

ORIGINAL

IN THE SUPREME COURT OF OHIO

CINCINNATI CITY SCHOOL DISTRICT
BOARD OF EDUCATION,

Supreme Court Case No. 2013-1426

Appellant,

On Appeal from the Board of Tax Appeals

v.

JOSEPH W. TESTA, TAX
COMMISSIONER OF OHIO, et al.

Appellees.

MERIT BRIEF OF APPELLANT CINCINNATI CITY SCHOOL DISTRICT
BOARD OF EDUCATION

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INTRODUCTION

Appellant Cincinnati City School District's ("CPS") sole reason for participating in this case is to challenge the constitutionality of amendments included in the 129th General Assembly's biennial budget bill, Am.Sub.H.B. No. 153, 2011 Ohio Laws File 28 ("Am.Sub.H.B. 153"). Specifically, CPS challenges the constitutionality of an amendment to R.C. 5709.084, which provides a real estate tax exemption for the Duke Energy Convention Center ("the Convention Center") owned by Appellee the City of Cincinnati ("the City"). Furthermore, uncodified § 757.95 that was included in Am.Sub.H.B. 153 directs the Board of Tax Appeals ("BTA") and this Court to apply the tax exemption retroactively to prior tax years.

In 2006, the City applied for a tax exemption for a parcel of private property it acquired to expand the Convention Center. At the time of the City's application, the other parcels comprising the Convention Center were exempt from real estate taxes. CPS did not object to the City's application for an exemption for the additional parcel in 2006. Nevertheless, Appellee Ohio Tax Commissioner ("the Tax Commissioner") denied the City's application for an exemption on March 22, 2011, finding that the City's agreement with a private entity to manage the Convention Center caused the City to lose its public use exemption for the property. The Tax Commissioner determined the property was taxable and directed the City to pay back taxes for the parcel for the 2007 to 2011 tax years.

Faced with liability for back taxes of approximately \$12 million, the City turned to the General Assembly for a backdoor legislative "fix." The City successfully lobbied the General Assembly to include a tax exemption for the Convention Center in its budget appropriations bill, Am.Sub.H.B. 153, effective on September 29, 2011. The amendment to R.C. 5709.084 provided a tax exemption to a single parcel of property in the entire state – the Cincinnati Convention

Center. Pursuant to uncodified § 757.95, the tax exemption applies retroactively to “the tax years at issue” in any pending exemption application or appeal. The City’s then pending appeal of the Tax Commissioner’s March 22, 2011 decision denying an exemption was the only case to which uncodified § 757.95 did, or could ever, apply.

Under well-established case law, a tax exemption that applies to prior tax years violates the prohibition against “retroactive laws” in the Ohio Constitution, Article II, § 28. The last-minute insertion of the amendments violates the “one-subject” provision in the Ohio Constitution, Article II, § 15(D), because the amendments bear no relation to the budget appropriations bill. Finally, the Am.Sub.H.B. 153 amendments violate the requirement in Ohio Constitution, Article II, § 26, for laws to operate “uniformly” throughout the state because the tax exemption applies solely to one parcel of land owned by the City, and the uncodified provision applies the exemption retroactively in a single case.

On September 29, 2011, the effective date of the Am.Sub.H.B. 153, CPS took every conceivable step to challenge the constitutionality of the amendment to R.C. 5709.084 and uncodified § 757.95. CPS filed a declaratory judgment action in the Franklin County Court of Common Pleas raising these claims. Also on September 29, 2011, CPS filed a statement of its intent to participate in the tax exemption proceedings pursuant to R.C. 5715.27.

The Tax Commissioner and the City moved to dismiss CPS’s declaratory judgment action, arguing that CPS’s “exclusive” remedy was to oppose the City’s exemption application in an R.C. 5715.27 proceeding. The court denied the motions to dismiss, and stayed the declaratory judgment case pending the outcome of CPS’s request to participate in the R.C. 5715.27 proceedings, and appeals to the BTA or this Court.

After the court stayed the declaratory judgment action, the Tax Commissioner dismissed CPS's case under R.C. 5715.27, and granted the City's exemption application for the Convention Center pursuant to the newly amended R.C. 5709.084. The Tax Commissioner reasoned that CPS's request to participate was untimely because it was not filed in 2006 when the City applied for the exemption, years before the challenged amendments were enacted in 2011. The consistent position of the Tax Commissioner and the City has been that CPS has no right to raise its constitutional challenges to the 2011 amendments in any forum.

This case is on appeal from the Tax Commissioner's and the BTA's denial of CPS's request to participate in the tax proceedings pursuant to R.C. 5715.27 for the limited purpose of creating a formal record to challenge the statute. CPS respectfully submits that the Court should reverse the decisions of the Tax Commissioner and BTA. Further, the Court should invalidate the amendment to R.C. 5709.084 and uncodified § 757.95 in Am.Sub.H.B. 153, because those provisions violate the Ohio Constitution. The Court should direct the Tax Commissioner and BTA to decide this case according to the law in existence in 2006, when the City filed its application for an exemption.

STATEMENT OF FACTS

In the cases below, the Tax Commissioner and the BTA declined to hold any hearings or allow CPS to develop a formal record from which to challenge the constitutionality of the amendments in Am.Sub.H.B. 153. Nevertheless, to preserve the record on appeal, CPS submitted a "proffer of evidence" to the BTA that includes stipulations and exhibits agreed to by the Tax Commissioner and the City in the case before the Court of Common Pleas. Moreover, the Tax Commissioner relied on the same stipulations to support his motion to dismiss CPS's appeal to the BTA. Thus, the factual record before this Court is sufficiently well-developed to

provide a background summary of this case and to support CPS's arguments that the Challenged Provisions violate the Ohio Constitution.

A. The City Applies For A Tax Exemption For The Convention Center Parcel.

In 2002, the City acquired a parcel of property for the purposes of expanding its Duke Energy Convention Center (Hamilton County Parcel No. 145-0002-0057, hereinafter the "Convention Center Parcel"). (Supp. 29; Supp. 135.) The City completed the construction of the expansion in January 2006. (Supp. 135.) On July 1, 2006, the City entered into a management agreement with Global Spectrum, LP, to manage and operate the Convention Center. (Supp. 30.) Under the management agreement, "[a]ll day-to-day and year-to-year activities involved with the operation of the Duke Energy Center and its various services [are] controlled by the contractor." (Supp. 136.)

The City filed an application for an exemption of real property taxes for the Convention Center Parcel on September 24, 2006. (Supp. 30.) The City sought the exemption under R.C. 5709.08, which exempts real property belonging to the state if it is used "exclusively for a public purpose." (Supp. 135, 137.)

Under R.C. 5715.27(B), Ohio school districts have the right to receive notice of exemption applications on property located within the school district. Ohio school districts also have the right to participate in administrative hearings on exemption applications by filing a statement indicating an intent to participate in the proceeding prior to the first day of the third month after the exemption application is docketed. R.C. 5715.27(C). At the time the City filed its 2006 application for an exemption, CPS had not requested notice of exemption applications. (Supp. 31.) CPS did not file a statement of intent to participate in the City's exemption application in 2006. (Supp. 31.)

B. The Tax Commissioner Denies The City's Application For A Tax Exemption Because The Convention Center Was Not Used "Exclusively For Public Purposes."

Although CPS did not participate in the initial proceedings in connection with the exemption application, the Tax Commissioner received evidence from the City and issued his "Final Determination" on March 22, 2011. The Tax Commissioner held that the Convention Center was not entitled to a tax exemption beginning with tax year 2007 because it was not "used exclusively for a public purpose." (Supp. 137-139.) According to the Tax Commissioner, by "turn[ing] over the management of its City-owned Duke Energy Center to a for-profit partnership . . . the City has effectively privatized the [Center]." (Supp. 138.)

Based on the Tax Commissioner's decision, the City was not exempt from paying real estate taxes for the Convention Center Parcel and the parcel was to be placed on the auditor's list of taxable property. (Supp. 141.) Absent a successful appeal, CPS estimated that the total tax revenues that would have been generated from the Convention Center property exceeded \$12 million. Of the \$12 million, CPS estimated that it would have received more than \$7 million in property tax revenues. (Supp. 6.)

Pursuant to R.C. 5715.02, the City filed an appeal with the BTA of the decision denying its application for a tax exemption for the Convention Center on May 13, 2011. (Supp. 31.) Because CPS did not participate in the proceedings before the Tax Commissioner, CPS did not attempt to intervene in the City's merits appeal in May 2011. Even if CPS had participated in the case at that time, it would have had no reason to appeal the Tax Commissioner's finding that the Convention Center was not entitled to a tax exemption.

C. After The Tax Commissioner Denied The City's Application, The General Assembly Enacts A Property Tax Exemption To Apply Solely To The Convention Center.

Faced with a \$12 million bill for back taxes, the City was not content to appeal the merits of the Tax Commissioner's decision denying the application under the "public use" exemption. Rather, the City took a backdoor approach and lobbied the General Assembly for a "legislative fix" (i.e., a new statute providing a tax exemption solely to the Cincinnati Convention Center that would apply both prospectively and retroactively). (Supp. 5.) The proposed exemption consisted of two sentences inserted into the General Assembly's 3,264-page budget appropriations bill at the eleventh hour. Am.Sub.H.B. 153, 2011 Ohio Laws File 28. Final versions of the budget bill passed by both the House of Representatives and the Senate did not include the proposed exemption for the Convention Center. (Supp. 32.) Without further debate, hearings or amendments, the exemption provisions were added to the budget bill during the conference committee sessions at a time when the passage was most assured. (*Id.*) The final version of the bill was passed on June 20, 2011 and became effective on September 29, 2011. (Supp. 31-32.)

In Am.Sub.H.B. 153, the General Assembly amended R.C. 5709.084, which now reads as follows:

Real and personal property comprising a convention center owned by the largest city in a county having a population greater than seven hundred thousand but less than nine hundred thousand according to the most recent federal decennial census is exempt from taxation, regardless of whether the property is leased to or otherwise operated or managed by a person other than the city.

2011 Am.Sub.H.B. No. 153, 2011 Ohio Laws File 28. (Supp. 31.) Only Hamilton County satisfies the population standard set forth in the amended statute. (Supp. 33; see also U.S.

Census (2010) *available at* www.2010.census.gov.)¹ Cincinnati is the largest city in Hamilton County. (Supp. 33.) Thus, the City's Convention Center is the sole property in Ohio that satisfies the newly-enacted tax exemption and will remain so until at least the 2020 census.

