

IN THE SUPREME COURT OF OHIO

CINCINNATI CITY SCHOOL
DISTRICT BOARD OF EDUCATION,

: Supreme Court Case No. 2013-1426

Appellant,

v.

: On Appeal from the Board of Tax Appeals

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

Appellees.

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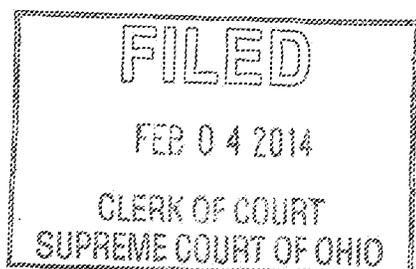


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INTRODUCTION

This appeal arises from the Appellant Board of Education's (the "BOE's") attempt to circumvent the statutory requirements of the property tax exemption process. The BOE sought in 2011 to intervene in the Tax Commissioner's consideration of an application for real property tax exemption that the Appellee City of Cincinnati (the "City") filed in 2006 (the "2006 Exemption Application"). The BOE was five years too late.

The 2006 Exemption Application related to one of the parcels of real property that constitute the City's Convention Center, which is now known as the Duke Energy Center (the "Center"). Prior to the events in this case, the City applied for and received tax exemption for sixteen of the Center's parcels. The BOE neither requested notice of, nor opposed, those exemption applications, and it never filed complaints against those parcels' continued exemption. Consistent with its historic acquiescence to the Center's exemption, the BOE did not request notice of, or make itself a party to, the 2006 Exemption Application in 2006. Ohio law will not allow the BOE to do so now.

The BOE also attempts to circumvent the Court's jurisdictional rules. The BOE's Merit Brief focuses on issues that it did not raise in its Notice of Appeal, and that the Board of Tax Appeals (the "BTA") did not address in its decision dismissing the BOE's defective appeal. The BOE's Notice of Appeal makes no mention of the merits of the BOE's constitutional arguments as they relate to Am.Sub.H.B. 153's (the "2011 Budget Bill's") changes to R.C. 5709.084 (the "R.C. 5709.084 Amendments"). *See* Notice of Appeal. And the BTA decision from which the BOE has appealed to this Court likewise makes no mention of either the merits of the 2006 Exemption Application, or the application of the R.C. 5709.084 Amendments to the 2006 Exemption Application.

The BOE's arguments regarding the merits of its constitutional claims are, at best, premature and misplaced. Because the BOE did not include them in its Notice of Appeal and Specifications of Error to this Court, the Court lacks jurisdiction to consider them.

Instead, this appeal relates to the narrow question of whether a board of education, having squandered its limited statutory opportunity to make itself a party to, and participate in, the Tax Commissioner's consideration of a taxpayer's exemption application may, years later, interpose itself in the Tax Commissioner's consideration of the exemption application simply because the legislature has amended a property tax exemption statute that affects the exemption application.

R.C. 5715.27(B) and (C) provide the only means by which a board of education may become a party to, and oppose, a property owner's exemption application. Under this statute, the window of time in which the BOE could have filed a statement to become a party to the 2006 Exemption Application closed in 2006.

Because the BOE neglected to file a timely R.C. 5715.27(C) statement with the Tax Commissioner to participate in the 2006 Exemption Application, the Tax Commissioner appropriately denied the BOE's attempt to intervene in his consideration of the 2006 Exemption Application. And the BTA reasonably and lawfully granted the Tax Commissioner's Motion to Dismiss the BOE's improper attempt to appeal – as a non-party – to the BTA from the Final Determination that the Tax Commissioner issued granting the 2006 Exemption Application.

Notably, though, the BOE *did* request notice of, and then made itself a party to, an exemption application that the City filed in 2011 to seek exemption for some of the Center's parcels (the "2011 Exemption Application"). It is in those proceedings, not here, that the BOE may assert and preserve its constitutional claims. By opting not to file a timely statement in the

2006 Exemption Application, though, it lacked standing to participate in, or appeal from, the Tax Commissioner's consideration of the 2006 Exemption Application.

