

ORIGINAL

In the
Supreme Court of Ohio

EQUITY DUBLIN ASSOCIATES AND
SHSCC #2 LIMITED PARTNERSHIP,

Appellees,

v.

JOSEPH W. TESTA, TAX COMMISSIONER
OF OHIO, BOARD OF EDUCATION OF THE
COLUMBUS CITY SCHOOL DISTRICT,
AND BOARD OF EDUCATION OF THE
DUBLIN CITY SCHOOL DISTRICT,

Appellants.

Case No. 14-0168

Appeal from Ohio Board of Tax Appeals

Case Nos. 2011-1792 and 2011-1795

NOTICE OF APPEAL

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FILED
JAN 30 2014
BOARD OF TAX APPEALS
COLUMBUS, OHIO

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JAN 30 2014
CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF APPEAL

Appellant, Joseph W. Testa, Tax Commissioner of Ohio, hereby gives notice of his appeal to the Supreme Court of Ohio from a Decision and Order of the Ohio Board of Tax Appeals (the "Board") journalized in Case Nos. 2011-1792 and 2011-1175 on December 31, 2013. A true copy of the Decision and Order of the Board being appealed is attached hereto as Exhibit A and incorporated herein by reference. This appeal is filed as a matter of right pursuant to Revised Code ("R.C.") 5717.04.

These appeals involve real property tax exemption claims brought by Equity Dublin Associates and SHSCC#2 Limited Partnership (the appellees herein), as for-profit owners/lessors of realty leased to Columbus State Community College.

The appellant Commissioner complains of the following errors in the Decision and Order of the Board:

1. While correctly rejecting claims brought by the commercial for-profit owners/lessors to real property tax exemption under the *specific* "community college" exemption in R.C. 3354.15, the BTA's decision and order then erred by determining that the subject realty, nonetheless, qualified for exemption, in part, on the basis of the *more general* real property tax exemption set forth in R.C. 5709.07(A)(4) for "public colleges."
2. Unfortunately, the Board's decision ignored a controlling holding of the Ohio Supreme Court unanimous decision in *Athens Cty. Aud. v. Wilkins*, 106 Ohio St. 3d 293, 2005-Ohio-4986 ("*Athens County*") at ¶ 13 (citing to the Court's earlier decision

in *Rickenbacker Port Auth. v. Limbach*, 64 Ohio St. 3d 628, 631). Under this controlling guidance, the BTA should have held that, because R.C. 3354.15 is the only statutory provision directly related to property-tax exemptions for community colleges, the more general provision for “public colleges” in R.C. 5709.07(A)(4) cannot provide the commercial real property owners/lessors with a property-tax exemption.

3. The Board’s decision further erred by failing to recognize or apply the *stare decisis* standards established by the Ohio Supreme Court as set forth in *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 2003-Ohio-5849; and *Ohio Apt. Assn. v. Levin*, 127 Ohio St. 3d 76, 2012-Ohio-4414. Under the *Galatis* test, as reaffirmed in *Ohio Apt. Assn.*, for this Court to overturn its previous decision in *Athens County*, the following criteria must be affirmatively demonstrated: “(1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it.” *Ohio Apt. Assn.* at ¶ 30 (quoting paragraph one of the syllabus in *Galatis*).
4. The Board’s decision erred in failing to find that the *stare decisis* standard, as set forth in *Galatis* and reaffirmed in *Ohio Apt. Assn.*, has not been met, and could not be met, here. *First*, the Court’s holding in *Athens County* was not wrongly decided by either the Court or by the BTA in its decision in that case. *Second*, no changes in circumstances have occurred that would render continued adherence to the decision no longer justified. *Third*, the *Athens County* decision does not defy practical workability. *Fourth*, abandoning the precedent *would* create an undue hardship

because real property tax exemptions are in derogation of equal rights, and place a disproportionate tax burden on all other taxpayers.