Am.Sub.H.B. 153 also included an uncodified provision, § 757.95, which stated:

§ 5709.084 of the Revised Code, as amended by this Act, is remedial in nature and applies to the tax years at issue in any application for exemption from taxation or any appeal from such an application pending before the Tax Commissioner, the Board of Tax Appeals, any Court of Appeals, or the Supreme Court on the effective date of this Act and to the property that is the subject of any such application or appeal.

Taken together, amended R.C. 5709.084 and uncodified § 757.95 (collectively, the "Challenged Provisions"), not only targets the Convention Center Parcel as tax exempt, but also directs the Tax Commissioner, the BTA, the Courts of Appeals, and this Court to apply the statute retroactively "to the tax years at issue" in any "pending" application. The City's exemption application was the only "pending" case to which § 757.95 could ever apply. (Supp. 33.) There will never be another case seeking a tax exemption related to a convention center in the largest city in any county that was pending on September 29, 2011, the effective date of Sub.H.B. 153.

With the newly-enacted exemption in hand, the City and the Tax Commissioner filed a joint motion in the BTA on August 11, 2011 to remand the City's exemption application to the Tax Commissioner. (Supp. 32.) The sole reason for remanding the case was for the Tax Commissioner to consider the implications of the City's exemption application under the newly amended R.C. 5709.084 that was to be effective in a few weeks. (Supp. 4.)

¹ In 2010, Hamilton County had a population of 802,374. By way of comparison, Franklin County had a population of 1,163,414, Cuyahoga County had a population of 1,280,122, Summit County had a population of 541,781, and Montgomery County had a population of 535,153. Hamilton County is the only county in Ohio that fits the population parameters of amended R.C. 5709.084. *See* U.S. Census (2010) *available at* www.2010.census.gov.

D. CPS Promptly Takes Action To Challenge The Constitutionality Of The Challenged Provisions.

When CPS learned of the enactment of the Challenged Provisions, it took every conceivable step to contest the constitutionality of the Challenged Provisions. On the effective date of the Challenged Provisions (September 29, 2011), CPS filed a statement of intent to participate in the exemption application proceedings, which had been remanded to the Tax Commissioner. (Supp. 32-33; Supp. 183) CPS's sole purpose in requesting to participate in the case was to establish a formal record to address the constitutionality issues and the retroactive application of the Challenged Provisions. (Supp. 183-188.)

CPS also filed a declaratory judgment action in the Franklin County Court of Common Pleas on the effective date of the Challenged Provisions. (Supp. 1-21.) In its complaint, CPS raised the same arguments regarding the constitutionality of the amendments that are raised in this appeal. (*Id.*) CPS also filed a motion for a temporary restraining order to enjoin the Tax Commissioner from issuing a revised final determination based on the Challenged Provisions. (Supp. 197.) In response, the Tax Commissioner voluntarily postponed his decision to allow time for the Court to consider motions to dismiss filed by the Tax Commissioner and the City. (Supp. 199.)

The Tax Commissioner and the City filed motions to dismiss CPS's declaratory judgment case in the court of common pleas. They argued that the declaratory judgment action was improper because CPS's "exclusive" remedy was to participate in the proceedings before the Tax Commissioner and BTA pursuant to R.C. 5715.27. Judge Frye summarized this argument as follows:

Tax Commissioner Testa . . . argues that a special statutory procedure exists under R.C. 5715.27 which precludes a parallel declaratory judgment suit in this court. . . .The City likewise argues the only forum for the dispute is before the Tax Commissioner, and

that coming to court bypasses an exclusive procedure mandated by the legislature.

(Supp. 199-200.) The Tax Commissioner and the City argued that CPS could not participate in the tax proceedings pursuant to R.C. 5715.27 to raise its constitutional arguments because it had not filed a statement to participate in 2006, years before the statute at issue was enacted.

The court rejected the arguments advanced by the Tax Commissioner and the City and denied “all motions to dismiss based upon lack of jurisdiction, lack of standing, and lack of ripeness.” (Supp. 201.) Judge Frye reasoned, “Indeed, if the cribbed view of [CPS’s] right to participate advanced by defendants in this court were ultimately accepted by the Tax Commissioner and the BTA, [CPS] would have no remedy absent this suit.” (Supp. 201.)

Although the court held that CPS could proceed with its declaratory judgment action, the court stayed the case pending the conclusion of the proceedings in the Tax Commission on the City’s application for an exemption. (Supp. 201.) At the time of the court’s decision, Judge Frye reasoned that it was not a “foregone conclusion that the Tax Commissioner [would even] apply these odd amendments as written.” (Supp. 202.) Even if the Tax Commissioner and BTA applied the amendments, the court reasoned that the tax proceedings were a more appropriate forum for CPS to challenge their constitutionality. Citing “the role of administrative agencies in setting-up constitutional issues for a judicial determination,” the court held that “staying this case in a complicated area like state taxation also reflects sensible deference to the expertise of the Commissioner and the BTA in this specialized field of law.” (Supp. 203-204.) On December 29, 2011, the Court stayed all further proceedings in the case “pending completion of the case before the Tax Commissioner (and appeals to the BTA and the Ohio Supreme Court”). (Supp. 204.)

E. The Tax Commissioner And BTA Apply The Challenged Provisions, Grant The City's Application For A Tax Exemption, And Decline To Allow CPS To Participate In This Case.

After the court stayed CPS's declaratory judgment action, the parties returned to the proceedings before the Tax Commissioner relating to the City's application for an exemption. The City and the Tax Commissioner had previously filed a joint motion to remand the case to the Tax Commissioner for "further consideration" of the Challenged Provisions. (Supp. 181.) CPS sought to participate in this "further consideration" by filing a statement of intent to participate on September 29, 2011, the effective date of the Challenged Provisions. (Supp. 183-188.) The Tax Commissioner responded by email later in the day stating that CPS "had no jurisdiction to file." (Supp. 191.) After Judge Frye stayed the declaratory judgment action on December 28, 2011, CPS, complying with the court's directive to proceed through the administrative process, filed a renewed motion to intervene in the Tax Commission proceedings on January 12, 2012. (Supp. 206-211.)

On February 21, 2012, without a hearing, briefing, or any further argument from the City or CPS, the Tax Commissioner issued a revised Final Determination reversing his prior finding and granting the City's application for a tax exemption for the Convention Center Parcel due solely to the existence of the amended statute and uncodified section: "Pursuant to R.C. 5709.084 effective in accordance with Am.Sub.H.B. 153, uncodified sec. 757, the Commissioner finds that the above parcel qualifies for exemption." (Appx. 19.) Although the amendments to R.C. 5709.084 were not enacted until 2011, the Tax Commissioner applied the statute retroactively, holding that the City was "entitled to exemption for tax years 2006 forward." (*Id.*)

The Tax Commissioner gave little consideration to CPS's request to participate in the proceedings for the limited purpose of raising the constitutional arguments. Instead, the Tax Commissioner held that the City and the Tax Commissioner were the only proper parties who

could participate in the exemption application proceedings because “[n]o other parties filed an interest in accordance with R.C. 5715.27.” (*Id.*) On this basis, the Tax Commissioner denied CPS’s request to participate. (*Id.*)

On April 10, 2012, CPS filed a timely appeal of the Tax Commissioner’s decision to the BTA pursuant to R.C. 5717.02. CPS’s notice of appeal again specified that its only interest in the case was to address the constitutionality of the 2011 Challenged Provisions. (CPS Notice of Appeal, April 10, 2012.) The BTA scheduled a hearing for the appeal on July 24, 2013. (BTA Notice of Merit Hearing, May 8, 2013.) On June 13, 2013, the Tax Commissioner filed a motion to dismiss. Again, the Tax Commissioner argued that CPS was not a proper party under R.C. 5715.27 because it did not file a statement to participate in the appeal in 2006. On August 9, 2013, the BTA granted the Tax Commissioner’s motion, reasoning that CPS “failed to meet the statutory prerequisites of R.C. 5715.27(C) and therefore cannot invoke this board’s jurisdiction on appeal.” (Appx. 8.)

On September 4, 2013, CPS filed a timely notice of appeal to this Court pursuant to R.C. 5717.04.

ARGUMENT

Proposition of Law No. I: When the General Assembly enacts a tax exemption statute that applies to a case pending before the Tax Commissioner or BTA, a school district has a right to participate in the case for the limited purpose of challenging the constitutionality of the exemption.

A. CPS Has The Right Under R.C. 5715.27 To Participate In This Case.

The Tax Commissioner and the BTA erred by denying CPS an opportunity to submit evidence and create a formal record to address the constitutionality of the Challenged Provisions before this Court. CPS exercised its right to participate at the earliest opportunity: it filed its statement to participate in this case on the effective date of the Challenged Provisions.

R.C. 5715.27 confers on boards of education the opportunity to participate in proceedings relating to a taxpayer's application for an exemption:

R.C. 5715.27 is a general statute relating to the granting and revoking of exemptions from real property taxes. The statute allows property owners to file applications for exemption with the commissioner, who must then notify the boards of education of these applications if requested to do so. See R.C. 5715.27(A) and (B). A board of education may then "file a statement with the commissioner *** indicating its intent to submit evidence and participate in any hearing on the application." R.C. 5715.27(C). The commissioner may not act on the application for exemption before the board of education's deadline for submitting this statement unless certain statutory exemptions apply.

Bd. of Edn. of Gahanna-Jefferson Local School Dist. v. Zaino, 93 Ohio St.3d 231, 233, 2001-Ohio-1335, 754 N.E.2d 789 (2001) (overruling BTA's decision that it lacked statutory jurisdiction to consider school district's complaint regarding continued exemption of property in a community reinvestment area).

Under R.C. 5715.27(C), a board of education has a right to file a statement of intent to participate "prior to the first day of the third month following the end of the month in which that application was docketed." A board of education's decision not to file within the three-month

time frame does not necessarily deprive the Tax Commissioner of the authority to allow the board of education to participate in the case. Indeed, the Tax Commissioner has express, statutory authority to permit a school district to participate in a tax proceeding even if the statement was not filed within three months. Under R.C. 5715.27(D), “[t]he commissioner or auditor may extend the time for filing a statement under division (C) of this section.”

In the instant case, CPS filed a timely statement to participate in 2011 for the limited purpose of challenging the constitutionality of the Challenged Provisions when those laws were enacted. A school district “challeng[ing] the constitutionality of the application of a tax statute in a particular situation is required to raise that challenge at the first available opportunity during the proceedings before the Tax Commissioner.” (Emphasis added.) *Bd. of Edn. of the South-Western City Schools v. Kinney*, 24 Ohio St.3d 184, 186, 494 N.E.2d 1109 (1986) (holding that school district could not raise an as-applied challenge to the constitutionality of a tax statute for the first time in the Supreme Court). Here, that first available opportunity arose on the effective date of the offending laws.