Because the BTA's decision to dismiss the BOE's defective appeal was reasonable and lawful, the Court should affirm the BTA's decision.

STATEMENT OF FACTS

The Center is composed of seventeen parcels of property, including sixteen that enjoyed exemption before 2006 pursuant to a determination of the Tax Commissioner that preceded the events that occurred in this case (the “Sixteen Parcels”). *See* Stipulations Submitted in Common Pleas Court Action, attached as Exhibit F to Tax Commissioner’s Motion to Dismiss BOE’s BTA Appeal, and included with BOE’s Supplement to its Merit Brief (“Stips.”), at ¶ 1. The BOE neither requested notice of, nor objected to, nor filed complaints against, the Sixteen Parcels’ exemption.

The City acquired the seventeenth parcel of property (the “0057 Parcel”) in 2002 to expand the Center. *Id.*, at ¶ 2. The City filed the 2006 Exemption Application in September 2006 to seek exemption for the 0057 Parcel. The BOE did not object to the 2006 Exemption Application in 2006 or file a timely statement with the Tax Commissioner making it a party to the 2006 Exemption Application. *See* BOE’s Merit Brief, at 4 (citing BOE’s Supp., at 31). Indeed, the BOE had not even requested that the Tax Commissioner notify it of the filing of *any* exemption applications relating to property in its District. *Id.*

Pursuant to R.C. 5715.27, the BOE’s opportunity to make itself a party to the 2006 Exemption Application came and passed in late 2006.

On March 22, 2011, the Tax Commissioner issued a Final Determination that denied the 2006 Exemption Application. *See* March 22, 2011 Final Determination. The Tax Commissioner also issued an Order to Restore Real Property to Tax List, which directed the Hamilton County Auditor to restore the Sixteen Parcels to the list of taxable property. *Stips.*, at ¶ 10–11.

The City appealed these decisions of the Tax Commissioner to the BTA.

During the pendency of the City’s appeal of the Tax Commissioner’s decisions, the General Assembly passed the 2011 Budget Bill, which included the R.C. 5709.084 Amendments.

The R.C. 5709.084 Amendments clarified a property tax exemption statute that affected the 2006 Exemption Application. Following the General Assembly's passage of the Budget Bill, the BTA remanded the City's appeals to the Tax Commissioner.

After an agent or employee of the Tax Commissioner denied the BOE's informal September 29, 2011 email request to oppose the 2006 Exemption Application, the BOE filed a lawsuit against the City and the Tax Commissioner in the Court of Common Pleas of Franklin County, Ohio. That case has been assigned Case Number 11CVH-09-12158; however, the common pleas court decided on December 29, 2011 to "stay further proceedings pending completion of the case before the Tax Commissioner (and appeals to the BTA and the Ohio Supreme Court)." *See* Dec. 29, 2011 Decision and Journal Entry, at 6.

At no time between 2004 and September 29, 2011 did the BOE seek to participate in the Tax Commissioner's consideration of *any* property tax exemption applications. *See* BOE's Responses to Tax Commissioner's Requests for Admission, attached to Tax Commissioner's June 13, 2013 Motion to Dismiss in BTA No. 2012-Q-1047, at 5, ¶ 7. And until September 29, 2011, the BOE had never sought to participate in the Tax Commissioner's consideration and Final Determination of the 2006 Exemption Application. *Id.*, at 4, ¶ 4.

On or about September 29, 2011, and for the first time, the BOE filed a request with the Tax Commissioner, pursuant to R.C. 5715.27(B), to receive notices of tax exemption applications filed as to property located within the BOE's District. *See* BOE's Request for Notification of Exemption Applications, submitted to Tax Commissioner on September 29, 2011, included in Tax Commissioner's Statutory Transcript to BTA; BOE's Responses to Tax Commissioner's Requests for Admission, attached to Tax Commissioner's June 13, 2013 Motion to Dismiss in BTA No. 2012-Q-1047, at 3; *see also* BOE's Merit Brief, at 4 ("[When] the City

filed its 2006 application for an exemption, [the BOE] 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.”).

