

In the  
Supreme Court of Ohio

THE CINCINNATI BOARD OF EDUCATION  
OF THE CINCINNATI CITY SCHOOL  
DISTRICT,

Appellant,

v.

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

Appellees.

Case No. 2013-1426

On Appeal from the  
Ohio Board of Tax Appeals

Board of Tax Appeals  
Case No. 2012-Q-1047

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**MERIT BRIEF OF APPELLEE JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO**

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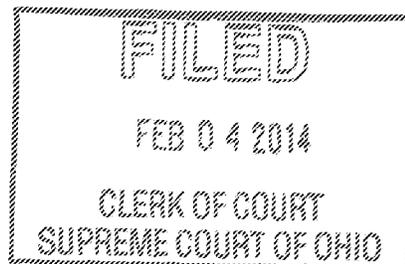
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## INTRODUCTION

Two undisputed facts dispose of this appeal. *First*, an Ohio statute—R.C. 5715.27—sets forth the mandatory measures by which a school board secures the right to challenge the exemption of real property from taxation. Stips at 6-7<sup>1</sup>. *Second*, the Board of Education did not timely meet the demands of that statute, as it concedes. Stips at 8-9; Admissions No. 3-4, 7<sup>2</sup>. These two facts are dispositive and they are undisputed. As a consequence, the Board of Education cannot pursue relief on the merits of the underlying application for exemption for this parcel of property—it has no right. Under settled precedent, every tribunal along the way has lacked jurisdiction to hear its claims. It's that easy. Everything else, the sum total of the Board of Education's arguments, is an attempt to avoid the consequences of its own actions.

This Court cannot excuse the void of jurisdiction left in the wake of the Board of Education's abdication of its rights. Nor should it. The Board of Education seeks unlimited time in which to challenge a property owner's exemption application, irrespective of the General Assembly's instructions. This result would be fundamentally unfair to property owners who, like the City of Cincinnati in this case, must spend considerable resources fighting the Board of Education's untimely and unauthorized litigation.

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<sup>1</sup> The parties to this case entered into Stipulations ("Stips") in a proceeding before the Franklin County Common Pleas Court, Case No. 11CVH-0-12158 on November 10, 2011. The stipulations are included in the record of this case ("Record") as Exhibit F to the Motion to Dismiss of Joseph W. Testa, Tax Commissioner, dated June 13, 2013. The common pleas case is discussed *infra*.

<sup>2</sup> The Board of Education provided responses to the Tax Commissioner's Requests for Admissions ("Admissions") in this case on August 3, 2012. Those Admissions are included in the Record as Exhibit G to the Motion to Dismiss of Joseph W. Testa, Tax Commissioner, dated June 13, 2013.

This case boils down to a play by the Board of Education to obtain an unwarranted windfall. Boards of education are political subdivisions of limited powers that can be created, changed, and dissolved at will by the General Assembly. Accordingly, boards of education can only act within the confines of their statutory authority. Relatedly, this Court long has held that the General Assembly is free to change the source, amount, and allocation of funding of political subdivisions, so long as the money has not yet been distributed. When, like here, a board of education abandons its statutory right to participation, and has not received a distribution of the funds, it has no vested right to such funds and cannot collaterally attack the General Assembly's allocation decisions.

#### STATEMENT OF THE FACTS AND CASE

In 2002, the City of Cincinnati acquired a parcel of property adjacent to the Cincinnati Convention Center (the "new parcel") and in 2004, began construction on that parcel to expand the Convention Center. *See*, Tax Commissioner's Statutory Transcript ("ST") of September 24, 2012 at 11, 96-97; Stips at 2. The original sixteen parcels that comprised the Convention Center were tax exempt at that time. ST 11, Exhibit; Admission No. 1; Stips at 1. However, the new parcel was not yet determined tax exempt when the City purchased it. Stips at 2.

On September 14, 2006, the City filed an application with the Hamilton County Auditor for real property tax exemption and remission seeking exemption for the new parcel beginning with tax year 2005. ST 141-153; Admission No. 2; Stips at 5. The Auditor forwarded the application to the Tax Commissioner on October 5, 2006. *Id.* On March 22, 2011, the Tax Commissioner issued his final determination, finding that the City was not entitled to exemption for the new parcel. ST 96-102; Stips at 10. Also on March 22, 2011, the Tax Commissioner issued an Order to Restore Real Property to Tax List, which directed the Hamilton County Auditor to restore the

sixteen parcels comprising the original Convention Center property to the tax list. ST, at Exhibit 1; Stips at 11. The City appealed to the BTA on May 13, 2011. ST 90-95; Stips at 13.

While the City's appeal was pending before the BTA, amendments to R.C. 5709.084 and uncodified 757.95 ("the new laws") were enacted in the biennial budget bill and became effective on September 29, 2011. ST 9; Stips at 14. Those portions of the annual budget bill established that in counties meeting certain population thresholds, convention center property owned by the largest city is exempt from taxation, regardless of third party lease or management. 2011 Am.Sub.H.B. 153. The Tax Commissioner and the City agreed to remand the case to consider the effect of the laws, and the BTA ordered remand. ST 85-86; Stips at 17.