In contrast to the actions taken by the school district in *South-Western City Schools*, CPS raised its challenge to the constitutionality of the Challenged Provisions at the “first available opportunity.” CPS filed a notice of intent to participate on September 29, 2011 – the effective date of the Challenged Provisions. (Supp. 183-188.) There was no earlier opportunity for CPS to oppose the constitutionality of the Challenged Provisions for they were not then enacted. As Judge Frye observed:

Obviously, the history of the exemption dispute shows that no one in the General Assembly conceived of the Amendments before late spring 2011, so one may logically ask how [CPS] could have been expected to anticipate that it needed to take steps earlier protecting its right to participate.

(Supp. 202.)

The Tax Commissioner and the BTA erred by refusing to allow CPS to develop the formal record to present its constitutional arguments regarding the Challenged Provisions. Based on the change to the law in 2011, and given that CPS filed its constitutional challenge “at the earliest opportunity,” it was unreasonable and unlawful for the Tax Commissioner and BTA to deny CPS an opportunity to participate in this case.

B. The Tax Commissioner’s Argument That CPS Waived Its Right To Challenge The Constitutionality Of The Challenged Provisions Is Without Merit.

The Tax Commissioner and BTA denied CPS an opportunity to participate in the proceedings below based on a misguided interpretation of R.C. 5715.27. In the view of the Tax Commissioner and the BTA, CPS waived the right to participate in this case because it did not file a statement to participate when the City filed its application for a tax exemption for the Convention Center in 2006. Of course, CPS was not clairvoyant and did not know in 2006 that the General Assembly at the behest of the City would enact legislation five years later granting a retroactive exemption that applied solely to the Convention Center Parcel.

The two cases relied upon by the Tax Commissioner are easily distinguishable from the instant case. See Tax Commissioner Mot. to Dismiss citing *Strongsville Bd. of Edn. v. Zaino*, 92 Ohio St.3d 488, 2001-Ohio-1269, 751 N.E.2d 996 (2001), and *Olmsted Falls Bd. of Edn. v. Tracy*, 76 Ohio St.3d 386, 667 N.E.2d 1200 (1996). Both *Strongsville* and *Olmsted Falls* involve boards of education that sought to oppose the merits of a property owner’s application for an exemption despite filing untimely statements to participate. *Strongsville*, 92 Ohio St.3d at 488 (dismissing school district’s statement to participate that was filed after the deadline for opposing property owner’s exemption application); *Olmsted Falls*, 76 Ohio St.3d at 388 (noting that the board of education was “informed by the commission of the filing of [the property owner’s]

1990 application, but it failed to file any statement with the commissioner of its intention to participate in any hearings”). These two cases are distinguishable from the instant case, in which CPS could not have raised its constitutional challenge before the Challenged Provisions were enacted in 2011. Further, these two cases involve school districts that sought to challenge the merits of the application and not the impact of a statute passed after the Tax Commissioner had reached a decision on the merits.

In its decision dismissing CPS’s appeal, the BTA also cited cases involving parties who did not properly perfect a notice of appeal. (Appx. 7.) *See, e.g., Am. Restaurant & Lunch Co. v. Glander*, 147 Ohio St. 147, 150, 70 N.E.2d 93 (1946) (dismissing appeal that was “filed ten months after the expiration of the time prescribed by statute for the perfection of the appeal”); *Craftsman Type, Inc. v. Lindley*, 6 Ohio St.3d 82, 85 451 N.E.2d 768 (1983) (declining to consider argument that was “never properly raised” in the BTA); *Southside Community Dev. Corp. v. Levin*, 119 Ohio St.3d 521, 2008-Ohio-4839, 895 N.E.2d 551, ¶ 14 (“[T]hose who appeal to the BTA from final determinations of the Tax Commissioner must ‘specify the errors complained of’ in that initial determination.”). Unlike the appellants in the cases cited by the BTA, CPS properly raised its constitutional challenges in its notice of appeal.

Relying on these cases, the Tax Commissioner and BTA reasoned that they lacked the statutory authority to allow CPS to present its arguments regarding the constitutionality of the Challenged Provisions. This Court has not taken such a constrained view of the jurisdiction of the Tax Commissioner and BTA:

While this court has never encouraged or condoned disregard of procedural schemes logically attendant to the pursuit of a substantive legal right, it has also been unwilling to find or enforce *jurisdictional* barriers not clearly statutorily or constitutionally mandated, which tend to deprive a supplicant of a fair review of his complaint on the merits.

Groveport Madison Local Schools Bd. of Edn. v. Franklin Cty. Bd. of Edn., 2013-Ohio-4627, ¶ 14 (citing *Nucorp, Inc. v. Montgomery Cty. Bd. of Revision*, 64 Ohio St.2d 20, 21, 412 N.E.2d 947 (1980)).

In this case, there are no jurisdictional barriers that would have prevented the Tax Commissioner or BTA from allowing CPS to create a formal record of its constitutional argument. R.C. 5715.27(D) expressly authorizes the Tax Commissioner to “extend the time” for a board of education to file a statement of its intent to participate in proceedings relating to a Tax Exemption. The BTA itself has recognized a school district’s right to intervene in cases that involved changed circumstances while the case was pending. *See, e.g., Fazio Ltd. Partnership No. 2 v. Cuyahoga Cty. Bd. of Revision*, BTA Case No. 201-K-1797, 2011 WL 4748925 (Oct. 4, 2011) (allowing a school district to intervene in an appeal notwithstanding its non-participation in proceedings conducted before the Cuyahoga County Board of Revision). The BTA reasoned that a “change in circumstances” justified the school district participating in the appeal, because the appellant sought a greater reduction in the value of its property in the BTA than it had initially sought in the Board of Revision. *Id. See also Thomas L. Bassett v. Franklin Cty. Bd. of Revision*, BTA Case No. 2007-A-994, 2008 WL 2316535 (May 27, 2008) (citing cases in which school districts were permitted to intervene for the first time in the BTA). The Tax Commissioner and BTA had the authority to allow CPS to participate in this case for its stated limited purpose.

Nor can the decision to deny CPS an opportunity to participate in this case be justified for reasons of administrative efficiency or judicial economy. After the General Assembly enacted the budget bill on June 30, 2011, the City and the Tax Commissioner filed a joint motion in the BTA to remand the City’s exemption application to the Tax Commissioner “for further

consideration.” (Supp. 179.) The sole purpose of the remand was to consider the City’s application in light of the recently-enacted Challenged Provisions. CPS filed its statement to participate less than one month later, before the Tax Commissioner engaged in any “further consideration” of the City’s application under the Challenged Provisions. CPS was not seeking to re-litigate the merits of the City’s exemption application under the “exclusively public use” exemption. To the contrary, CPS sought to participate for the sole purpose of challenging the constitutionality of the newly enacted Challenged Provisions.

Moreover, by participating in CPS’s declaratory judgment action in the court of common pleas, the Tax Commissioner and the City were well-aware that CPS planned to pursue its constitutional challenges either in the tax proceedings or in court. The court stayed the declaratory judgment action, in part because Judge Frye reasoned that the proceedings in the Tax Commission would be a more appropriate and efficient forum for CPS to make its constitutional arguments:

Even if the Commissioner and BTA apply the amendments . . . a more timely resolution of the dispute will be available using that avenue than can be provided by this declaratory judgment case. This case remains to work its way through trial, the intermediate court of appeals, and only then can reach the Supreme Court of Ohio.

(Supp. 204.)

If CPS is denied the opportunity to raise its constitutional arguments here, the case will return to the court of common pleas: “This declaratory judgment litigation over the constitutional questions can be resumed should those avenues not resolve the matter with finality.” (*Id.*) As Judge Frye forecasted, it could take years for the case to return on appeal to this Court. If this Court ultimately determines that the Challenged Provisions violate the Ohio Constitution, it will be even more complicated to undo the application of the exemption. It makes far more sense for

this Court to consider the constitutionality of the Challenged Provisions in this appeal of the City's application.

C. The Court Should Rule On The Constitutionality Of The Challenged Provisions.

Although the Tax Commissioner and BTA erred in disallowing CPS's participation in the formal proceedings below, this case need not be remanded for further proceedings in the BTA or Tax Commissioner's office. Because those tribunals cannot rule on the constitutional issues, no purposes would be served by remanding the case. Further, the facts underpinning the challenges are not in dispute as shown by the Stipulations. Instead, this Court should rule on CPS's challenge to the constitutionality of the Challenged Provisions.

The Tax Commissioner and BTA do not have the authority to rule on the constitutionality of tax statutes. *See Cleveland Gear Co. v. Limbach*, 35 Ohio St.3d 229, 231, 520 N.E.2d 188 (1988) (“[T]he Board of Tax Appeals is an administrative agency, a creature of statute, and is without jurisdiction to determine the constitutional validity of a statute.”). The “role” of the Tax Commissioner and BTA in cases alleging a constitutional challenge is “to be a receiver of evidence.” *MCI Telecommunications Corp. v. Limbach*, 68 Ohio St.3d 195, 197, 625 N.E.2d 597 (1994). “The BTA receives evidence at its hearing, but [the Supreme Court] determine[s] the facts necessary to resolve the constitutional question.” *Id.* at 198.

Here, there is no additional evidence needed for this Court to rule on CPS's constitutional challenges to the statute. CPS argues below that the Challenged Provisions are unconstitutional pursuant to the prohibition against “retroactive laws” set forth in Article II, § 28, the “single-subject” requirement set forth in Article II, § 15(D), and the requirement that laws operate “uniformly” as set forth in Article II, § 26. CPS respectfully submits that the Challenged Provisions are facially unconstitutional. “[E]xtrinsic facts are not needed to determine that a

statute is unconstitutional on its face.” *Cleveland Gear Co.*, 35 Ohio St.3d at 231. “[T]he question of whether a tax statute is unconstitutional on its face may be raised initially in the Supreme Court or the courts of appeals, although the question was not previously raised before the Board of Tax Appeals.” *Id.* Here, CPS raised its constitutional challenge in the proceedings below, which was more than sufficient to preserve its challenge to the constitutionality of the Challenged Provisions here.

To the extent any facts are needed to support CPS’s constitutional arguments, the facts are merely background and undisputed by the City or the Tax Commissioner. For example, the parties do not dispute that the Convention Center was the only parcel in the state that met the requirements of the tax exemption in the Challenged Provisions at the time they became effective. (Supp. 33.) The parties also agree that there were no other cases pending before the BTA or the Tax Commissioner to which amended R.C. 5709.084 would apply. (Supp. 33.) No other facts are needed for the Court to invalidate the Challenged Provisions. And there is no set of facts that the City or Tax Commissioner could develop to support an argument that the Challenged Provisions are constitutional.