Several months later, and five-and-a-half years after the BOE's opportunity to become a party to the 2006 Exemption Application came and passed, the BOE moved the Tax Commissioner to permit it to intervene in the Tax Commissioner's consideration of the 2006 Exemption Application. *See* BOE's Jan. 12, 2012 Motion to Intervene.

Following the remand of the 2006 Exemption Application from the BTA to the Tax Commissioner, and following the General Assembly's passage of the R.C. 5709.084 Amendments, the Tax Commissioner granted the 2006 Exemption Application. *See* Feb. 21, 2012 Final Determination of DTE No. ME 3048. In the same Final Determination, the Tax Commissioner rejected the BOE's tardy attempt to intervene in the 2006 Exemption Application. *Id.* In particular, because the BOE did not file “an interest in accordance with R.C. 5715.27,” the Tax Commissioner decided that he could not “permit the [BOE] to participate as has been requested by the [BOE].” *See* Feb. 21, 2012 Final Determination of DTE No. ME 3048.

Though it had not filed a timely statement to make itself a party to the 2006 Exemption Application, and though the Tax Commissioner denied its Motion to Intervene, the BOE filed a Notice of Appeal of the Feb. 21, 2012 Final Determination of the 2006 Exemption Application with the BTA. *See* BOE's April 9, 2012 Notice of Appeal to BTA, assigned BTA No. 2012-X-1047.

In December 2011, the City filed the 2011 Exemption Application, which sought exemption for certain of the parcels that constitute the Center, which had been returned to the tax list following the Tax Commissioner's issuance of his March 22, 2011 order to restore.

Because the BOE had by then requested that the Tax Commissioner notify it of exemption applications affecting property in its district, the BOE received notice of the 2011 Exemption, filed a statement pursuant to R.C. 5715.27(C), and is a party to the 2011 Exemption Application, which is presently pending before the Tax Commissioner.

On June 13, 2013, the Tax Commissioner moved the BTA to dismiss the BOE's appeal of the Tax Commissioner's Final Determination of the 2006 Exemption Application, arguing that "[t]he appeals statute, R.C. 5717.02, expressly conditions the right of boards of education to appeal to th[e BTA] upon satisfaction of the requirements of R.C. 5715.27. Because the [BOE] failed to comply with R.C. 5715.27, it could not participate before the Tax Commissioner and cannot confer jurisdiction on [the BTA] to consider its appeal." *See* Tax Commissioner's Motion to Dismiss, at 1-2.

Reasoning "that the BOE failed to meet the statutory prerequisites of R.C. 5715.27(C)," the BTA found that the BOE had not made itself a party to the 2006 Exemption Application, and concluded that the BOE's notice of appeal "cannot invoke th[e BTA's] jurisdiction on appeal." *See* Aug. 9, 2013 BTA Decision and Order, BTA No. 2012-X-1047, at 5. While the BTA acknowledged that, in appropriate cases, it can act as a "receiver of evidence for constitutional challenges," it held that the BOE had "not satisfied the threshold requirement of R.C. 5717.02 to invoke our jurisdiction to do so." *Id.*, at 5, n.3 (quoting *MCI Telecommunications Corp. v. Limbach*, 68 Ohio St.3d 195, 625 N.E.2d 597 (1994)).

The BOE – which was not a party to the Tax Commissioner's or the BTA's consideration of the 2006 Exemption Application – has now appeal to this Court, alleging three assignments of error, none of which asserts that the R.C. 5709.084 Amendments are unconstitutional:

- 1) The [BTA] Decision and Order granting the Tax Commissioner's Motion to Dismiss is unreasonable and unlawful;
- 2) The [BTA] Decision and Order denying the [BOE's] request for intervention for the limited purpose of establishing a record before the Board to Challenge the constitutionality of [the R.C. 5709.084 Amendments] was unreasonable and unlawful; and
- 3) The [BTA] Decision and Order denying the [BOE's] request for intervention for the limited purpose of establishing a record to challenge the constitutionality of [the R.C. 5709.084 Amendments] 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.

See BOE's Notice of Appeal, at Ex. B Assignment of Errors.

The scope of the BOE's appeal is much narrower than its Merit Brief suggests; the appeal turns on the Court's adoption of the City's single, straightforward, Proposition of Law.