Five years after the application for exemption was filed, on September 29, 2011, the Board of Education filed a request with the Tax Commissioner to participate in the exemption process from that moment forward and asked the Tax Commissioner for notification of applications for exemption filed within its district. ST 69-75; Stips at 18.

Prior to September 29, 2011, the Board of Education had never asked for notice of applications for exemptions within its district, nor had it sought to participate in any way in the exemption process, or to object to the continuing exemption for the property comprising the Convention Center. Admissions Nos. 3, 4; Stips at 8, 9. Indeed, during the time at issue, prior to September 29, 2011, the Board of Education did not participate in *any* administrative proceedings before the Tax Commissioner on determination of applications for exemption within its district. Admissions No. 7.

Still, on September 29, 2011 the Board of Education filed "Statement of its Intention to Intervene and Oppose the City of Cincinnati's Application for a Tax Exemption" with the Tax Commissioner. Stips. at 18. The Tax Commissioner could not permit the Board of Education to

become involved in the proceedings because it had failed to meet the statutory prerequisites, and he informed the Board of Education of that fact via email on September 29, 2011. ST 68; Stips at 18.

Also on September 29, 2011, the Board of Education filed a civil suit in the Franklin County Common Pleas Court, naming the Tax Commissioner and the City as defendants. ST at 10; Exhibit H to the Tax Commissioner's Motion to Dismiss before the BTA. The suit alleged that the new laws were unconstitutional for several reasons. *Id.* On October 19, 2011, the Board of Education filed an amended complaint, adding a new constitutional challenge at the request of the trial court. *See* Exhibit I to the Tax Commissioner's Motion to Dismiss before the BTA. On December 29, 2011, the trial court ruled that the Board of Education's lawsuit should be stayed, pending completion of the proceedings before the Tax Commissioner and any related appeals. ST 14-18.

On February 21, 2012, the Tax Commissioner issued his final determination in this case. ST 1-2. The Commissioner determined that no party had contested his March 22, 2011 order restoring the 16 parcels to the tax list and that those parcels therefore would remain taxable on the County's real property tax list. *Id.* However, as to the new parcel, the Tax Commissioner determined that this parcel was entitled to exemption in 2006 and remission for 2005, pursuant to amendments to R.C. 5709.084 and uncodified 757.95. *Id.*

The Tax Commissioner also found that the Board of Education failed to comply with R.C. 5715.27 by failing to request notification of applications for exemption within its district and by failing to file a timely statement of intent to participate in this case. Accordingly, the Tax Commissioner found that the Board of Education was precluded by that statute, and by this Court's precedent applying that statute, from participating in the proceedings on the application

for exemption. *Id.* For that reason, the Tax Commissioner denied the Board of Education's formal request for intervention. *Id.*

On April 10, 2012, the Board of Education appealed to the BTA. *See* Notice of Appeal to BTA, dated April 9, 2012. The City, who is the property owner and the applicant for exemption, did not appeal the Tax Commissioner's final determination. The Tax Commissioner filed a motion to dismiss, contending that the BTA did not have jurisdiction to hear the Board of Education's appeal. Motion to Dismiss of Joseph W. Testa, Tax Commissioner, dated June 13, 2013. The Tax Commissioner asserted that the Board of Education was not an authorized party to bring an appeal pursuant to R.C. 5717.02, because the Board of Education had not filed a statement concerning an application for real property exemption pursuant to R.C. 5715.27(C). *Id.*

The BTA granted the Tax Commissioner's motion to dismiss and dismissed the Board of Education's appeal for a lack of jurisdiction. *See* Decision and Order, August 9, 2013. The BTA found that the Board of Education "failed to meet the statutory prerequisites of R.C. 5715.27(C) and therefore cannot invoke [the BTA's] jurisdiction on appeal." *Id.* The Board of Education now appeals to this Court. Notice of Appeal, dated September 5, 2013.

## LAW AND ARGUMENT

### Appellee Tax Commissioner's Proposition of Law No. 1:

*In order to participate in proceedings on real property tax exemption applications, boards of education must satisfy the requirements of R.C. 5715.27 by requesting notice from the Tax Commissioner of applications filed in their district, and by filing a statement of intent to participate in the Tax Commissioner's determination of a particular application.*

1. **The Board of Education cannot participate in the legal proceedings on this application for exemption because it failed to follow the statutory procedures established by R.C. 5715.27 and 5717.02.**

R.C. 5715.27 provides the procedures by which the Board of Education could have participated in determinations on the exemption application in this case. Ensuing appeals are governed by R.C. 5717.02, which expressly conditions the right to appeal on satisfaction of the requirements of R.C. 5715.27. The Board of Education did not comply with these jurisdictional statutes, and accordingly, was statutorily foreclosed from participating before the Tax Commissioner, and cannot appeal the merits of the Tax Commissioner's final determination to the BTA or this Court.

When a property owner files an application for real property tax exemption, the Tax Commissioner is charged by statute to "consider such application or complaint in accordance with procedures established by the commissioner, [and] determine whether the property is subject to taxation or exempt therefrom." R.C. 5715.27(F). That statute also permits a board of education to participate in the Tax Commissioner's proceedings on the determination of the merits of such real property exemption applications.