It would serve no purpose to remand this case to the Tax Commissioner or the BTA for the development of a formal record. The undisputed facts as shown in the Stipulations filed in the case before Judge Frye enable this Court to rule on CPS’s constitutional challenges to the Challenged Provisions.

Proposition of Law No. II: The Challenged Provisions violate the Ohio Constitution.

A. The Challenged Provisions Violate The Prohibition Against Retroactive Laws.

The Challenged Provisions are unconstitutional because they are retroactive and impact substantive rights. Article II, § 28 of the Ohio Constitution provides that “[t]he general assembly shall have no power to pass retroactive laws.”

This Court applies a two-part analysis to determine whether a statute should be invalidated as a retroactive law. *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St.3d 100, 104-109, 522 N.E.2d 489 (1988). The court first determines whether the General Assembly intended the law to apply retroactively. *Id.* at 106. If the law was intended to apply retroactively, the Court then determines whether the statute is remedial or substantive. *Id.* at 106-107. A remedial statute which “merely substitute[s] a new or more appropriate remedy for the enforcement of an existing right” is constitutional even if applied retroactively. *Id.* at 107. By contrast, a statute is substantive if it “impairs or takes away vested rights, affects an accrued substantive right, imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction, creates a new right out of an act which gave no right and imposed no obligation when it occurred, creates a new right, [or] gives rise to or takes away the right to sue or defend actions at law.” *Id.* at 107. This Court has consistently invalidated laws that are both retroactive and impair substantive rights.

Legislation, like the Challenged Provisions, that applies tax exemptions retroactively violates the Ohio Constitution’s prohibition against retroactive laws: “[A]n exemption statute, such as this is, can exempt only taxes, the assessment of which had not been completed at the time the exemption statute became a law, and cannot exempt taxes which had been finally assessed and had become due and payable before the date when the exemption statute became a

law.” *State ex rel. Struble v. Davis*, 132 Ohio St. 555, 567, 9 N.E.2d 684 (1937) (tax exemption statute enacted in 1933 that applied to taxes accrued in 1932 violated retroactive laws provision in the Ohio Constitution, Article II, § 28). *See also Perk v. City of Euclid*, 17 Ohio St.2d 4, 8, 244 N.E.2d 475 (1969) (statute providing an exemption to the city for past tax years was unconstitutionally retroactive, notwithstanding the city’s argument that the retroactive laws provision should not apply to political subdivisions who are tax creditors as well as tax debtors).

Two cases interpreting amendments in 1999 Sub. H.B. 694 are instructive. *Cincinnati City School Dist. Bd. of Edn. v. Hamilton Cty. Bd. of Revision*, 91 Ohio St.3d 308, 2001-Ohio-46, 744 N.E.2d 751 (2001) (the “*Mirge*” decision) and *Rubbermaid, Inc. v. Wayne Cty. Aud.*, 95 Ohio St.3d 358, 2002-Ohio-2338, 767 N.E.2d 1159 (2002). The General Assembly enacted HB 694 in response to *Sharon Village, Ltd. v. Licking Cty. Bd. of Revision*, 78 Ohio St.3d 479, 678 N.E.2d 932 (1997), which determined that a board of revision did not have jurisdiction over a complaint prepared and filed by a non-attorney tax agent. *See Mirge*, 91 Ohio St.3d at 309-10. HB 694 gave certain non-attorney property owner representatives the right to file a tax valuation complaint. An uncodified provision of HB 694 stated that the statute could be applied retroactively to allow parties to refile complaints for prior tax years that had been previously dismissed per the holding in *Sharon Village*.

In *Mirge*, the school district argued that the uncodified provision in HB 694 violated the retroactive laws provision because it allowed a property owner to refile a valuation complaint for past tax years that was previously dismissed under the holding in *Sharon Village*. Applying its two-part analysis, the Court determined that the General Assembly intended the amendments in HB 694 to apply retroactively to prior tax years. *See Mirge*, 91 Ohio St.3d at 311. This Court then determined that the new statute was substantive, rather than merely remedial, because it

created a new right allowing property owners to refile dismissed complaints, while imposing a new burden on officials to defend such complaints. *Id.* at 316-17. Accordingly, the *Mirge* court invalidated the retroactive application of HB 694 as a violation of Article II, § 28 of the Ohio Constitution. *Id.* at 317.

The issue left open by *Mirge* was whether HB 694 was unconstitutional when applied to an original case that was pending at the time the amendments were enacted. In *Rubbermaid*, the taxpayer's initial complaint was dismissed pursuant to the holding in *Sharon Village*, but its appeal was pending in the BTA when the General Assembly enacted HB 694. *Rubbermaid*, 95 Ohio St.3d at ¶¶ 6-8. The BTA reasoned that the HB 694 amendments could be applied to save *Rubbermaid*'s previously-filed valuation complaint. This Court reversed the BTA's decision, reasoning that *Mirge* applied with "equal force" to an original complaint filed before the enactment of the statute and still pending on the statute's effective date. *Id.* at ¶ 9.

Following the cases stemming from the enactment of HB 694, the Challenged Provisions should be invalidated as a retroactive law that affects substantive rights. In the instant case, a plain reading of the statute shows that the General Assembly clearly intended the Challenged Provisions to apply retroactively to exemption applications filed prior to the enactment of the statute. Under the uncodified provision, § 757.95, the tax exemption "applies to the tax years at issue in any application for exemption or any appeal from such an application pending before the Tax Commissioner, the Board of Tax Appeals, any Court of Appeals, or the Supreme Court on the effective date of this act." Further, the Tax Commissioner relied solely on the Challenged Provisions to reverse his prior decision and grant the City's application for a tax exemption for tax years 2006 through 2011.

The Challenged Provisions also impact substantive rights. The fact that the uncodified provision § 757 self-servingly states that R.C. 5709.084 is “remedial in nature” is irrelevant. *See Rubbermaid*, 95 Ohio St.3d at ¶ 7 (“Although the uncodified Section 3 of Sub. H.B. No. 694 refers to the amendment as remedial in nature, this court is not bound to accept that characterization but must instead undertake its own analysis.”).

The Challenged Provisions are substantive, not merely remedial, because they grant the City a right to an exemption that it did not have in 2006 or in the intervening years before the Challenged Provisions were enacted. Indeed, the Challenged Provisions are far more substantive than the provisions that this Court found unconstitutionally retroactive in *Mirge* and *Rubbermaid*. In *Mirge* and *Rubbermaid*, this Court found that HB 694 was substantive even though the bill only changed the persons who were entitled to file a complaint with the board of revision. HB 694 had no impact on the merits of a valuation complaint. Nevertheless, the Court held that the change to the process impacted the parties’ substantive rights. Here, the Challenged Provisions expand the category of property exempt from real estate taxes, and changes the substantive rights of the City and CPS. Further, the Challenged Provisions take away tax funded revenue for school districts that they were entitled to receive absent the exemption.

The prohibition against retroactive laws prevents the General Assembly from authorizing a tax exemption that applies to tax years before the enactment of the statute. This Court should hold that the Challenged Provisions may not be applied retroactively, and either void these provisions altogether or direct the Tax Commissioner and BTA to apply only those exemptions in effect in 2006 to this case.

B. The Challenged Provisions Violate The Single-Subject Requirement.

The Challenged Provisions are unconstitutional under the single-subject requirement. Article II, § 15(D) of the Ohio Constitution provides that “[n]o bill shall contain more than one subject, which shall be clearly expressed in its title.”

The single-subject requirement safeguards “against logrolling and stealth and fraud in legislation.” *In re Nowak*, 104 Ohio St.3d 466, 2004-Ohio-6777, 820 N.E.2d 335, ¶ 44 (2004) (invalidating statutory amendments that bore no rational connection to the title or other provisions of the bill). A bill violates the single-subject rule where the bill “includes a disunity of subject matter such that there is no discernible practical, rational, or legitimate reason for combining the provisions in one act.” *State ex rel. Ohio Civ. Serv. Emps. Assn. v. State Emp. Relations Bd.*, 104 Ohio St.3d 122, 2004-Ohio-6363, 818 N.E.2d 688, ¶ 28 (2004) (internal quotation omitted); *see also Riebe Living Trust v. Concord Twp.*, 11th Dist. No. 2011-L-068, 2012-Ohio-981, ¶ 16 (“[t]he one-subject provision attacks logrolling by disallowing unnatural combinations of provisions in acts, i.e., those dealing with more than one subject, on the theory that the best explanation for the unnatural combination is a tactical one—logrolling”). The Challenged Provisions were enacted as part of Substitute House Bill 153, a budget bill that addressed appropriations, fund transfers, and similar provisions. A retroactive tax exemption solely for the Cincinnati Convention Center is clearly unrelated to state appropriations and fund transfers.

Budget appropriation bills are not immune from challenge under the single-subject rule. In *Ohio Civ. Serv. Emps. Assn.*, 104 Ohio St.3d 122, 2004-Ohio-6363, 818 N.E.2d 688, at ¶ 32, this Court invalidated a provision of a budget appropriations bill that exempted Ohio School Facilities Commission (“OSFC”) employees from Ohio’s public employee collective bargaining

laws. This Court noted that the amendment amounted to a single sentence in a 226 page budget appropriations bill. *Id.* Although this Court acknowledged “[a]pplication of the one-subject rule is complicated when the challenged provision is part of an appropriations bill,” OSFC’s argument that all the provisions were bound by a common thread “stretche[d] the one-subject concept to the point of breaking.” *Id.* at ¶ 33. The legislative record was devoid of any explanation as to the manner in which the amendment clarified or altered the appropriation of state funds. *Id.* at ¶ 34. As a result, this Court invalidated the statute pursuant to the one-subject rule. *Id.*

Similarly, in *Simmons-Harris v. Goff*, 86 Ohio St.3d 1, 14-17, 711 N.E.2d 203 (1999), this Court struck down Ohio’s school voucher program from a budget appropriations bill. This Court reasoned that inclusion of the school voucher program in the budget appropriations bill amounted to little more than a “rider” that was certain of adoption “not on its own merits, but on the merits of the measure to which it [was] attached.” *Id.* at 16. This Court reasoned that application of the single-subject rule should be enforced to allow the issues presented to be “better grasped and more intelligently discussed.” *Id.* This Court then struck the school voucher program from the budget appropriations bill because it violated the one-subject rule. *Id.*

Here, the Challenged Provisions were clearly “riders” to a much larger appropriations bill. Like the provisions in *Ohio Civ. Serv. Emps. Assn.* and *Simmons-Harris*, the Challenged Provisions consist of a mere two sentences in a budget appropriations bill that was 3,264 pages long. As in *Ohio Civ. Serv. Emps. Assn.*, the legislative record here lacked any explanation as to how the amendment affected the appropriation of state funds.

