road
Elyria, Ohio 44035

HUNTINGTON TOWNSHIP
Margaret Harris, Fiscal Officer
26309 State Route 58
Wellington, Ohio 44090

PENFIELD TOWNSHIP
Eleanor Gnanndt, Fiscal Officer
42760 Peck Wadsworth Road
Wellington, Ohio 44090

SHEFFIELD TOWNSHIP
Patricia F. Echko, Fiscal Officer
5166 Clinton Avenue
Lorain, Ohio 44055

BROWHELM TOWNSHIP
Marshal Doane Funk, Fiscal Officer
1940 North Ridge Road
Vermilion, Ohio 44089

COLUMBIA TOWNSHIP
Rita Plata, Fiscal Officer
P. O. Box 819
Columbia Station, Ohio 44028

GRAFTON TOWNSHIP
John Bracken, Fiscal Officer
17310 Chamberlin Road
Grafton, Ohio 44044

LAGRANGE TOWNSHIP
Roberta M. Dove Moore, Fiscal
Officer
P. O. Box 565
355 South Center
LaGrange, Ohio 44050

PITTSFIELD TOWNSHIP
James R. McConnell, Fiscal Officer
17567 Hallauer Road
Wellington, Ohio 44090

WELLINGTON TOWNSHIP
Louise Grose, Fiscal Officer
P. O. Box 425
Wellington, Ohio 44090

CAMDEN TOWNSHIP
Cheryl Parrish, Fiscal Officer
15374 Baird Road
Oberlin, Ohio 44074

EATON TOWNSHIP
Linda Spitzer, Fiscal Officer
12043 Avon Belden Road
Grafton, Ohio 44044

HENRIETTA TOWNSHIP
Francis J. Knoble, Fiscal Officer
10413 Vermilion Road
Oberlin, Ohio 44074
Vermilion, Ohio 44089

NEW RUSSIA TOWNSHIP
Elaine R. King, Fiscal Officer
46268 Butternut Ridge Road
Oberlin, Ohio 44074

ROCHESTER TOWNSHIP
Laura Brady, Fiscal Officer
52185 Griggs Road
Wellington, Ohio 44090