R.C. 5715.27 is the jurisdictional gateway for school districts to become involved in real property exemption determinations. A board of education must faithfully comply with the terms of that statute in order to perfect its right to participate in the proceedings. *Strongsville Bd. of Edn v. Zaino*, 92 Ohio St.3d 488, 489 (2001) (as a prerequisite, school districts must comply with

R.C. 5715.27 in order to participate in the process); *Olmsted Falls Board of Edn. v. Tracy*, 76 Ohio St.3d 386, 388 (1996)(same); Stips at 6-7.

The recent decision of *Groveport Madison Local Schools Bd. of Edn. v. Franklin Cty. Bd. of Edn.* confirms this result. 137 Ohio St.3d 266, 2013-Ohio-4627, ¶ 14. Although that case does not strictly apply, because it concerns the requirements for complaints before boards of revision under a different statute with its own comprehensive body of precedent, the decision is still illuminating. This Court confirmed that “[w]hen a *statute* specifically requires a litigant to perform certain acts in order to invoke the jurisdiction of an administrative tribunal (or the jurisdiction of a court to review an administrative decision), the performance of such acts usually constitutes a prerequisite to the tribunal’s jurisdiction.” *Id.* (Emphasis sic.) (quoting *Knickerbocker Properties, Inc. XLII v. Delaware Cty. Bd. of Revision*, 119 Ohio St.3d 233, 2008-Ohio-3192, ¶ 10). This Court explained that when a statute *does* contain specific requirements, (as does R.C. 5715.27), complete compliance with statutory requirements is generally an “indispensable prerequisite to [an agency’s] exercise of jurisdiction.” *Id.* at ¶ 12.

Under settled law, because R.C. 5715.27 confers a right to petition the Tax Commissioner (and appeal therefrom), strict adherence to the “conditions thereby imposed is essential to the enjoyment of the right conferred.” *Performing Arts Sch. of Metro. Toledo, Inc. v. Wilkins*, 104 Ohio St.3d 284, 2004-Ohio-6389 ¶ 19 (quoting *Am. Restaurant & Lunch Co. v. Glander*, 147 Ohio St. 147, 150, (1946) paragraph one of the syllabus).

The versions of R.C. 5715.27(B) and (C), when the City filed its application provide<sup>3</sup>:

(B) The board of education of any school district *may* request the tax commissioner to provide it with notification of applications for exemption from taxation for property located within that district. If so requested, the commissioner *shall* send to the board for the quarters ending on the last day of March, June, September, and December of each year, 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 shall mail the reports on or about the fifteenth day of the month following the end of the quarter.

(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 most recent report provided under that division, *file a statement with the commissioner and with the applicant indicating its intent to submit evidence and participate in any hearing on the application*. The statements shall be filed prior to the first day of the third month following the end of the quarter in which that application was docketed by the commissioner. *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 decision to the board of tax appeals.*

(Emphasis added). Two jurisdictional requirements are expressly set forth in R.C. 5715.27.

*First*, prior to the owner's filing of the real property tax exemption application, the board of education must have previously requested notification from the Tax Commissioner of any exemption applications filed relating to property within its school district. *See* R.C. 5715.27(B) and (C); Stips at 6-7. *Second*, if, and only if, the board of education has made that request, the board of education then must timely inform the Tax Commissioner of its intent to participate in the Commissioner's administrative proceedings. R.C. 5715.27(C); Stips at 6-7. The board of

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<sup>3</sup> R.C. 5715.27 was amended in 2008 and again in 2011. The amendments are not material for purposes of this appeal, except that the 2008 amendments, which remain in the current version of the statute, changed the time for the Tax Commissioner to notify boards of education of new applications from quarterly to monthly and the response time for school boards to participate is now shorter.

education must state its intent to participate within roughly three months of the owner's filing of the application. See former R.C. 5715.27(D).

Those two statutory steps are absolute prerequisites for a school board to become involved at the Tax Commissioner's level. So, when a property owner files an application for exemption, a school board can only participate in the Tax Commissioner's administrative determination of that exemption application when those two steps have been met.

The Board of Education has freely admitted, throughout these and other proceedings, that it did not timely participate in the exemption determination process outlined above. Admissions No. 3, 4; Stips at 8, 9; Apt. Merit Brief at 1-2, 4-5, 14.

*First*, the Board of Education failed to request notice of applications for exemptions from the Tax Commissioner under R.C. 5715.27(B). *Id.* Accordingly, the Board of Education could not have filed a statement of intent to participate under R.C. 5715.27(C) *at all*, because it failed to meet the precondition of requesting notice of applications for exemption filed in its district pursuant to R.C. 5715.27(B). *Second*, the Board of Education never filed the statement required by R.C. 5715.27(C), indicating its intent to participate. R.C. 5715.27(C) expressly provides that only when the statement of intent has been filed may a board of education be a party to the Tax Commissioner's proceedings.

The failure to comply with R.C. 5715.27 has jurisdictional consequences for appeal too. Like the right to participate at the Tax Commissioner level, the right to *appeal* a determination of the Tax Commissioner on an exemption application is expressly conditioned on compliance with R.C. 5715.27.