The timing of the introduction of the Challenged Provisions, and the fact that they were introduced without any public hearings or debate, is strong evidence of logrolling. Here, the

Challenged Provisions were not included in prior versions of the budget appropriations bill, including (1) the original version of the bill introduced in the Ohio House of Representatives on March 15, 2011, (2) the version reported out of the House Finance and Appropriations Committee on May 4, 2011, (3) the version passed by the Ohio House of Representatives on May 5, 2011, and (4) the version reported by the Ohio Senate on June 8, 2011. (Supp. 32.) The Challenged Provisions were not included in the budget bill until the bill reached the conference committee in June 2011. (*Id.*) As Judge Frye observed, the Challenged Provisions “materialized just in time to be tucked into the last conference committee version of the biennial state budget bill...” (Supp. 196.) Judge Frye further notes that the Challenged Provisions “surely were inconspicuous to most legislators” as they were found within the “massive 3,246-page document.” (*Id.*) The Challenged Provisions were merely riders that were adopted on the merits of the rest of the appropriation bill, not on their own merits.

The Challenged Provisions were added only after the Tax Commissioner’s March 2011 Final Determination denying the City’s application for an exemption. The special and unique nature of the exemption, and the inclusion of the uncodified retroactive provision, speaks volumes as to the special nature of this logrolling effort. The Challenged Provisions violates the single-subject provision in Article II, § 15(D) of the Ohio Constitution.

C. The Challenged Provisions Violate The Uniformity Clause.

The Challenged Provisions also violate the Uniformity Clause of the Ohio Constitution. Article II, § 26 of the Ohio Constitution provides that “[a]ll laws, of a general nature, shall have a uniform operation throughout the state.”

“The purpose of the Uniformity Clause is to prohibit the enactment of special or local legislation.” *Austintown Twp. Bd. of Trustees v. Tracy*, 76 Ohio St.3d 353, 356, 667 N.E.2d

1174 (1996). “Historically, tax statutes have been viewed by this Court to be of a general nature.” *State ex rel. Zupancic v. Limbach*, 58 Ohio St.3d 130, 138, 568 N.E.2d 1206 (1991) (citing cases). The Court has “emphasized the importance of uniformity in the operation of [taxation] statutes.” *Id.* The Challenged Provisions, and especially uncodified § 757.95, create a tax exemption that only applies to the Cincinnati Convention Center and permits the retroactive application of the exemption in a single case then-pending in the BTA.

In *Zupancic*, this Court considered a statute applying a special property tax distribution formula to power plants with an initial equipment cost exceeding \$1 billion. Under the prior statute, the taxing district where the power plant was located (i.e., the situs district) received a larger share of the tax proceeds from the plant. *Id.* at 134. In 1988, the General Assembly enacted a revised distribution formula that would apply only to “highly costly electric plants,” in part in response to the construction of the Perry Nuclear Power Plant. Under the new formula, taxing districts surrounding the situs district received a larger share of the tax proceeds from the more expensive plant. At the time, the Perry Nuclear Power Plant was the only plant in the state with equipment costing more than \$1 billion, and the situs district filed a lawsuit arguing that the revised apportionment formula violated the Uniformity Clause. The Court upheld the statute reasoning that the operative provisions were not “arbitrary” and there were no distinctions drawn or created that were “artificial distinctions where no real distinction exists.” Moreover, this Court upheld that the formula despite its application to only one plant, “so long as its terms are uniform and it may apply to cases similarly situated in the future.” (Emphasis added.) *Id.* at 138.

In *Put-in-Bay Island Taxing Dist. Auth. v. Colonial, Inc.*, this Court declared a statute unconstitutional because it targeted a “limited geographical class.” 65 Ohio St.3d 449, 452, 605

N.E.2d 21 (1992). There, in order to raise funds for designated townships and municipal corporations, the statute established each island in Ohio as a “special taxing district.” In finding a violation of the Uniformity Clause, this Court held that the statute was unconstitutional because the statute could never apply to any other existing part of the state. *Id.* The number of islands was finite, and because the legislation lacked the *potential* to apply throughout the state, the statute lacked uniformity. *Compare to Kellys Island Caddy Shack, Inc. v. Zaino*, 96 Ohio St.3d 375, 2002-Ohio-4930, 775 N.E.2d 489 (holding that amended statute applying only to “resort areas” was constitutional because there were “no limitations or restrictions to prevent other municipal corporations or townships from qualifying in the future”).

Here, the Challenged Provisions provide a tax exemption only to a convention center in the largest city in a county with a population between 700,000 and 900,000. According to the 2010 census, Hamilton County was the only county in Ohio with a population between 700,000 and 900,000. By limiting the application to Hamilton County, the Challenged Provisions create an “arbitrary geographic distinction” which violates the Uniformity Clause. *Compare City of East Liverpool v. Columbiana Cty. Budget Comm.*, 114 Ohio St.3d 133, 2007-Ohio-3759, 870 N.E.2d 705, ¶ 15 (2007) (holding that limitation to certain small counties based on population “represent[ed] a rational balancing of political subdivision interests . . . in a small county in which a few of the cities are of similar size, the interests of the largest city should not weigh more heavily”).

Moreover, the Challenged Provisions go further than just exempting property in one county. By definition, there will always be only one city – currently it is Cincinnati – in any county that ever meets the criteria. Thus, the Challenged Provisions do not even apply uniformly within the only county to which they apply. Furthermore, the requirements of the exemption are

so narrowly drawn as to apply to only one parcel of property in the state – the Cincinnati Convention Center. This extremely narrow exemption suggests enactment of special or local legislation – the type of legislation the Uniformity Clause makes unconstitutional.

Furthermore, the uncodified provision in § 757.95 of Sub HB 153 provides that the tax exemption applies to any “pending [cases] on the effective date of this act.” It is undisputed by the Tax Commissioner that the instant case was the only case involving the application of the Challenged Provisions on the effective date of the statute. Thus, even if the prospective grant of a tax exemption under the provisions of the modified R.C. 5709.084 survives scrutiny under the Uniformity Clause, the application of the uncodified provision in this case does not. Because no other cases were pending at the time the Challenged Provisions were effective, there is no potential future application of the uncodified provision. Thus, the Challenged Provisions that include the uncodified provisions should be invalidated under the Uniformity Clause.

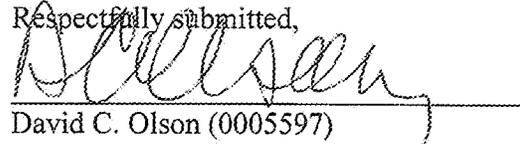
CONCLUSION

For the foregoing reasons, CPS respectfully submits that this Court should reverse the decisions of the Tax Commissioner and BTA for refusing to allow CPS to participate in this case. This Court should invalidate the Challenged Provisions because they violate the "retroactive laws," "single-subject," and "uniformity" provisions of the Ohio Constitution.

This Court should overrule the Tax Commissioner's Final Determination dated February 21, 2012 in which the Tax Commissioner applied the 2011 Challenged Provisions to the City's 2006 application for an exemption for the Convention Center. The Tax Commissioner has already issued a Final Determination in this case based on the law in effect before the enactment of the Challenged Provisions. (Appx. 11-17.) This Court should remand this case to the BTA,

with instructions to direct the Tax Commissioner to reinstate the March 22, 2011 Final Determination.

Respectfully submitted,



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A handwritten signature in cursive script, appearing to read "Matthew G. ...", is written over a horizontal line.

APPENDIX

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ORIGINAL

IN THE SUPREME COURT OF OHIO
APPEAL FROM THE BOARD OF TAX APPEALS

13-1426

CINCINNATI CITY SCHOOL
DISTRICT BOARD OF EDUCATION,

APPELLANT,

v.

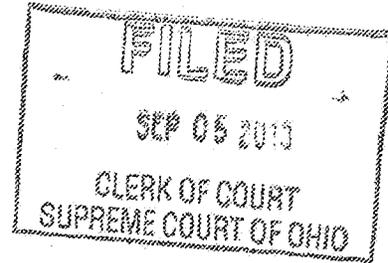
JOSEPH W. TESTA, TAX
COMMISSIONER OF OHIO,

THE CITY OF CINCINNATI,

APPELLEES.

SUPREME COURT CASE NUMBER:

BOARD OF TAX APPEALS CASE NO.
2012-Q-1047



NOTICE OF APPEAL

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IN THE SUPREME COURT OF OHIO
APPEAL FROM THE BOARD OF TAX APPEALS

CINCINNATI CITY SCHOOL)
DISTRICT BOARD OF EDUCATION,)

APPELLANT,)

v.)

JOSEPH W. TESTA, TAX)
COMMISSIONER OF OHIO,)

CITY OF CINCINNATI)

APPELLEE.)

SUPREME COURT CASE NUMBER:

BOARD OF TAX APPEALS CASE NO.
2012-Q-1047

NOTICE OF APPEAL TO THE
SUPREME COURT OF OHIO
PURSUANT TO SECTION 5717.04
REVISED CODE

The Appellant, City of Cincinnati School District Board of Education, by and through counsel, hereby gives notice of its appeal to the Supreme Court of Ohio from a Decision and Order of the Ohio Board of Tax Appeals rendered on the 9th day of August, 2013, a copy of which is attached hereto as "Exhibit A" and which is incorporated herein as though fully rewritten in this Notice of Appeal.

The Errors complained of are attached hereto as "Exhibit B" which is incorporated herein by reference.

Respectfully submitted,

FROST BROWN TODD LLC

David C. Olson, by S.M.A.

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OHIO BOARD OF TAX APPEALS

City of Cincinnati School District Board of Education,)	CASE NO. 2012-Q-1047
)	
Appellant,)	(REAL PROPERTY TAX EXEMPTION)
)	
vs.)	DECISION AND ORDER
)	
Joseph W. Testa, Tax Commissioner of Ohio, Hamilton County Auditor, and The City of Cincinnati,)	
)	
Appellees.)	

APPEARANCES:

For the Appellant	- Frost Brown Todd LLC David C. Olson 3300 Great American Tower 301 E. Fourth Street Cincinnati, Ohio 45202
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For the City of Cincinnati	- Bricker & Eckler LLP Jonathan T. Brollier 100 South Third Street Columbus, Ohio 43215

Entered **AUG 09 2013**

Mr. Williamson, Mr. Johrendt, and Mr. Harbarger concur.