ARGUMENT

Proposition of Law: If a board of education does not make itself a party to the Tax Commissioner's consideration of a property tax exemption application pursuant to R.C. 5715.27(C), then it may not appeal the Tax Commissioner's decision of the exemption application to the BTA under R.C. 5717.02, and it may not appeal the BTA's determination of the exemption application under R.C. 5717.04.

I. By Neglecting to Comply with the Limited Statutory Procedures for Participating in Exemption Applications, the BOE Waived its Opportunity to Participate in, and File Appeals from, the Tax Commissioner's Consideration of the 2006 Exemption Application

Under R.C. 5715.27, if the BOE wished to challenge the City's 2006 Exemption Application, it had to do so by the end of 2006. It was too late in 2011 and 2012 for the BOE to intervene in, or appeal from, the Tax Commissioner's Final Determination of the 2006 Exemption Application.

a. This Court Prohibits School Districts from Opposing Exemption Applications Unless the School Districts Comply with R.C. 5715.27

The General Assembly has created a particularized procedure for property owners to seek exemption for their property, for school districts to opt to participate in that process, for the Tax Commissioner to consider such exemption applications, and for parties before the Tax Commissioner to appeal – as a matter of right – to the BTA and this Court. A school district must strictly comply with these statutory requirements; otherwise, it cannot become a party to a property owner's exemption application. *State ex rel. Strongsville Bd. of Educ. v. Zaino*, 92 Ohio St. 3d 488, 489–490, 751 N.E.2d 996 (2001). Parties to these administrative proceedings also may assert constitutional challenges to the underlying statutes, and may have these constitutional challenges heard – as a matter of right – by the Supreme Court of Ohio. *See Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St. 3d 229, 520 N.E.2d 188, paragraph two of the syllabus.

A school district may become a party to property owners' exemption applications by requesting that the Tax Commissioner "provide it with notification of applications for exemption from taxation for property located within that district,"¹ and "may, with respect to any application for exemption of property located in the district... file a statement with the commissioner and with the applicant stating its intent to submit evidence and participate in any hearing on the application."² R.C. 5715.27(B) & (C). A school district that files such a statement with the Tax Commissioner is made a party to the exemption application proceedings, including all appeals. *Id.*; see *Strongsville*, 92 Ohio St. 3d at 489-490.

A school district that made itself a party to the exemption application may appeal the Tax Commissioner's determination of the exemption application to the BTA, and then to the Supreme Court of Ohio, or certain courts of appeals, as a matter of right. See R.C. 5717.02; R.C. 5717.04.

However, the rights of school districts to participate in the Tax Commissioner's consideration of an exemption application are not without limit. That is, "[a] litigant has no inherent right to appeal a tax determination, only a statutory right." *Avon Lake City Sch. Dist. v. Limbach*, 35 Ohio St. 3d 118, 119, 518 N.E.2d 1190 (1988). And boards of education are no different from other litigants – "***a public official's right to participate in tax-assessment proceedings exists not by constitutional right, but by legislative grant.***" *Delaney v. Testa*, 128 Ohio St. 3d 248, 2011-Ohio-550, 943 N.E.2d 546, ¶ 4 (emphasis added).

¹ Once a school district makes such a request, the Tax Commissioner must "send to the board [of education] 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 the name of the property owner, the property's address, and the County Auditor's parcel number for the property. R.C. 5715.27(B).

² The statement must 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." R.C. 5715.27(C).

This Court has held that a party's "right to appeal [the Tax Commissioner's decisions to the BTA] is not open-ended, it requires compliance with the specific and mandatory provisions of R.C. 5717.02. *Failure to comply with R.C. 5717.02 divests the BTA of jurisdiction.*" *DeWeese v. Zaino*, 100 Ohio St. 3d 324, 2003-Ohio-6502, 800 N.E.2d 1, ¶ 20 (emphasis added).