Specifically, R.C. 5717.02 provides that if the R.C. 5715.27(C) statement is not filed, the BTA has no jurisdiction over the appeal:

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 by a school district *that filed a statement concerning that application under division (C) of section 5715.27 of the Revised Code.*

R.C. 5717.02 (Emphasis added).

Thus, by failing to provide the R.C. 5715.27(C) statement, the Board of Education precluded the possibility of appeal to the BTA. Accordingly, the Tax Commissioner and the BTA properly determined that the Board of Education could not participate in the proceedings on the City's exemption application at the Tax Commissioner level or in subsequent appeal to the BTA. *Olmsted Falls Board of Edn.*, 76 Ohio St.3d 388; *Strongsville Bd. of Educ.*, 92 Ohio St.3d at 489. This Court should affirm the BTA's dismissal.

The lack of jurisdiction of the BTA results in a lack of jurisdiction at this Court too. As this Court has repeatedly explained, its jurisdiction is "derivative" of the BTA's. *Brown v. Levin*, 119 Ohio St.3d 335, 2008-Ohio-4081, ¶ 23 fn. 4 ("an issue of the BTA's jurisdiction \* \* \* bears, derivatively, on our own.") (citing *Elyria v. Lorain Cty. Budget Comm.*, 117 Ohio St.3d 403, 2008-Ohio-940, ¶ 13); *Worthington City Sch. Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 124 Ohio St.3d 27, 2009-Ohio-5932, ¶ 17 ("An issue that pertains to the BTA's jurisdiction to hear the merits of an appeal thereby pertains derivatively to our own jurisdiction \* \* \* .") And, when the BTA lacks jurisdiction over an appeal, so does this Court. *Osborne Bros. Welding Supply, Inc. v. Limbach*, 40 Ohio St.3d 175, 178 (1988); *Brown*, 2008-Ohio-4081 at ¶ 23. Accordingly, just as the BTA lacked jurisdiction, so too does this Court.

Moreover, it would be fundamentally unfair to property owners, like the City, to allow school districts to ignore their statutory duties but still jump into litigation at a later date. As the BTA has explained in another case where a school district failed to timely participate in an exemption application proceeding: “it 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 Bd. of Educ. v. Tracy*, BTA No. 93-P-1382 & 1383, 1995 Ohio Tax LEXIS 1294, at \*20-21, (Nov. 3, 1995) (the school district filed an untimely complaint against continuing exemption, and the BTA held that the Tax Commissioner was without jurisdiction to consider the complaint).

Because the Board of Education failed to comply with R.C. 5715.27, it failed to confer jurisdiction on the Tax Commissioner, the BTA, and this Court. *See, Strongsville Bd. of Edn.*, 92 Ohio St.3d at 489; *Olmsted Falls Board of Edn.*, 76 Ohio St.3d at 388. The decision of the BTA must be affirmed on that basis. The remaining issues presented in this appeal are merely academic.

2. **A board of education can only raise challenges to the Tax Commissioner’s determination on real property exemption applications through the special statutory proceedings provided by the General Assembly.**

The special statutory proceedings provided for in R.C. 5715.27, R.C. 5717.02, and R.C. 5717.04, are the *exclusive* methods by which a board of education may raise challenges to the exemption of real property. Because it failed to follow the statutory process, the Board of Education failed to impart jurisdiction on any tribunal—including this Court—to consider the merits of its challenges to the Tax Commissioner’s determination through any other means.

Because the special statutory proceedings are the *exclusive* method, no other tribunal has jurisdiction to hear the Board of Education's constitutional challenges.

When parties wish to raise constitutional claims through the administrative process, they must do so in their notice of appeal to the BTA. *Cleveland Gear Co. v. Limbach*, 35 Ohio St.3d 229, 229 (1988) paragraph three of the syllabus (“The question of whether a tax statute is unconstitutional when applied to a particular state of facts must be raised in the notice of appeal to the Board of Tax Appeals”). The BTA does not “determine the constitutional validity of a statute.” *Id.* at paragraph three of the syllabus. Nonetheless, the BTA “receive[s] evidence concerning th[e] question if presented \* \* \*.” *Id.* at paragraph three of the syllabus.

Mindful of this adjudicatory framework, parties routinely allege constitutional violations before the BTA and submit evidence and argument in support of such claims, which are then subject to direct review as of right by the Ohio Supreme Court pursuant to R.C. 5717.04. *See, e.g., Ohio Apt. Assn. v. Levin*, 127 Ohio St.3d 76, 2010-Ohio-4414, at ¶16; *Home Depot USA, Inc. v. Levin*, 121 Ohio St.3d 482, 2009-Ohio-1431, at ¶ 22; *Columbia Gas Transmission. Co. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, at ¶ 40; *MCI Telecommunications Corp. v. Limbach*, 68 Ohio St.3d 195, 197-198 (1994); *Columbia Gas v. Limbach*, 68 Ohio St.3d 366, 368-69 (1994). In this manner, parties preserve their constitutional claims for resolution by the Supreme Court on appeal pursuant to R.C. 5717.04.