This matter is now considered upon the appellee Tax Commissioner's motion to dismiss. Specifically, the commissioner asserts that this board is without

jurisdiction to consider this appeal because the appellant board of education ("BOE") failed to follow the requisite statutory procedures to participate in the commissioner's proceedings on the City of Cincinnati's real property tax exemption application. We proceed to consider the matter on the notice of appeal, the statutory transcript certified by the commissioner, the motion, and the BOE's response thereto.

A brief history of the events leading to the present appeal is appropriate. The subject real property tax exemption application was originally filed in 2006 by the City of Cincinnati ("the City"); in March 2011 the commissioner found that the property, i.e., parcel number 145-0002-0057, was not entitled to exemption. The City appealed that determination to this board. In the interim, the General Assembly enacted 2011 Am.Sub.H.B. No. 153, modifying the applicable exemption statute, effective September 29, 2011.¹ As a result of this legislation, the City and the commissioner agreed to remand their appeal to the commissioner for further proceedings. On September 29, 2011, the BOE filed a request with the commissioner to participate in the exemption process.² Finally, on February 21, 2012 the

¹ 2011 Am.Sub.H.B. No. 153 added the following language to R.C. 5709.084: "Real and personal property comprising a convention center owned by the largest city in a county having a population greater than seven hundred thousand but less than nine hundred thousand according to the most recent federal decennial census is exempt from taxation, regardless of whether the property is leased to or otherwise operated or managed by a person other than the city." The act further stated, in uncodified section 757.95: "Section 5709.084 of the Revised Code, as amended by this act, is remedial in nature and applies to the tax years at issue in any application for exemption from taxation or any appeal from such application pending before the Tax Commissioner, the Board of Tax Appeals, any Court of Appeals, or the Supreme Court on the effective date of this act and to the property that is the subject of any such application or appeal."

² On the same date, the BOE filed a complaint in the Franklin County Court of Common Pleas arguing that the amendments of H.B. 153 violated the Ohio Constitution. *Bd. of Edn. of the Cincinnati City School Dist. v. City of Cincinnati, et al.*, Franklin C.P. No. 11CVH-09-12158. The BOE represented in its response to the instant motion that those proceedings have been stayed pending the outcome of this matter. Memorandum in Opposition at 5.

commissioner issued a final determination finding that the subject property qualifies for exemption and, further stating that:

"In compliance with the ruling of the Court in *State ex rel. Strongsville Bd. Of Educ. v. Zaino* (2001), 92 Ohio St. 3d 488, the Commissioner is constrained from allowing any involvement from any other party. Specifically, in accordance with *Strongsville Bd. Of Educ.*, supra, the Commissioner cannot permit the Cincinnati City School District ("School District") to participate as has been requested by the School District. The School District's formal request for intervention is denied."

The commissioner, through the instant motion, essentially seeks to have his prior determination affirmed by asserting that this board is without jurisdiction to entertain the BOE's appeal because it was not filed by one authorized to do so by R.C. 5707.02. That section provides, in pertinent part:

"Appeals from a decision of the tax commissioner or county auditor concerning an application for a property tax exemption may be taken to the board of tax appeals by the applicant or a school district that filed a statement concerning that application under division (C) of 5715.27 of the Revised Code." (Emphasis added.)

Also relevant, R.C. 5715.27 provides:

"(B) The board of education of any school district may request the tax commissioner or auditor to provide it with notification of applications for exemption from taxation for property located within that district. If so requested, the commissioner or auditor shall send to the board on a monthly basis reports that contain sufficient information to enable the board to identify each property that is the subject of an exemption application, including, but not limited to, the name of the property owner or applicant, the address of the property, and the auditor's parcel number. The commissioner or auditor shall mail the reports by the fifteenth day of the month following the

end of the month in which the commissioner or auditor receives the applications for exemption.

“(C) A board of education that has requested notification under division (B) of this section may, with respect to any application for exemption of property located in the district and included in the commissioner’s or auditor’s most recent report provided under that division, file a statement with the commissioner or auditor and with the applicant indicating its intent to submit evidence and participate in any hearing on the application. The statement shall be filed prior to the first day of the third month following the end of the month in which that application was docketed by the commissioner or auditor. *A statement filed in compliance with this division entitles the district to submit evidence and to participate in any hearing on the property and makes the district a party for purposes of sections 5717.02 to 5717.04 of the Revised Code in any appeal of the commissioner’s or auditor’s decision to the board of tax appeals.*” (Emphasis added.)

In *Am. Restaurant & Lunch Co. v. Glander* (1946), 147 Ohio St. 147, the court reviewed the requirements for filing a notice of appeal set forth in G.C. 5611, the predecessor to R.C. 5717.02, holding at paragraph one of the syllabus that “where a statute confers the right to appeal, adherence to the conditions thereby imposed is essential to the enjoyment of the rights conferred.” The court has reaffirmed this position on numerous occasions. See, e.g., *Craftsman Type, Inc. v. Lindley* (1983), 6 Ohio St.3d 82, 85 (“It is axiomatic that when a right to appeal is conferred by legislative enactment, the statute’s prescriptions must all be strictly complied with in order to invoke the jurisdiction of the appropriate appellate tribunal.”).

The court also noted in *Southside Community Dev. Corp. v. Levin*, 119 Ohio St.3d 521, 2008-Ohio-4839, ¶6, “[t]he right to prosecute an application for exemption involves an administrative procedure statutorily created and delimited. See

Performing Arts School of Metro. Toledo, Inc. v. Wilkins, 104 Ohio St.3d 284, 2004-Ohio-6389, ***, ¶19; *Victoria Plaza Ltd. Liab. Co. v. Cuyahoga Cty. Bd. of Revision* (1999), 86 Ohio St.3d 181, 183, ***, quoting *State ex rel. Tubbs Jones v. Suster* (1998), 84 Ohio St.3d 70, 77, ***, fn. 4 (in administrative proceedings, ‘ “parties must meet strict standing requirements in order to satisfy the threshold requirement for the administrative tribunal to obtain jurisdiction” ’).”

Based upon the foregoing, we find that the BOE failed to meet the statutory prerequisites of R.C. 5715.27(C) and therefore cannot invoke this board’s jurisdiction on appeal.³ Accordingly, the commissioner’s motion is well taken, and this matter must be, and hereby is, dismissed for lack of jurisdiction.

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.



A.J. Groeber, Board Secretary

³ We acknowledge the court’s statements in past cases regarding this board’s role as “a receiver of evidence for constitutional challenges.” *MCI Telecommunications Corp. v. Limbach* (1994), 68 Ohio St.3d 195. However, we find that the appellant in this matter has not satisfied the threshold requirement of R.C. 5717.02 to invoke our jurisdiction to do so.

EXHIBIT "B"

ASSIGNMENT OF ERRORS

ASSIGNMENT OF ERROR NO. 1

The Board of Tax Appeals Decision and Order granting the Tax Commissioner's Motion to Dismiss is unreasonable and unlawful.

ASSIGNMENT OF ERROR NO. 2

The Board of Tax Appeals Decision and Order denying the City of Cincinnati School District Board of Education's request for intervention for the limited purpose of establishing a record before the Board to challenge the constitutionality of 2011 Am.Sub.H.B. No. 153 that added language to R.C. 5709.084 and uncodified section 757.95 was unreasonable and unlawful.

ASSIGNMENT OF ERROR NO. 3

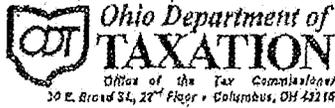
The Board of Tax Appeals Decision and Order denying the City of Cincinnati School District Board of Education's request for intervention for the limited purpose of establishing a record to challenge the constitutionality of 2011 Am.Sub.H.B. No. 153 that added language to R.C. 5709.084 and uncodified section 757.95 ignores the fact that the statute being challenged was enacted years after the time period set forth in R.C. 5715.27 that requires the filing of a statement of interest by a school board and at a time when the statute being challenged was neither enacted nor effective.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing NOTICE OF APPEAL was mailed via certified United States mail, postage prepaid, to Michael DeWine, Attorney General of Ohio c/o Daniel W. Fausey, Assistant Attorney General, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215, Attorney for the Tax Commissioner of the State of Ohio, Thomas J. Scheve, Assistant County Prosecutor, 230 East Ninth Street, Cincinnati, Ohio 45202, Counsel for the Hamilton County Auditor, and Jonathan T. Broiler, Bricker & Eckler, 100 South Third Street, Columbus, Ohio 43215, Counsel for City of Cincinnati this 24th day of September, 2013.

Samuel M. Scoggin

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FINAL DETERMINATION

Date: MAR 22 2011

City of Cincinnati
801 Plum Street, Room 214
Cincinnati, OH 45202

Re: DTE No.: MB 3048
 Auditor's No.: 6-156
 County: Hamilton
 School District: Cincinnati City SD
 Parcel Number: 145-0002-0057

This is the final determination of the Tax Commissioner on an application for exemption of real property from taxation filed on September 14, 2006. The applicant seeks exemption of real property from taxation for tax year 2006 and remission of taxes, interest and penalties for 2005 under Ohio Revised Code (R.C.) 5709.08.

The applicant, the City of Cincinnati (hereinafter referred to as "City"), acquired title to the subject property on November 25, 2002. The applicant states in the application that exempt use of the subject property began on January 1, 2005.

The rule in Ohio is that all real property is subject to taxation, R.C. 5709.01. Exemption from taxation is the exception to the rule. *Seven Hills Schools v. Kinney* (1986), 28 Ohio St. 3d 186. Exemption statutes must be strictly construed. *American Society for Metals v. Limbach* (1991), 59 Ohio St. 3d 38, 40 and *Faith Fellowship Ministries, Inc. v. Limbach* (1987), 32 Ohio St. 3d 432. Pursuant to R.C. 5715.271 the property owner has the burden of proof to show that its property is entitled to exemption.

I. Factual Background

The evidence shows that the applicant acquired title to the subject property on November 25, 2002. The application states that the City did not gain possession of the property from the seller, Scripps-Howard Publishing Co., until June 1, 2004. The evidence shows that the applicant demolished the previously existing structure on the property. The applicant then constructed a major expansion of the City's convention and exposition center attached to the City's pre-existing convention center facilities that are located on adjoining parcels. According to the application the construction on the subject property was completed in January 2006. The complete convention and exposition center is known as the Duke Energy Center. The Duke

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Energy Center consists of approximately 750,000 square feet of exhibition space, meeting rooms and ballroom space.

The City, on July 1, 2006, entered into a management agreement with Global Spectrum, LP, a Delaware for-profit limited partnership, (hereinafter referred to as "Global Spectrum" or "the Manager" or "the contractor") for the management and staffing of the entire convention and exposition center located on the subject property and the adjoining parcels. Until 2006, it appears that the City of Cincinnati managed the center using its own employees.