In *DeWeese*, the Court held that, even though the Tax Commissioner's decision of certain intercounty tax assessments deprived some counties of revenue, the affected county auditors could not appeal the determinations to the BTA because the General Assembly had not included intercounty assessments in R.C. 5717.02's list of determinations from which county auditors are authorized to appeal. *Id.* Even though the assessments harmed the counties, the legislature simply had not provided for the auditors to appeal in those circumstances. *Id.*, at ¶ 23 ("Clearly, the General Assembly has shut the county auditors out of the Tax Commissioner's review of petitions for reassessment involving intercounty returns. If the county auditors desire authority to challenge intercounty personal property tax returns on issues not determined by the Tax Commissioner, they will have to seek that authority from the General Assembly.").

Similarly, a school district that fails to comply with R.C. 5715.27's and R.C. 5717.02's "specific and mandatory" requirements cannot become a party to, and then appeal from, the Tax Commissioner's determination of a property owner's exemption application, even if the Tax Commissioner's determination may harm the BOE's finances. *See id; Strongsville*, 92 Ohio St. 3d at 489-490.

A school district that fails to become a party to an exemption application in the first instance – by filing a statement that complies with R.C. 5715.27(C) – is barred from later participating in the consideration of the exemption application, is barred from subsequently intervening in the exemption application, and is barred from perfecting an appeal of the Tax

Commissioner's determination of the exemption application to the BTA or this Court. See *Strongsville*, 92 Ohio St. 3d at 489–490; *Ellwood Engineered Castings Co. v. Tracy* (July 27, 1997), BTA No. 96-B-1049, 1997 Ohio Tax LEXIS 841, *3–4; see also *Bd. of Educ. of the Princeton City Sch. Dist. v. Tracy* (May 15, 1998), BTA No. 97-K-830, 1998 Ohio Tax LEXIS 594, *3–5 (rejecting attempt by non-party political subdivision to intervene in exemption application) (citing *Avon Lake*, 35 Ohio St. 3d at 119).

In the *Strongsville* case, this Court held that a school district that failed to file a statement pursuant to R.C. 5715.27(C) had no right whatsoever to participate in the Tax Commissioner's consideration of a property owner's exemption application. *Strongsville*, 92 Ohio St. 3d at 489–490. The Court rejected the school district's tardy attempt to affect the outcome of the Tax Commissioner's consideration of the exemption application, noting that “to participate in this exemption hearing the BOE merely had to send a timely statement to the commissioner and the applicant of its intention to submit evidence and participate in the hearing. However, the BOE did not file any statement of intention to participate by the filing date.” *Id.*

Just as a school district cannot participate in an exemption application if it failed to be made a party, a school district that failed to file a timely R.C. 5715.27(C) statement also may not intervene in the Tax Commissioner's or BTA's consideration of an exemption application. *Ellwood*, 1997 Ohio Tax LEXIS 841, *3–4. In *Ellwood*, the BTA denied the school district's motion to intervene, explaining that “R.C. 5715.27 and R.C. 5717.02 provide specific statutory means by which an affected board of education may become involved in an exemption request before the Tax Commissioner However, it appears from the record that the BOE did not file a statement under R.C. 5715.27(C).” *Id.* at *2, 4.

When a school district failed to request notification of exemption applications, but instead attempted to file untimely complaints against continuing exemption, the BTA affirmed the Tax Commissioner's dismissal of the tardy complaints, concluding that: "... the School District's dilemma is more the result of its own inaction concerning the established statutory procedures, than error on the part of the Tax Commissioner." *Olmstead Falls Bd. of Educ. v. Tracy* (Nov. 3, 1995), BTA No. 93-P-1382 & 1383, 1995 Ohio Tax LEXIS 1294, at *13.

After noting that the district's dilemma was a problem of the district's own making, the BTA explained: "*[I]t would be unfair to a property owner to be put to all the time and expense of exemption proceedings, only to find that he must re-litigate all of those issues for subsequent intervening tax years merely because a school district elected to sit idly by or neglected to join in the litigation in the first instance. Nor would such a statutory scheme foster judicial economy.*" *Olmstead Falls*, 1995 Ohio Tax LEXIS 1294, at *20-21 (emphasis added).³

Having noted that the legislature has permitted school districts to participate in property owners' exemption applications only in limited circumstances, and under specific deadlines, the BTA explained that, in contrast to school districts, the Tax Commissioner and County Auditors "appear to be the properly delegated officials to police exemptions on an annual basis." *Olmstead Falls*, 1995 Ohio Tax LEXIS 1294, at *20.