5. Because of the controlling holding in *Athens County* and the established *stare decisis* standards set by this Court, the Board is barred from consideration of R.C. 5709.07(A)(4), so that its decision and order partially reversing the Commissioner's final determination on the basis of that exemption should be reversed and the Commissioner's final determination should be upheld in its entirety. But even if the Board were not barred under the Ohio Supreme Court's *Athens County* holding and *stare decisis*, the Board's decision and order finding that exemption to apply would be erroneous in any event for several reasons, as set forth below:

- a. The Board erred as a matter of subject matter jurisdiction to consider any claim to exemption under R.C. 5709.07(A)(4) because the for-profit commercial property owners/lessors, Equity Dublin Associates and SHSCC#2 Limited Partnership, failed to set forth any such statutory basis for exemption in their timely filed real property tax exemption applications, as prescribed by the Commissioner, pursuant to R.C. 5715.27(A). By failing to raise any R.C. 5709.07(A)(4) claim in their real property tax exemption applications, Equity Dublin Associates and SHSCC#2 Limited Partnership thereby failed to confer jurisdiction on the Tax Commissioner, and subsequently on the Board, to consider any claim to exemption on the basis of R.C. 5709.07(A)(4).

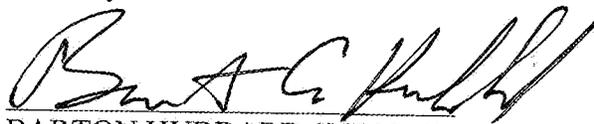
- b. The Board's decision erred as a matter of fact and law in granting partial exemption under R.C. 5709.07(A)(4) because Equity Dublin Associates and SHSCC#2 Limited Partnership failed factually and legally to meet the affirmative requirements for exemption thereunder, including that, to qualify for exemption, the realty must not be held "with a view to profit" pursuant to commercial leases.
- c. The Board's decision erred as a matter of fact and law in granting partial exemption under R.C. 5709.07(A)(4) because, under R.C. 5709.07(B), the exemptions set forth in R.C. 5709.07(A) "shall not extend to leasehold estates or [of] real property held under the authority of a college or university of learning in this state [.] [bracketed language added]." As applied here, this quoted language of R.C. 5709.07(B) applies to bar exemption for the subject property under R.C. 5709.07(A)(4) because the subject property is held "as a leasehold interest of real property" under the authority of Columbus State Community College. Alternatively, this quoted language of R.C. 5709.07(B) applies because the subject property constitutes "real property held under the authority of" Columbus State Community College.

Wherefore, the Appellant Tax Commissioner requests that the Court reverse as unreasonable and unlawful the Board's decision to the extent that the Board's decision grants partial exemption of the subject realty, and remand the matter for issuance of an Order denying

applications for real property tax exemption in their entirety to Equity Dublin Associates and SHSCC#2 Limited Partnership for the subject tax year 2005. The Appellant Tax Commissioner further requests remand so that the Board may deny Equity Dublin Associates and SHSCC#2 Limited Partnership requests for the remission of taxes and interest for tax years 2002, 2003 and 2004 in their entirety.

Respectfully submitted,

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OHIO BOARD OF TAX APPEALS

Equity Dublin Associates and SHSCC #2)	CASE NOS. 2011-Q-1792
Limited Partnership,)	and 2011-Q-1795
)	
Appellants,)	(REAL PROPERTY TAX EXEMPTION)
)	
vs.)	DECISION AND ORDER
)	
Joseph W. Testa, Tax Commissioner of)	
Ohio, Board of Education of the Columbus)	
City School District, and Board of)	
Education of the Dublin City School)	
District,)	
)	
Appellees.)	

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Entered **DEC 31 2013**

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

Appellants appeals final determinations of the Tax Commissioner denying exemption from taxation for certain real property, i.e., parcel numbers 273-001709 and 010-215437-00, located in Franklin County, Ohio, for tax year 2005, and remission of taxes paid for tax years 2002, 2003, and 2004. The parties have



submitted these matters to the Board of Tax Appeals upon the notices of appeal, the statutory transcripts ("S.T.") certified by the commissioner, and their written legal arguments.