The evidence shows that Global Spectrum, LP is a for-profit partnership and is not a charitable or non-profit entity. Global Spectrum markets itself in its website as a way for public facilities to be "privatized" and to expand their revenue streams.

As recited in the management agreement, the City entered into the agreement with Global Spectrum "for the benefit of the City" and upon deciding that "Global Spectrum's proposal was the most responsive" of all the proposals received for the management of the facility.

The management agreement between the parties specifies the management fee paid to the Manager by the City. In the initial year of operation, the Manager is paid a "fixed management fee" of \$12,000.00 per month. The "fixed management fee" is to be adjusted annually based upon the Consumer Price Index. Further, the Manager is entitled to receive an "incentive fee" based on a "quantitative component" tied to revenue and a "qualitative component" based on "customer satisfaction", "cooperative marketing and partnerships" and "facility management". The operation is also subsidized by the City providing for reimbursement of the Manager for substantially all of the Manager's operating expenses and salaries.

II. Relationship of Parties

Global Spectrum is a for-profit partnership, neither a charitable nor a non-profit entity. Global Spectrum is accountable to its partners and investors. In light of that fact, it is logical that Global Spectrum sought and entered into the contract for the management and operation of the Duke Energy Center with a view to a profit for itself and its partners and investors. Further, the facts indicate that the City of Cincinnati entered into the contract to maximize its return from the facility through the management and operation by Global Spectrum.

Under the contract, all people who work at the Duke Energy Center are Global Spectrum's employees, not the City's employees. All purchasing and supply contracts are in the name of the contractor. Global Spectrum is contractually obligated to maintain all tax and employee related returns and forms in the contractor's name rather than the City's. All day-to-day and year-to-year activities involved with the operation of the Duke Energy Center and its various services are controlled by the contractor. The City retains a right of reasonable entry and inspection of the premises and the books to assure compliance with the contract, similar to that which would be found in a lease. The City has made Global Spectrum an independent contractor because it is advantageous to do so for business purposes; however, apparently for taxation issues, the City has attempted to claim that the Global Spectrum is an agent because the City deems it

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advantageous for tax purposes. The city cannot have it both ways. The facts indicate that the relationship of the Global Spectrum to the City is that of independent contractor for the city.

Through the use of the word "agent" in the management contract, the City of Cincinnati has attempted to establish the relationship between it and the Global Spectrum as that of principal and agent; however, the modifying and explanatory language contained in the contract belies the true relationship of Global Spectrum to the City. The relationship of Global Spectrum to the City is that of an independent contractor rather than an agent.

In any event, even if Global Spectrum were to be considered an agent for some purposes, that would not alter the fundamental operating arrangements for the management of the Duke Energy Center and their related operations, and in turn, would not change the outcome of this determination.

III. Ohio Revised Code Section 5709.08

R.C. 5709.08 reads as follows:

Real or personal property belonging to the state or United States used exclusively for a public purpose, and public property used exclusively for a public purpose, shall be exempt from taxation. ***

The Supreme Court of Ohio has held that there are three prerequisites which must be met in order for property to qualify for exemption under this statute: (1) the property must be public property; (2) the use thereof must be for a public purpose; and (3) the property must be used exclusively for a public purpose. *Carney v. Cleveland* (1962), 173 Ohio St. 56.

In *Cleveland v. Perk* (1972), 29 Ohio St.2d 161, the Ohio Supreme Court further held that:

When *** private enterprise is given the opportunity to occupy public property in part and make a profit, even though in so doing it serves not only the public, but the public interest and a public purpose, such part of the property loses its identity as public property and its use cannot be said to be exclusively for a public purpose. A private, in addition to a public, purpose is then subserved.

Id at 166.

The Supreme Court of Ohio more recently addressed the exemption of public property used by a private, for-profit entity in *City of Parma Heights v. Wilkins*, (2005) 105 Ohio St.3d 463:

We have said in past cases that "whenever public property is used by a private citizen for a private purpose, that use generally prevents exemption." *Whitehouse v. Tracy* (1995), 72 Ohio St.3d 178, 181, 648 N.E.2d 503. The rule explained more than 30 years ago remains true today: "When * * * private enterprise is given the opportunity to occupy public property in part and make a profit, even

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though in so doing it serves not only the public, but the public interest and a public purpose," the property no longer meets the R.C. 5709.08 requirement that the property be "used exclusively for a public purpose." *Cleveland v. Perk* (1972), 29 Ohio St.2d 161, 166, 58 O.O.2d 354, 280 N.E.2d.653 (holding that areas of a city-owned airport that were leased to private entities for commercial enterprises were not exempt from real property taxes). And we have also noted that "one who is in the possession and control of property and is occupying, managing and operating the same as lessee is often to be treated as the owner thereof." *Carney v. Cleveland* (1962), 173 Ohio St. 56, 58, 18 O.O.2d 256, 180 N.E.2d 14 ...

Id. at 465.

Here, the City of Cincinnati turned over the management of its City-owned Duke Energy Center to a for-profit partnership with a view to maximizing the net revenue for the City while allowing Global Spectrum to seek a profit from the operation of the facility. Through this action the City has effectively privatized the City-owned Duke Energy Center.

Global Spectrum's independent motive is that of a for-profit enterprise, generating income and distributing any profits to its shareholders or members. In both its marketing and management of the Duke Energy Center, its independent motive is to make a profit from the operation of the Duke Energy Center and its associated services. Global Spectrum's agreement with the City allows it to occupy public property to make a profit or, at the very least, with a view to profit. To this end, Global Spectrum is not merely the agent of the City but rather an independent contractor, serving its own ends within the contractual limits imposed on it by the City.

The Board of Tax Appeals has recently ruled on a directly comparable situation and with a contract similar to the one in this matter. That ruling concerned the City of Cincinnati's contractual relationship with a golf management company for the management of its city-owned golf courses. The Board found that the relationship there was that of independent contractors rather than merely that of principal and agent for purposes of Ohio Revised Code Title 57. On April 20, 2010, the Ohio Board of Tax Appeals issued its decision in *Cincinnati Golf Management, Inc. and the City of Cincinnati v. Levin*, (April 20, 2010), BTA Case No. 2007-M-1411, appeal pending in the Supreme Court of Ohio, Case No. 2010-0896. In that case, the City of Cincinnati, through the Cincinnati Recreation Commission, contracted with Cincinnati Golf Management, Inc., a subsidiary of Billy Casper Golf Management, Inc., to manage and operate the City's seven golf courses. Under the agreement, Cincinnati Golf Management had exclusive responsibility and control over all areas and structures within the golf premises, hired all course employees and paid all personnel expenses. The City and Cincinnati Golf Management appealed the Tax Commissioner's final determination on a petition for reassessment, under R.C. 5739.13 and R.C. 5741.14, of a use tax assessment arguing that Cincinnati Golf Management was exempt from such a tax because it was an agent of the City. The Board held that the relationship between the City and Cincinnati Golf Management was that of independent contractor rather than one of principal and agent. The Board specifically held that the degree of control exercised by the City through the Cincinnati Recreation Commission over the actions of Cincinnati Golf Management was insufficient to deem Cincinnati Golf Management an agent of the City. *Id.* at 8. The Board also noted that "While the agreements presented in the present appeal appear to delineate more

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specifically Cincinnati Golf's obligations, the contract and the scope of services agreement still relinquish all authority over the manner in which the obligations are met." *Id.* at 7. Moreover, the Board reasoned that under the agreements, the City's "specified purpose was to 'obtain management services' for the operation of the golf course" and that while the agreements described the scope and standard of services, "the implementation of those services is the responsibility of Cincinnati Golf." *Id.* at 7-8.

When the control and management of the publicly owned property herein, the City-owned Duke Energy Center, is turned over to a private for-profit entity, that property loses its identity as public property used exclusively for a public purpose as anticipated in the foregoing statute, particularly when that publicly owned property is used in direct competition with private businesses. At that point, even if the public may receive an incidental benefit, the primary use of the property has ceased to be public use.

Likewise, it is clear under the above statutes that real property must not be used with a view to a profit. Profit is central to the City's management and operation contract for the Duke Energy Center with Global Spectrum.

As in the *Cincinnati Golf Management* case, Global Spectrum has exclusive control of the facilities and premises, hires employees and pays all personnel expenses in its own name, not in the City's. Global Spectrum operates the Duke Energy Center not as the City's agent, serving at the City's behest and doing its bidding, but rather as a for-profit enterprise, managing the Duke Energy Center operations to maximize the income for both it and the City.

Moreover, the provisions of the contract clearly evidence the independent contractor status of Global Spectrum. All people who work at the Duke Energy Center are Global Spectrum's employees, not the City's employees. All purchasing and supply contracts are in the name of Global Spectrum. All day-to-day and year-to-year activities involved with the operation of the Duke Energy Center and its various services are controlled by Global Spectrum. The City retains only a right of reasonable entry and inspection of the premises and the books to assure compliance with the contract, similar to that which would be found in a lease. Though the City has attempted to characterize the status of the relationship between it and Global Spectrum agent, the modifying and explanatory language contained in the contract belies the independent contractor relationship between Global Spectrum and the City. All authority over the manner in which Global Spectrum manages the property resides with Global Spectrum rather than the City.

The City has allowed a for-profit enterprise to use and occupy public property and to make a profit, or at the very least, with a view to profit from its occupancy and use of the public property. Even if, *arguendo*, Global Spectrum's management of the property serves the public and is in the public interest, the property is occupied and used by a private entity, Global Spectrum, to make a profit. Therefore, it does not qualify for exemption under R.C. 5709.08 for tax years 2007 through 2011.

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IV. Ohio Revised Code Chapter 351

Though not cited by the City of Cincinnati in its application, this matter is also considered under R.C. Chapter 351: Convention Facilities Authorities.

R.C. 351.02 provides that:

A county may create a convention facilities authority by resolution of the county commissioners, provided that in no case shall the same county create more than one convention facilities authority.

R.C. 351.12 provides for exemption from tax under the following requirements:

... As the operation and maintenance of facilities will constitute the performance of essential governmental functions, a convention facilities authority shall not be required to pay any taxes or assessments upon any to which it hold title, or upon any property acquired or used by it under this chapter, or upon the income therefrom, provided that any part of such a facility or property leased to, or exclusively used by, a private enterprise, and the income therefrom, shall be subject to appropriate taxes and assessments, and the listing of such a facility or property shall be split as provided in section 5713.04 of the Revised Code. ...

In this matter, the Duke Energy Center is wholly owned by the City of Cincinnati and not a convention facilities authority created by the county. Therefore, the Center is not eligible for exemption under R.C. 351.12 because it is not owned by a county created convention facilities authority.