Of note, the General Assembly did not permit school districts – or anyone else – to oppose exemption applications until 1985, when the General Assembly amended R.C. 5715.27.

³ Having surveyed the special statutory proceedings that the General Assembly has developed for the filing and consideration of exemption applications, the BTA in *Olmstead Falls* "believe[d] it worthy of observation that in establishing this statutory scheme the General Assembly provided the County Auditor – not the School District – with the statutory duty and responsibility to strike property from the exempt list" pursuant to R.C. 5713.08(A). *Olmstead Falls*, 1995 Ohio Tax LEXIS 1294, at *19.

“Without the specific authority granted by the 1985 amendment of R.C. 5715.27, even school boards would not be able to participate in a hearing on an application for exemption.” *Strongsville*, 92 Ohio St. 3d at 492. Thus, R.C. 5715.27 provides the sole means for a school district to oppose an exemption application. *See id.*

And R.C. 5717.02 only permits a school district to appeal from the Tax Commissioner’s determination of an exemption application if the district first became a party to the exemption application by “fil[ing] a statement concerning that application under [R.C. 5715.27(C)].” R.C. 5717.02(A).

In the absence of R.C. 5715.27, R.C. 5717.02, and R.C. 5717.04, school districts would enjoy absolutely no right to participate in or appeal exemption cases. *See id.*; *see also Delaney*, 128 Ohio St. 3d 248, at ¶ 4.

When a school district fails to take the simple steps that R.C. 5715.27 prescribes, it can neither become a party to the exemption application, nor can it intervene in or otherwise insinuate itself into the Tax Commissioner’s consideration of the exemption application five years later. And it may not appeal from the Tax Commissioner’s determination of such an exemption application. *See Strongsville*, 92 Ohio St. 3d at 489–492; *Olmstead Falls*, 1995 Ohio Tax LEXIS 1294, at *13, 20–21; *Princeton*, 1998 Ohio Tax LEXIS 594, at *3–5; *Ellwood*, 1997 Ohio Tax LEXIS 841, at *3–4.

b. The BOE Failed to Comply with R.C. 5715.27(C), Did Not Become a Party to the 2006 Exemption Application, and Could Not Appeal from the Final Determination to the BTA or this Court

Until 2011, the BOE had not even asked to receive notice from the Tax Commissioner of the filing of exemption applications that related to property in its district. Further, and perhaps as a consequence of this predicate omission, the BOE neglected to file a timely statement of

participation, pursuant to R.C. 5715.27(C), in the 2006 Exemption Application. Therefore, it did not become a party to the 2006 Exemption Application.

Having missed the opportunity in 2006 to become a party to the Exemption Application, the BOE cannot now intervene in the Exemption Application, and it cannot appeal to the BTA or this Court from the Tax Commissioner's Final Determination of the 2006 Exemption Application. The Court should therefore affirm the BTA's reasonable and lawful decision to dismiss the BOE's jurisdictionally-defective appeal.

c. The BOE's Arguments to the Contrary are Unavailing

The BOE claims that the Court should grant it the special dispensation of being able to intervene in, and appeal from, the Tax Commissioner's consideration of the 2006 Exemption Application, since the General Assembly passed a statute that affected the merits of the 2006 Exemption Application in 2011. *See* BOE Merit Brief, at 13.

The BOE argues that whenever laws change during an exemption application's pendency, the school board in whose district the subject property is located should be permitted to involve itself in the exemption application, even if the school board had not taken the statutorily-prescribed steps of requesting notice of exemption applications, and filing a statement to participate in the particular exemption application. *See* BOE Merit Brief, at 13.