The subject parcels are owned by Equity Dublin Associates ("EDA") and SHSCC #2 Limited Partnership ("SHSCC"), respectively, both of which lease portions of the properties to Columbus State Community College ("CSCC"), which uses the properties for classrooms, offices, lab space, and related school activities.¹ The owners each filed applications for real property tax exemption seeking exemption under R.C. 3354.15, which provides that "[a] community college district shall not be required to pay any taxes or assessments upon any real or personal property acquired, owned, or used by it pursuant to provisions of sections 3354.01 to 3354.18, inclusive, of the Revised Code, ***."²

The commissioner denied both applications under both R.C. 3354.15, and under R.C. 5709.07(A)(4). As to the former, the commissioner found that, because the property is not owned by CSCC, but is rather leased to it, it does not qualify for exemption under R.C. 3354.15:

¹ As indicated in the final determinations, CSCC leases "approximately 13,545 of the 116,000 total square feet available" of the building located on parcel number 273-001709, owned by EDA, and "12,000 square feet of building space and adjacent parking" of parcel number 010-215437-00, owned by SHSCC. The underlying applications for exemption further explain that the subject properties "are among [CSCC]'s nine (9) facilities located primarily in the Columbus suburban areas," at which "[a] full array of courses are offered and students *** can earn an Associate of Arts and Sciences Degree ***, and "[b]ookstore, academic counseling, and advising services are also provided." 2011-1792 S.T. at 15; 2011-1795 S.T. at 40.

² The owners also referenced R.C. 3358.10, which states that "Sections 3354.01, 3354.121, 3354.15, and 3354.16 of the Revised Code apply to state community college districts and their boards of trustees."

“*** R.C. 3354.15 does not exempt the property from taxation; it merely prevents the CSCC from having to pay any taxes on such property. Real property is taxed to the owner of that property, and lessees are not considered owners of property under a lease such as the one at hand. See, R.C. 319.28; R.C. 323.13; R.C. 323.43; *Cincinnati College v. Yeatman* (1876), 30 Ohio St. 276; *Performing Arts Schools [of Metro. Toledo, Inc. v. Wilkins]*, 104 Ohio St.3d 284, 2004-Ohio-6389]. Pursuant to R.C. 3354.15, since Equity Dublin Associates [and SHSCC] owns the property, it is responsible for paying the taxes and cannot force the college to pay them.”

The commissioner further noted that, under *Athens County Auditor v. Wilkins*, 106 Ohio St.3d 293, 2005-Ohio-4986, the owners “cannot claim a vicarious exemption for property owned by [them] and used by the college of its students.”

The commissioner therefore proceeded to consider the owners’ applications under R.C. 5709.07(A)(4), which exempts “[p]ublic colleges and academies and all buildings connected with them, and all lands connected with public institutions of learning, not used with a view to profit.” He noted that both properties are leased for profit – from EDA for approximately \$120,000 per year, and from SHSCC for approximately \$156,000 per year – and therefore not entitled to exemption under these statutes. Citing *Athens*, supra, the commissioner specifically noted that “the General Assembly promulgated a ‘tax exemption to reduce the tax burden on higher education facilities; not to shelter private property owners.’ *Id.* [at ¶11].” The applications were therefore denied, and the present appeals ensued.³ Appellants raise

³ At this board’s hearing, the appellees moved to strike the “Memorandum in Support” attached to each notice of appeal that were submitted on behalf of CSCC, which was excluded as a party to these matters by order of this board. *Equity Dublin Associates, et al. v. Testa* (Interim Order, Aug. 21, 2013), BTA Nos. 2011-1792 and 2011-1795, unreported. The motion is granted.

two assignments of error on appeal – that, under both R.C. 3354.15 and R.C. 5709.07(A)(4), the commissioner erred in finding that CSCC must own the property for it to be exempt.⁴

In our review of these matters, we are mindful that the findings of the Tax Commissioner are presumptively valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. Consequently, it is incumbent upon a taxpayer challenging a determination of the commissioner to rebut the presumption and to establish a clear right to the requested relief. *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St.2d 135; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138. In this regard, the taxpayer is assigned the burden of showing in what manner and to what extent the commissioner's determination is in error. *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213.