But when a party, like the Board of Education, has failed to take the steps necessary to participate in the administrative determination of the real property exemption application, that party cannot raise any constitutional challenges—or any other issues—on appeal at all. A party has no right to raise claims or present evidence in support of issues that are not jurisdictionally before the BTA. *Wagenknecht v. Levin*, 121 Ohio St.3d 13, 2008-Ohio-6812, at ¶ 15-19 (“[A]

litigant's right to a hearing under R.C. 5717.02 does not encompass a right to present evidence on points that are not jurisdictionally before the BTA.") In short, the Board of Education is a stranger to this case.

Boards of education were created by the General Assembly as limited-function quasi-corporate bodies. Their purpose is to carry out the General Assembly's plans for the system of statewide education. "It is well settled that a board of education is a quasi-corporation acting for the public as one of the state's ministerial education agencies 'for the organization, administration and control of the public school system of the state.'" *Beifuss v. Westerville Bd. of Education*, 37 Ohio St.3d 187, 189 (1988) (citation omitted).

This Court has explained that the General Assembly may take the property of a school district, transfer debt to it, change its territory and its tax base, modify its powers, or even abolish a district entirely—all without violating any constitutional guarantees. *See, Avon Lake City School Dist. v. Limbach*, 35 Ohio St.3d 118, 120-22 (1988).

Boards of education are "creatures of statute." *See, e.g., Verberg v. Board of Education*, 135 Ohio St. 246, 248 (1939) ("Boards of education are created by statute, and their jurisdiction is conferred only by statutory provision. Just as any other administrative board or body, they have such powers only as are clearly and expressly granted."); *Wolf v. Cuyahoga Falls City School Dist. Bd. of Educ.*, 52 Ohio St.3d 222, 223 (1990) (same); *Hall v. Lakeview Local School Dist. Bd. of Educ.*, 63 Ohio St.3d 380, 383 (1992) (same). As creatures of statute, boards of education are strictly limited to act within the authority expressly conferred upon them by statute. *Id.*

As far as the Board of Education is concerned, the administrative proceedings furnished by statute are the *exclusive* proceedings, because they are the *only* venue expressly provided for

boards of education by the General Assembly. But, as explained, the Board of Education did not participate in the exemption determination process outlined above. The Board of Education did not request notice of applications filed within its district or timely indicate its intent to participate in the Tax Commissioner's proceedings pursuant to R.C. 5715.27.

Therefore, no tribunal can take jurisdiction over the Board of Education's claims outside of this exclusive set of special statutory proceedings. "[W]here the General Assembly has enacted a complete, comprehensive and adequate statutory scheme governing review by an administrative agency, exclusive jurisdiction may be held to lie with such an agency." *State ex rel. Geauga Cty. Budget Commission v. Court of Appeals*, 1 Ohio St.3d 110, 113 (1982); *see, also Westbrook v. Prudential Ins. Co.*, 37 Ohio St.3d 166, 170 (1988) ("[W]here statutory relief is afforded and clearly applies to the circumstances giving rise to the action, the statute constitutes the exclusive avenue for seeking redress.")

The special statutory proceedings in R.C. 5715.27, R.C. 5717.02, and R.C. 5717.04 provide the Board of Education with the exclusive method for challenging the constitutionality of the statutes at issue. This Court should not permit the Board of Education an end-run around the special statutory proceedings set forth in R.C. 5715.27 by improper appeal to this Court.

The Board of Education's (stayed) action for declaratory judgment and injunction in the Franklin County Common Pleas Court is similarly inappropriate. This Court has explained that "actions for declaratory judgment and injunction are inappropriate where special statutory proceedings would be bypassed" and that "courts have no jurisdiction to hear [such] actions in the first place." *State ex rel. Albright v. Court of Common Pleas of Delaware Cnty.*, 60 Ohio St.3d 40, 42 (1991). "The circumvention of these special statutory procedures would nullify the legislative intent to have specialized tax questions initially determined by boards and agencies

specifically designed and created for that purpose.” *State ex rel. Iris Sales v. Voinovich*, 43 Ohio App.2d 18, 23 (8th Dist. 1975). *Accord, Zupancic v. Wilkins*, 10th Dist. No. 08AP-472, 2009-Ohio-3688, ¶ 25 (finding that an “action for declaratory judgment is not the proper vehicle by which to challenge the Tax Commissioner’s decision”); *Wise v. Clark*, 5th Dist. No. 02CA006, 2003-Ohio-1247, ¶ 18 (“The courts of this state have consistently held that a declaratory judgment action is not appropriate when an adequate remedy at law is available \* \* \* .”)

**3. There is no *post hoc* fix for the Board of Education’s abdication of its right to participate in administrative proceedings on applications for exemption.**

The Board of Education abandoned its right to participate in all administrative proceedings on applications for exemption long before this case arose. Stips at 6-9; Admissions No. 3-4, 7. Realizing the gravity of its failure, the Board of Education did belatedly attempt to “intervene” in the Tax Commissioner’s proceedings on September 29, 2011 (five years too late), citing to R.C. 5715.27(C) as the basis for an extension of time. ST 69-75; Stips at 18. At the same time, the Board of Education submitted a notice that it wished to be informed of future applications for exemption. ST 76; Stips at 18.