The BOE claims that the "first available opportunity" for it to oppose the 2006 Exemption Application occurred in 2011, with the passage of the R.C. 5709.084 Amendments. *Id.* But that's not right – by neglecting to become a party to the 2006 Exemption Application in 2006, the BOE opted to forego its limited statutory opportunity to participate in, oppose, and appeal from, any decision on the 2006 Exemption Application, regardless of any subsequent change in statute or case law. The time for the BOE to opt-in to oppose the 2006 Exemption Application came and passed in 2006, and the General Assembly's passage of the R.C. 5709.084

Amendments in 2011 did not re-wind the clock or create a new opportunity for the BOE to insinuate itself in the 2006 Exemption Application.

The BOE relies upon an easily-distinguishable tax exemption case to support its claim that the passage of the R.C. 5709.084 Amendments created a new opportunity to oppose the 2006 Exemption Application. *See* BOE Merit Brief, at 13 (citing *South-Western City Schools v. Kinney*, 24 Ohio St.3d 184, 186, 494 N.E.2d 1109 (1986)). The BOE argues that the “first available opportunity” for it to challenge the R.C. 5709.084 Amendments arose in 2011. BOE Merit Brief, at 13.

But this argument puts the cart before the horse – the school district in the *South-Western City Schools* case was already a party to that case; in fact, it had initiated the Tax Commissioner’s consideration of the exempt status of the subject property by filing a timely complaint against continued exemption under R.C. 5715.27(E). *South-Western City Schools*, 24 Ohio St.3d at 184–185. Thus, the school district had complied with R.C. 5715.27, and was properly a party to that case; in contrast, the BOE here is not, and never was, a party to the 2006 Exemption Application. Unlike the school district in *South-Western City Schools*, the BOE here failed to comply with the statutes that set forth the limited circumstances in which a school district may participate in administrative proceedings affecting property tax exemption.

The BOE makes much of a pair of other cases – *Fazio* and *Bassett* – in which the BTA permitted school districts to intervene in pending tax *valuation* cases; however, those cases are similarly inapposite and distinguishable. *See* BOE Merit Brief, at 16; *see also Fazio L.P. No. 2 v. Cuyahoga County Bd. of Revision* (Oct. 4, 2011), BTA Case No. 2010-K-1798, 2011 Ohio Tax LEXIS 1897; *Bassett v. Franklin County Bd. of Revision* (May 27, 2008), BTA Case No. 2007-A-994, 2008 Ohio Tax LEXIS 1032.

In *Fazio* and *Bassett*, the property owners filed property tax valuation complaints, which are governed by R.C. 5715.19, with their county boards of revision. R.C. 5715.19 requires boards of revision to notify school districts only of those valuation complaints that seek reductions of greater than \$17,500 of taxable value. R.C. 5715.19(B). The owners' original valuation complaints did not request reductions in value that exceeded \$17,500 of taxable value; therefore, the boards of revision did not notify the school districts in which the properties were located of the valuation complaints. See *Fazio*, BTA Case No. 2010-K-1798, at 2-3; *Bassett*, BTA Case No. 2007-A-994, at 4.

On appeal to the BTA, however, the owners in *Fazio* and *Bassett* requested reductions in value that exceeded the \$17,500 threshold set forth in R.C. 5715.19(B). The BTA permitted the boards of education to intervene, concluding that this gave effect to R.C. 5715.19(B)'s notice provisions and obviated the risk of moral hazard associated with the property owner's apparent attempts to avoid school district participation by initially seeking small reductions. See *Fazio*, BTA Case No. 2010-K-1798, at 2-3; *Bassett*, BTA Case No. 2007-A-994, at 4-5.

In contrast to *Fazio* and *Bassett*, the instant case deals with property tax exemption, not property tax valuation. More significantly, the BOE in the present case neglected to request notice of *any* exemption applications; had it done so, it would have received notice of the 2006 Exemption Application. Because it had not requested notice of exemption applications, the BOE never filed a timely statement as to the 2006 Exemption Application with the Tax Commissioner. Had it done so, it would have become a party to the 2006 Exemption Application and could have appealed the Tax Commissioner's Final Determination to the BTA, and then to this Court.