“All real property in this state is subject to taxation, except only such as is expressly exempted therefrom.” R.C. 5709.01(A). As a result, “in any consideration concerning the exemption from taxation of any property, the burden of proof shall be placed on the property owner to show that the property is entitled to exemption.” R.C. 5715.271. Thus, exemption from taxation remains the exception to the rule, and a statute granting an exemption must be strictly, rather than liberally, construed. See, e.g., *Faith Fellowship Ministries, Inc. v. Limbach* (1987), 32 Ohio

⁴ The final determinations also address the exemption of the subject properties under R.C. 5709.07(A)(1); however, appellants have not raised as errors the commissioner's decisions under that section on appeal.

St.3d 432; *Anderson/Maltbie Partnership v. Levin*, 127 Ohio St.3d 178, 2010-Ohio-4904.

The parties agree that the factual issues are not in dispute.⁵ In their merit brief, EDA and SHSCC argue that the property must only be *used* by a community college to be exempt under R.C. 3354.15; because it is so used, they argue that the commissioner erred in denying exemption. The commissioner argues that the court's decision in *Athens*, supra, is dispositive in its favor. In that case, the court considered the exemption of two privately-owned dormitories located adjacent to Hocking Technical College under R.C. 3357.14 and R.C. 5709.07(A)(4). Finding that the dormitories were "used by" the students, and not the college itself, the court held: "because [the private owner's] property is not 'used by' the college within the meaning of the statute, [it] is prohibited from receiving a tax exemption pursuant to R.C. 3357.14."⁶ *Id.* at ¶11. EDA and SHSCC argue that, by implication, the court suggested that property owned by a private entity and leased to a college, would qualify for exemption if it was used by the college, rather than its students.

The appellee boards of education ("BOE") disagree. With regard to exemption under R.C. 3354.14, the BOE notes the court's statement in *Athens*, supra,

⁵ However, the commissioner, in his brief, notes that, although appellants assert in their initial brief that, under both lease agreements, CSCC was contractually obligated to pay real property taxes on the subject properties, only the lease with SCSS imposes such an obligation; the EDA lease only obligates CSCC to pay taxes pertaining to its own fixtures, furniture, and other personal property. Commissioner Brief at 3-4. Our review of the leases included in the statutory transcript confirm this representation.

⁶ The court further noted: "L&L has no education-related mission; it exists to earn a profit by renting temporary housing accommodations to students attending the college. The BTA reasonably determined that the General Assembly promulgated R.C. 3357.14's tax exemption to reduce the tax burden on higher education facilities; not to shelter private property owners who build and maintain student housing near college campuses." *Id.* at ¶11.

that the statute, in addition to similar ones in Chapter 33, do not “exempt private landowners from paying taxes on property located near, or even on, a college or university campus.” *Id.* at ¶11. The BOE argues that CSCC’s voluntary assumption of real property tax obligations does not render the leased property exempt.⁷ The BOE also argues that the subject properties are not exempt under R.C. 5709.07(A)(4), as they must qualify for exemption under the statute specifically applicable to community college property – R.C. 3354.15. See *Rickenbacker Port Auth. v. Limbach* (1992), 64 Ohio St.3d 628; *Church of God in N. Ohio, Inc. v. Levin* (2009), 124 Ohio St.3d 36.

The appellee commissioner argues that the court’s decision in *Athens*, *supra*, is dispositive in his favor, as the court therein specifically stated that the exemption under R.C. 3354.15 does not exempt private landowners from paying taxes. *Id.* at ¶¶9, 11. Like the BOE, the commissioner’s position is that EDA and SHSCC must qualify for exemption under R.C. 3354.15, as the statute specifically applicable to community college property, and, therefore, cannot seek exemption under R.C. 5709.07(A)(4).⁸

We first address the subject properties’ exemption under R.C. 3354.15 – the statute under which EDA and SHSCC applied for exemption. The parties direct this board to the court’s decision in *Athens*, *supra*. Therein, the court noted that R.C.

⁷ The BOE further argues: “At most, the prohibition set forth in R.C. 3354.15 would render the provisions of the commercial lease obligating Columbus State to make the prohibited payments null and void. The obligation to pay taxes would then revert to Equity Dublin and SHSCC#2, as owners of the properties.” BOE Brief at 5.

⁸ We find this position curious in light of the commissioner’s lengthy consideration of exemption under R.C. 5709.07(A)(4) in his final determination, despite the fact that appellants did not seek exemption under that statute in their applications.