However, the Board of Education could not join the proceedings on the application for exemption at that time. As this Court has held, an application to extend the time for participation under R.C. 5715.27(C) must be made *prior to the expiration of the original 3-month deadline*. *See, Strongsville Bd. of Educ.*, 92 Ohio St.3d at 490. In this case, that deadline passed nearly 6 years earlier. Furthermore, in order to invoke R.C. 5715.27(C), the Board of Education would have had to have requested notification of applications for exemption under R.C. 5715.27(B)—*which it never did*. Admissions No. 3, 4; Stips at 8, 9. Thus, even if the Board of Education had indicated its intent to participate, it would not have met the threshold.

In its brief, the Board of Education suggests that the Tax Commissioner should have allowed intervention five years after the deadline passed, because under R.C. 5715.27(D), the Commissioner “may extend the time for filing a statement under division (C) of this section.” Apt. Merit Brief at 13. This argument was not raised before the Tax Commissioner or the BTA and is not before this Court properly.

Regardless, this Court has already considered and rejected this exact argument. In *Strongsville*, the Tax Commissioner was faced with a statement of intent to participate from a board of education filed only *one month* late. 92 Ohio St.3d at 490. The Commissioner found that, because the statement was untimely, the board of education had failed to confer jurisdiction on him to consider its complaint. *Id.* at 489. This Court affirmed the Commissioner’s determination, holding that “[w]e are convinced that the Tax Commissioner’s interpretation of R.C. 5715.27(D) was reasonable, and that his decision was within the contemplation of the statute.” *Id.* at 490. This Court explained that “[i]f the BOE needed additional time to file a statement of intent to participate it could have asked the commissioner for that additional time prior to the expiration of the last date for filing.” *Id.* The same is true in this case. The Board of Education cannot show that the Tax Commissioner erred by failing to waive a statutory deadline that passed five years prior.

In its brief, the Board of Education also suggests that its intervention was appropriate, because it raised its claims “at the first available opportunity.” Apt. Merit Brief at 13 (citing *Bd. of Educ. of South-Western City Schools v. Kinney*, 24 Ohio St.3d 184, 186 (1986)). The Board of Education is mistaken about the term “available.” In this case, there was no “available” opportunity, because the Board of Education failed to follow the steps necessary to make an opportunity available.

The Board of Education also sought intervention at the BTA *in its own appeal*. See BTA Notice of Appeal at 4. Of course, there was no appeal before the BTA in which the Board of Education could “intervene.” The Board of Education was the only appellant; the applicant property owner, the City, did not appeal. Either the Board of Education had authority to pursue this action on appeal as a party, or its action in filing the notice of appeal was deficient and properly dismissed.

Still, the Board of Education suggests that BTA cases allow intervention for “changed circumstances.” Apt. Merit Brief at 16, citing *Fazio Ltd. Partnership No. 2 v. Cuyahoga Cty. Bd. of Revision*, BTA Case No. 2011-K-1797, 2011 WL 4748925 (Oct. 4, 2011), and *Bassett v. Franklin Cty. Bd. of Revision*, BTA Case No. 2007-A-994, 2008 WL 2316535 (May 27, 2008). Not so. In both of the (distinguishable) cases cited by the Board of Education, the BTA allowed a school board to intervene in a case arising from a Board of Revision valuation determination under R.C. 5715.19. In those cases, the BTA found that the property owners’ non-compliance or mis-compliance with the complaint provisions of R.C. 5715.19 justified school board involvement at the BTA level.<sup>4</sup> This case, however, concerns the application for exemption process that occurs through the Tax Commissioner. And, the property owner here did everything right—it is the Board of Education that mis-complied with the statutory requirements for participation. The Board of Education cannot claim that its *own* mis-action operates unfairly against it and militates in favor of intervention.

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<sup>4</sup> Specifically, in those cases, the property owner sought a valuation below the statutory dollar threshold requiring notification of the school board before the Board of Revision, but subsequently raised the dollar amount at issue on appeal to the BTA to a level that would have required notice on the school district, if sought at the BOR. *Fazio Ltd. Partnership No. 2*, BTA Case No. 2011-K-1797, at \*1-2; *Bassett*, 2008 WL 2316535 at \*2. The BTA found that intervention of the school district on appeal was appropriate in such circumstances. *Id.*

In the end, there is no need to engage in handwringing over the Board of Education's ability to participate, because the Board of Education abandoned that right long before the application at issue in this appeal was filed. Stips at 6-9; Admissions No. 3-4, 7. And there is no reasonable argument why the Board of Education would not have availed itself of the statutory process, had it intended to protect its rights. The threshold for participation in the exemption determination was low—it would have required merely two letters. *Strongsville Bd. of Edn.*, 92 Ohio St.3d at 489 (the Board of Education “merely had to send a timely statement to the commissioner and the applicant of its intention to submit evidence and participate in the hearing”). This is a minimal cost for the Board of Education to protect its rights in a case worth \$7 million, by its own reckoning. Apt. Merit Brief at 5, Supp. at 6. The dollar amount at issue alone should have been reason enough to take the simple step of monitoring the application process.