This is not a case – like *Fazio* or *Bassett* – of an evasive owner; rather, this is a case where an inattentive school district sat on and squandered its limited statutory rights. In other

words, “. . . *the School District’s dilemma is more the result of its own inaction concerning the established statutory procedures, than error on the part of the Tax Commissioner.*” *Olmstead Falls Bd. of Educ. v. Tracy* (Nov. 3, 1995), BTA No. 93-P-1382 & 1383, 1995 Ohio Tax LEXIS 1294, at *13 (emphasis added)

While the BOE claims that its being excluded from the Tax Commissioner’s special statutory proceedings will prevent it from enjoying its due process rights, this Court has already rejected that argument, concluding that “a public official’s right to participate in tax-assessment proceedings exists not by constitutional right, but by legislative grant.” *Delaney*, 128 Ohio St. 3d 248, at ¶ 4.

The BOE’s exclusion from these proceedings is the natural and mandatory consequence of the BOE’s failure, back in 2006, to have become a party to the City’s 2006 Exemption Application. But the BOE is not left entirely out in the cold – having finally complied with R.C. 5715.27 and made itself a party to the 2011 Exemption Application, it already has an avenue to assert, preserve, and build a factual record to support, the constitutional objections that it has to the R.C. 5709.084 Amendments. It is in the 2011 Exemption Application proceedings, not here, and not now, that the BOE may properly assert its claims.

II. Even if the BOE Made Itself a Party to the 2006 Exemption Application (Which it Did Not), the Court Lacks Jurisdiction to Consider the Merits of the BOE’s Constitutional Arguments Because the BOE Did Not Raise them in its Notice of Appeal and Specifications of Error to this Court

R.C. 5717.04 requires that a party’s notice of appeal from the BTA to this Court “shall set forth the decision of the [BTA] appealed from and the errors therein complained of.” R.C. 5717.04.

As this Court has often held, “when a litigant fails to raise a particular argument in the notice of appeal to the court, the court do[es] not have jurisdiction to consider the argument.”

Newman v. Levin, 120 Ohio St. 3d 127, 2008-Ohio-5202, 896 N.E.2d 995, ¶ 28 (quoting *Norandex, Inc. v. Limbach*, 69 Ohio St. 3d 26, 31, n.1, 630 N.E.2d 329 (1994)).

Thus, where an appellant in an appeal from the BTA failed to challenge the constitutionality of an administrative rule in its notice of appeal to this Court, the Court concluded that it “therefore lack[ed] jurisdiction to consider this claim.” *Global Knowledge Training, L.L.C. v. Levin*, 127 Ohio St. 3d 34, 2010-Ohio-4411, 936 N.E.2d 463, ¶ 19, n.2 (citing *Newman*, 120 Ohio St. 127, at ¶ 26).

As noted above, the three errors that the BOE specified in its Notice of Appeal relate only to the Tax Commissioner’s and BTA’s conclusion that the BOE failed to make itself a party to the 2006 Exemption Application by failing to comply with R.C. 5715.27. *See supra*, at Statement of Facts; *see also* BOE Notice of Appeal to this Court. And the BTA decision from which the BOE appealed did not deal with the BOE’s constitutional claims or the merits of the 2006 Exemption Application; rather, its scope was confined to determining that the BOE’s improper appeal, as a non-party, had failed to invoke its jurisdiction.

The Court’s jurisdiction in the present appeal is limited only to considering whether the BTA’s decision to dismiss the BOE’s appeal was reasonable and lawful; the Court lacks jurisdiction to move beyond those threshold questions to engage in the merits of the BOE’s constitutional arguments.

CONCLUSION

Because the BOE failed to comply with R.C. 5715.27, it did not make itself a party to the 2006 Exemption Application. And because it was not a party to the 2006 Exemption Application, its attempt to appeal from the Tax Commissioner's determination of the 2006 exemption application was faulty and failed to invoke the BTA's jurisdiction. The BTA's decision to dismiss the BOE's defective appeal from the Tax Commissioner's determination of the 2006 Exemption Application was reasonable and lawful, and the Court should affirm that decision.

Respectfully submitted,



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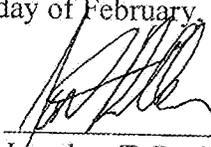
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