3357.14,⁹ the relevant statute in that matter, and R.C. 3354.15, among other similar statutes, do not “exempt private landowners from paying taxes on property located near, or even on, a college or university campus.” *Id.* at ¶11. The court specifically held:

“Accordingly, we agree with the BTA’s decision and hold that because R.C. 3357.14 grants a tax exemption only to ‘technical college districts,’ and because L & L’s property is not ‘used by’ the college within the meaning of the statute, L & L is prohibited from receiving a tax exemption pursuant to R.C. 3357.14.” *Id.* at ¶12.

Appellants seem to focus on the court’s discussion of the use of the property; however, we find the statute’s preceding statement more important. R.C. 3354.15 states that “[a] community college district shall not be required to pay any taxes or assessments on any real *** property acquired, owned, or used by it ***.” As the court acknowledged in *Athens*, *supra*, the owner of the property, alone, is responsible for paying taxes on property it owns. *Id.* at ¶9. While CSCC may have voluntarily assumed an obligation to pay real property taxes under the SHSCC lease, it is not *required* to pay any taxes on the subject properties.¹⁰ As EDA and SHSCC are clearly not community college districts, they are not entitled to an exemption under R.C. 3354.15. We accordingly reject the appellees’ argument that the subject

⁹ R.C. 3357.14 states, in pertinent part: “A technical college district shall not be required to pay any taxes or assessments upon any real or personal property acquired, owned, or used by it pursuant to sections 3357.01 to 3357.19, inclusive, of the Revised Code ***.”

¹⁰ As we noted in our order dismissing CSCC as an appellant in these matters, CSCC originally filed applications for exemption of the subject properties, but withdrew them in January 2005. *Equity Dublin Assoc. v. Testa* (Interim Order, Aug. 21, 2013), BTA Nos. 2011-1792, 1795, unreported, at fn. 1.

properties are only entitled to exemption under R.C. 3354.15 as the statute specifically applicable.

We therefore turn to the properties' exemption under R.C. 5709.07(A)(4). In doing so, we find the Tenth District's explanation of the statute, in *Bexley Village, Ltd. v. Limbach*, 68 Ohio App.3d 306 (10th Dist.1990), instructive:

"R.C. 5709.07 includes two separate and distinct clauses. First, public colleges and academies and all buildings connected therewith are exempt from taxation regardless of whether the property is used with a view towards profit. *Cleveland State Univ. v. Perk* (1971), 26 Ohio St.2d 1, ***; *Denison Univ. v. Bd. of Tax Appeals* (1965), 2 Ohio St.2d 17, ***. Second, all lands connected with public institutions of learning are exempted from taxation if they are not used with a view towards profit." *Id.* at 308.

The exemption of public college property under R.C. 5709.07(A)(4), where the property was not owned by the college, was specifically addressed by the Supreme Court in *Cleveland State Univ. v. Perk* (1971), 26 Ohio St.2d 1, which we find dispositive in this matter. In that case, the court found that property used solely for classrooms and faculty offices were buildings "connected with" a public college, and specifically rejected the argument that the property must be *owned* and used by the public college to be entitled to exemption. *Id.* at 7-8.

The Tenth District Court of Appeals reached the same conclusion in *Bexley Village*, supra. Rejecting the application of case law¹¹ under R.C. 5709.08 and R.C. 5709.12 that required a unity of ownership and use, the court stated:

“Neither of these cases are applicable to the statute at issue, because R.C. 5709.07 does not use the word ‘belonging,’ but instead uses the word ‘connected.’ The words ‘connected with,’ as used in R.C. 5709.07, clearly have a broader meaning than the words ‘belonging to.’

“We conclude that unity of ownership and use is not required to satisfy the ‘connected with’ element of R.C. 5709.07. Since the property was used in furtherance of the university’s educational purpose, it is connected with the university within the meaning of the statute.” *Id.* at 309-310.

See, also, *Anderson/Maltbie Partnership v. Levin*, 127 Ohio St.3d 178, 2010-Ohio-4904. We agree. As the parties do not dispute that the portions of the subject properties leased by CSCC are used for classrooms, offices, lab space, and related school activities, we find they are “connected with” the community college and therefore entitled to exemption under R.C. 5709.07(A)(4).