Even if the Center was owned by a county-created convention facilities authority, the fact that the exclusive operation and use of the Center has been turned over to a private enterprise would negate eligibility for any portions operated by the private enterprise under R.C. 351.12.

V. Ohio Revised Code Section 5709.084

The application is also considered under R.C. 5709.084, which was not enacted until 2010.

R.C. 5709.084 provides:

Real and personal property comprising a convention center that is constructed or, in the case of personal property, acquired after January 1, 2010, are exempt from taxation if the convention center is located in a county having a population, when construction of the convention center commences, of more than one million two hundred thousand according to the most recent federal decennial census, and if the convention center, or the land upon which the convention center is situated, is owned or leased by the county. ...

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The exemption available under this section is limited to counties with a certain level of population. The relevant federal census data for Ohio's three most populous counties demonstrates that only one county has a population fitting the statutory stricture: Cuyahoga County. Therefore, the Duke Energy Center does not qualify for exemption under R.C. 5709.084, as Hamilton County's population is less than that required. Further, the Duke Energy Center fails under R.C. 5709.084 by virtue of being owned by the City and not by the county. Therefore, no exemption accrues to the City of Cincinnati under R.C. 5709.084.

VI. Conclusion

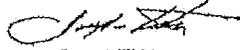
Based upon information available, the Tax Commissioner finds that the property described in the application is entitled to exemption for tax year 2006. The Tax Commissioner orders that all taxes, penalties and interest paid for tax year 2005 be remitted in the manner provided by R.C. 5715.22.

The Tax Commissioner further finds that the same property is not entitled to be exempt from taxation for tax years 2007 through 2011 and orders that the subject property be restored to the tax list.

The Tax Commissioner orders that penalties charged through the date of the final determination in this matter be remitted.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. NOTICE WILL BE SENT PURSUANT TO R.C. 5715.27 TO THE COUNTY AUDITOR. UPON EXPIRATION OF THE SIXTY-DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

I CERTIFY THAT THIS IS A TRUE AND ACCURATE COPY OF THE FINAL DETERMINATION RECORDED IN THE TAX COMMISSIONER'S JOURNAL


JOSEPH W. TESTA
TAX COMMISSIONER

/s/ Joseph W. Testa

Joseph W. Testa
Tax Commissioner

OHIO BOARD OF TAX APPEALS

City of Cincinnati,)	CASE NO. 2011-A-996
)	
Appellant,)	(REAL PROPERTY TAX
)	EXEMPTION)
vs.)	
)	ORDER
Joseph W. Testa, Tax Commissioner)	
of Ohio,)	(Remanding Appeal)
)	
Appellee.)	

APPEARANCES:

For the Appellant - John P. Curp
City Solicitor
Sean S. Suder
Chief Counsel
Room 214, City Hall
801 Plum Street
Cincinnati, Ohio 42025

For the Appellee - Michael DeWine
Attorney General of Ohio
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Columbus, Ohio 43215

Entered AUG 23 2011

Ms. Margulies, Mr. Johrendt, and Mr. Williamson concur.

Pursuant to the joint motion to remand filed August 11, 2011, the Board of Tax Appeals orders that the captioned appeal be remanded to the Tax Commissioner for further consideration.

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.


Sally F. Van Meter, Board Secretary



FINAL DETERMINATION

Date: FEB 21 2012

City of Cincinnati
801 Plum Street, Room 214
Cincinnati, OH 45202

Re: DTE No.: ME 3048
Auditor's No.: 6-156
County: Hamilton
School District: Cincinnati City, SD
Parcel Number: 145-0002-0057

This is the final determination of the Tax Commissioner ("Commissioner") on remand from the Board of Tax Appeals ("Board") in Case No. 2011-A-996, dated August 23, 2011. At issue in the Board's case is the parcel number, cited above, one of several parcels that comprise the City of Cincinnati's convention center. The applicant seeks exemption of real property from taxation for tax years 2006 and remission of taxes, interest and penalties for 2005. Pursuant to R. C. 5709.084 effective in accordance with Am. Sub. H.B. 153, uncodified sec. 757, the Commissioner finds that the above parcel qualifies for exemption.

During the pendency of the original action at the Commissioner's level the Commissioner on March 22, 2011 ordered the Hamilton County Auditor to restore other parcels associated with the City of Cincinnati's convention center. Specifically, the Commissioner restored to the taxable list parcel numbers 145-0002-0167, 145-0002-0414, 145-0002-0072, 145-0002-0074, 145-0002-0089, 145-0002-0419, 145-0002-0421, 145-0002-0431, 145-0002-0063, 145-0002-0056, 145-0002-0073, 145-0002-0088, 145-0002-0105, 145-0002-0420, 145-0002-0430 and 145-0002-0432. The City has not filed an application for exemption on these parcels, nor has the Commissioner issued an appealable final determination. The Commissioner finds with no application pending on these parcels; there is no action to be taken as of this date. The parcels are to remain restored to the tax list as previously ordered.

The parties to the Board case no. 2011-A-996 are the City of Cincinnati ("City") and the Commissioner. No other parties filed an interest in accordance with R.C. 5715.27. In compliance with the ruling of the Court in *State ex rel. Strongsville Bd. Of Educ. v. Zaino (2001), 92 Ohio St. 3d 488*, the Commissioner is constrained from allowing any involvement from any other party. Specifically, in accordance with *Strongsville Bd. Of Educ.*, supra, the Commissioner cannot permit the Cincinnati City School District ("School District") to participate as has been requested by the School District. The School District's formal request for intervention is denied.

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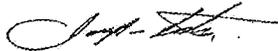
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Based upon the information available and applicable statutes, the Commissioner finds that the property described as parcel no. 145-0002-0057 is entitled to exemption for tax years 2006 forward. The Commissioner orders that all taxes, penalties and interest paid for tax year 2005 be remitted in the manner provided by R.C. 5715.22. The Commissioner further order that the auditor remit any penalties charged through the date of this final determination.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. NOTICE WILL BE SENT PURSUANT TO R.C.5715.27 TO THE COUNTY AUDITOR. UPON EXPIRATION OF THE SIXTY DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

I HEREBY CERTIFY THE FOREGOING TO BE A TRUE AND
CORRECT COPY OF THE ACTION OF THE TAX
COMMISSIONER TAKEN THIS DAY WITH RESPECT
TO THE ABOVE MATTER.



JOSEPH W. TESTA
TAX COMMISSIONER

/s/ Joseph W. Testa

Joseph W. Testa
Tax Commissioner

THE OHIO CONSTITUTION

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and certified to the secretary of state by the clerk thereof. The secretary of state shall, upon receipt of such certification, issue a certificate of election to the person so elected and upon presentation of such certificate to the Senate or the House of Representatives, as the case may be, the person so elected shall take the oath of office and become a member of the Senate or the House of Representatives, as the case may be, for the term for which he was so elected.

(1851, am. 1961, 1968, 1973)

*PRIVILEGE OF MEMBERS FROM ARREST,
AND OF SPEECH.*

§12 Senators and representatives, during the session of the General Assembly, and in going to, and returning from the same, shall be privileged from arrest, in all cases, except treason, felony, or breach of the peace; and for any speech, or debate, in either house, they shall not be questioned elsewhere.

(1851)

*LEGISLATIVE SESSIONS TO BE PUBLIC;
EXCEPTIONS.*

§13 The proceedings of both houses shall be public, except in cases which, in the opinion of two-thirds of those present, require secrecy.

(1851)

POWER OF ADJOURNMENT.

§14 Neither house shall, without the consent of the other, adjourn for more than five days, Sundays excluded; nor to any other place than that, in which the two houses are in session.

(1851, am. 1973)

HOW BILLS SHALL BE PASSED.

§15 (A) The General Assembly shall enact no law except by bill, and no bill shall be passed without the concurrence of a majority of the members elected to each house. Bills may originate in either house, but may be altered, amended, or rejected in the other.

(B) The style of the laws of this state shall be, "be it enacted by the General Assembly of the state of Ohio."

(C) Every bill shall be considered by each house on three different days, unless two-thirds of the members elected to the house in which it is pending suspend this requirement, and every individual consideration of a bill or action suspending the requirement shall be recorded in the journal of the respective house. No bill may be passed until the bill has been reproduced and distributed to members of the house in which it is pending and every amendment been made available upon a member's request.

(D) No bill shall contain more than one subject, which shall be clearly expressed in its title. No law shall be revived or amended unless the new act contains the entire act revived, or the section or sections amended, and the section or sections amended shall be repealed.

(E) Every bill which has passed both houses of the General Assembly shall be signed by the presiding officer of each house to certify that the procedural requirements for passage have been met and shall be presented forthwith to the governor for his approval.

(F) Every joint resolution which has been adopted in both houses of the

CONTESTED ELECTIONS.

§21 The General Assembly shall determine, by law, before what authority, and in what manner elections shall be conducted.

(1851)

APPROPRIATIONS.

§22 No money shall be drawn from the treasury, except in pursuance of a specific appropriation, made by law; and no appropriation shall be made for a longer period than two years.

(1851)

IMPEACHMENTS; HOW INSTITUTED AND CONDUCTED.

§23 The House of Representatives shall have the sole power of impeachment, but a majority of the members elected must concur therein. Impeachments shall be tried by the Senate; and the senators, when sitting for that purpose, shall be upon oath or affirmation to do justice according to law and evidence. No person shall be convicted without the concurrence of two-thirds of the senators.

(1851)

OFFICERS LIABLE TO IMPEACHMENT; CONSEQUENCES.

§24 The governor, judges, and all state officers, may be impeached for any misdemeanor in office; but judgment shall not extend further than removal from office, and disqualification to hold any office under the authority of this state. The party impeached, whether convicted or not, shall be liable to indictment, trial, and judgment, according to law.

(1851)

REPEALED. WHEN SESSIONS SHALL COMMENCE.

§25

(1851, rep. 1973)

LAWS TO HAVE A UNIFORM OPERATION.

§26 All laws, of a general nature, shall have a uniform operation throughout the state; nor, shall any act, except such as relates to public schools, be passed, to take effect upon the approval of any other authority than the General Assembly, except, as otherwise provided in this constitution.

(1851)

ELECTION AND APPOINTMENT OF OFFICERS; FILLING VACANCIES.

§27 The election and appointment of all officers, and the filling of all vacancies, not otherwise provided for by this constitution, or the constitution of the United States, shall be made in such manner as may be directed by law, but no appointing power shall be exercised by the General Assembly, except as prescribed in this constitution; and in these cases, the vote shall be taken "viva voce."

(1851, am. 1953)

RETROACTIVE LAWS.

§28 The General Assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.

(1851)