Even less reasonable is the Board of Education's claim that it could turn its back on the exemption process with impunity, because the law was so clearly in its favor. In this regard, the Board of Education complains that it was not “clairvoyant” and did not know in 2006 that the General Assembly might change the law. Apt. Merit Brief at 14. This assertion rests on the faulty premise that the Board of Education could have, but *chose* not to participate in the exemption determination process based upon a reasoned decision on the merits of case law as applied to this particular parcel of property. Not so. Instead, the Board of Education turned its back on *every* application for exemption filed in its district—choosing *never* to participate, by never filing a request for notice of exemption application with the Tax Commissioner pursuant to R.C. 5715.27(B). Stips at 6-9; Admissions No. 3-4, 7. It is disingenuous for the Board of Education to claim that it chose to forego the ability to participate in *all* exemption applications

for the *entire district* during *all of the years at issue*, based upon a reasoned study of the then-existing law relative to this one parcel and the stalwart conviction that such laws would never change. Nor has the Board of Education provided a shred of evidence to back this claim up.

This Court must recognize the Board of Education's appeal for what it is: a post-hoc attempt to fix its failure to participate in the statutory proceedings. But it is too late. The Board of Education failed to take the steps necessary to participate in this proceeding on the City's application for real property exemption.

**Appellee Tax Commissioner's Proposition of Law No. 2:**

*This Court will not consider propositions of law that were not specified as error by the Appellant in its notice of appeal pursuant to R.C. 5717.04.*

- 1. This Court lacks jurisdiction to consider the Board of Education's constitutional challenges pursuant to R.C. 5717.04, because the Board of Education did not specify these arguments as error in its Notice of Appeal.**

The Board of Education devotes a sizable portion of its brief (the entirety of its Second Proposition of Law) to the constitutionality of a statute and an uncodified portion of the bill. Apt. Merit Brief at 18-29. However, the Board of Education did not specify any error with regard to these arguments in its Notice of Appeal to this Court. Therefore, pursuant to R.C. 5717.04, the Court lacks jurisdiction to consider these new arguments, and must dismiss them.

This Court has explained that its "authority to review decisions issued by the BTA emanates from Section 2(B)(2)(d), Article IV of the Ohio Constitution, which states that this court's appellate jurisdiction encompasses '[s]uch revisory jurisdiction of the proceedings of administrative officers or agencies *as may be conferred by law.*'" *Polaris Amphitheater Concerts, Inc. v. Delaware Cty. Bd. of Revision*, 118 Ohio St.3d 330, 2008-Ohio-2454 (emphasis sic) ¶ 13. In this case, that law is R.C. 5717.04.

In appeals from the BTA, R.C. 5717.04 “strictly defines” this Court’s authority. *Id.* That statute “requires parties who seek review of a BTA decision to ‘set forth \* \* \* the errors therein complained of,’ and that mandate limits the scope of [this Court’s] appellate jurisdiction.” *Id.*

When an appellant fails to specify an argument as error in its notice of appeal to this Court, the Court lacks jurisdiction to consider that argument and will not grant relief upon it. *Id.* at ¶ 7-8 (citing *Cleveland Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 68 Ohio St.3d 336, 337, (1994) and *Columbus Bd. of Edn. v. J.C. Penney Properties, Inc.*, 11 Ohio St.3d 203, 204–205. (1984)).

In this case, when the Board of Education filed its notice of appeal with this Court, it identified three errors complained of as its reason for the appeal:

[(1)] The Board of Tax Appeals Decision and Order granting the Tax Commissioner’s Motion to Dismiss is unreasonable and unlawful;

[(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 reasonable and unlawful;

[(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 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 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.”

Notice of Appeal, dated September 5, 2013 at Exhibit B.

Assignment No. 1 is a specification so vague and non-specific that it might be raised in any appeal. This Court has frequently explained that such vague assignments of error fail to specify any error at all. *See, Richter Transfer Co. v. Bowers*, 174 Ohio St. 113, 114 (1962); *see,*

also, *Queen City Valves v. Peck*, 161 Ohio St. 579, 583 (1954) (Error specified cannot be “generalities” or “such as might be advanced in nearly any case” but must “call the attention of the board to those precise determinations of the Tax Commissioner with which appellant took issue.”); *Cottner & Co. v. Kosydar*, Eighth Dist. No. 33326, 1974 WL 184872 at \*1 (8th Dist. Nov. 7, 1974) (Specifications of error must be more than “general allegations of error” or “[a]llegations that could be applied to all cases” or “an allegation that the Tax Commissioner’s assessment is contrary to law” and “not so broad or general that it might be applied to any case.”) Accordingly, Assignment No. 1 fails to confer jurisdiction on this Court.