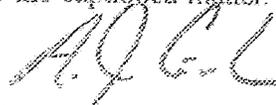
However, we must separately analyze the exemption of the parking lot space leased by CSCC and located on parcel number 010-215347-00, owned by SHSCC. Citing long-standing precedent, the court in *Cleveland State*, supra, held that, under R.C. 5709.07(A)(4), land connected with a public college, as opposed to buildings connected therewith, is only entitled to exemption if it is not “used with a

¹¹ Specifically, the court found that *Carney v. Cleveland City School Dist. Pub. Library* (1959), 169 Ohio St. 65, and *Evans Investment Co. v. Limbach* (1988), 51 Ohio App.3d 104, were inapplicable.

view to profit." Id. at 9-12 (citing *Denison Univ. v. Bd. of Tax Appeals* (1965), 2 Ohio St.2d 17, and *Kenyon College v. Schnebly* (1909), 12 Ohio C.C. (N.S.) 1). CSCC leases property from SHSCC pursuant to a for-profit lease, at a rate of \$11,000 per month. Appellants' Brief at 2. Clearly the land is used with a view to profit; we therefore find that it is not entitled to exemption. Cf. *Bexley Village*, supra (holding that parking lot leased for \$1 per year to college was exempt).

Based upon the foregoing, we find that the portions of the buildings located on the subject parcels that are leased by CSCC, but not the land, are entitled to exemption under R.C. 5709.07(A)(4). Accordingly, we hereby reverse in part the final determinations of the Tax Commissioner, consistent with the decision announced herein.

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

BEFORE THE BOARD OF TAX APPEALS
STATE OF OHIO

EQUITY DUBLIN ASSOCIATES AND	:	
SHSCC #2 LIMITED PARTNERSHIP,	:	
	:	
Appellants,	:	
	:	Case No. _____
v.	:	
	:	
	:	Appeal from Ohio Board of Tax Appeals
JOSEPH W. TESTA, TAX COMMISSIONER	:	
OF OHIO, BOARD OF EDUCATION OF THE:	:	Case Nos. 2011-1792 and 2011-1795
COLUMBUS CITY SCHOOL DISTRICT,	:	
AND THE BOARD OF EDUCATION OF	:	
DUBLIN CITY SCHOOL DISTRICT	:	
Appellees.	:	

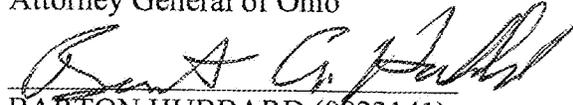
PRAECIPE

TO THE OHIO BOARD OF TAX APPEALS

Demand is hereby made that the Ohio Board of Tax Appeals ("Board") prepare, transmit and file with the Supreme Court of Ohio a certified transcript of the records and proceedings of the Board pertaining to its Order in the above-styled matter; including in said certified transcript, the Board's Order, the original papers in the case or a transcript thereof, and all evidence with originals or copies of all exhibits as adduced in said proceeding considered by the Board in making its Order.

Respectfully submitted,

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Attorney General of Ohio


BARTON HUBBARD (0023141)

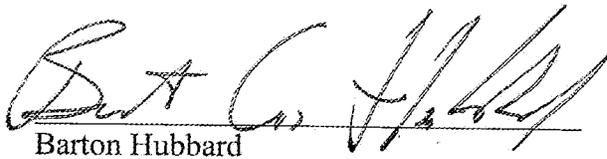
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Joseph W. Testa, Tax Commissioner of Ohio

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Notice of Appeal and Praecipe were filed by hand delivery with the Ohio Board of Tax Appeals, 30 E. Broad St., 24th Floor, Columbus, Ohio 43215, and by certified mail, and were served upon Matthew Anderson, Luper, Neidenthal & Logan, 50 W. Broad Street, Suite 1200, Columbus, Ohio 43215, counsel for Appellants, and Kimberly Allison, Rich & Gillis Law Group, LLC, 6400 Riverside Drive, Suite D, Dublin, Ohio 43017, counsel for Appellee Boards of Education, by certified mail return receipt requested this

31st day of January, 2014.



Barton Hubbard
Assistant Attorney General