Neither Assignments No. 2 or 3 raises a constitutional challenge to the statutes at issue. Instead, these assignments regard the Board of Education’s ability to intervene in the proceedings before the Tax Commissioner in order to build a record for its constitutional argument, *not that the BTA erred by failing to consider or overturn the statutes*. This is not wordplay by the Tax Commissioner—the Board of Education simply did not assign as error the constitutionality of the new laws. Nowhere in the Notice of Appeal does a true constitutional challenge appear. Such omission can hardly be a mistake. The Board of Education had thorough and quite specific specifications of error challenging the constitutionality in its Notice of Appeal to the BTA.<sup>5</sup> See BTA Notice of Appeal at 2-3. A simple cut-and-paste would have preserved them. But, instead, the Board of Education chose not to assign the constitutional challenges as

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<sup>5</sup> In its BTA Notice of Appeal, the Board of Education asserted, among other errors:

The Tax Commissioner erred in granting the tax exemption and remitting taxes for Parcel No. 145-0002-0057 because the basis for granting the exemption and remitting taxes, R.C. 5709.084 effective in accordance with Am. Sub. H.B. 153 along with uncodified section 757, violates the Ohio Constitution. Specifically, this statute violates (1) Article 2, Section 28 prohibiting retroactive laws; (2) Article 2, Section 15(D) limiting statutes to a single subject; and (3) Article 2, Section 26 requiring that laws be of uniform operation throughout the State.

error to this Court. Thus, this Court lacks jurisdiction to consider, and must dismiss the Board of Education's Second Proposition of Law in its brief. *Richter Transfer Co.*, 174 Ohio St. at 114.

Moreover, it would be unfair and prejudicial for this Court to consider the newly raised constitutional arguments, because the time to file a cross-appeal has passed, and the Tax Commissioner or City might have filed a protective cross-appeal had constitutional arguments been made.

For all of these reasons, this Court should find that it lacks jurisdiction to consider the constitutional arguments contained in Proposition of Law No. 2 of the Board of Education's Merit Brief.

2. **Even if this Court considered the Board of Education's constitutional arguments, the new laws would withstand scrutiny.**

Even if the Board of Education manages to clear all of the jurisdictional hurdles—failure to follow the statutory process to participate and failure to assign the constitutional challenges as error to this Court—this Court would still affirm the BTA's decision.

- A. **Laws passed by the General Assembly are presumed constitutional and challengers bear a heavy burden.**

In respect of the legislative-democratic process, courts assume that laws passed by the General Assembly are constitutional. "Precisely because we endeavor to avoid interfering with the legislative process, we presume that statutes are constitutional." *State ex rel. Ohio Civ. Serv. Employees Assn., AFSCME, Local 11, AFL-CIO v. State Emp. Relations Bd.*, 104 Ohio St.3d 122, 2004-Ohio-6363, ¶ 27.

Legislative enactments like the new laws at issue bear a presumption of constitutionality and must be shown to be unconstitutional "beyond a reasonable doubt." *Ohio Grocers Assn. v. Levin*, 123 Ohio St.3d 303, 2009-Ohio-4872, ¶ 11, (citing *Columbia Gas Transm. Corp.*, 2008-

Ohio-511 at ¶ 41, quoting *Yajnik v. Akron Dept. of Health, Hous. Div.*, 101 Ohio St.3d 106, 2004-Ohio-357, ¶ 16). The challenger bears a heavy burden to show that the law is unconstitutional, and a law will be upheld if a plausible constitutional interpretation is available. *Ohio Grocers* at ¶ 11. The Board of Education cannot meet this heavy burden in this case.

**B. The Board of Education cannot raise its as-applied constitutional claims on appeal to this Court.**

The Board of Education recognizes that it cannot raise constitutional claims before this Court that were not considered below. This recognition is inherent in its new assertion that its constitutional challenges are “facial” challenges. *See* Apt. Merit Brief at 18. The Board of Education must characterize the challenges as “facial,” in order to have this Court consider them at all, because the BTA found that the Board of Education had failed to impart jurisdiction on any tribunal to consider its claims.

In order for this Court to rule on these challenges as “facial” for the first time on appeal, this Court would *still* need to acquire jurisdiction over the underlying merits of the Board of Education’s appeal, which it has not. As explained above, the Board of Education failed to confer jurisdiction on this Court *at all*, regardless of how it characterizes its constitutional claims. The Board of Education cannot use this appeal from a dismissal on jurisdictional grounds as the thin edge of the wedge to drive in its merits claims.

Moreover, despite portraying its claims as facial challenges, the Board of Education’s actual arguments reveal that the challenges are as-applied. An as-applied challenge arises when a challenger attacks the “constitutional application of legislation to particular facts.” *South-Western City Sch.*, 24 Ohio St.3d at 185. “If the Act is challenged on the ground that it is unconstitutional when applied to a particular state of facts, the burden is upon the party making

the attack to present clear and convincing evidence of a presently existing state of facts which makes the Act unconstitutional and void when applied thereto.” *Cleveland Gear Co.*, 35 Ohio St.3d at 231.

A cursory review shows that all of the Board of Education’s claims are “as-applied,” meaning that they challenge the constitutionality of legislation as applied to the particular facts of this case. Plainly, these claims all revolve around the application of the new laws to the facts of the Board of Education’s case—typical as-applied challenges. Just as plainly, the Board of Education does not attempt to demonstrate that the laws are unconstitutional at all times and in all circumstances, as required for a facial challenge. *Lovell v. Levin*, 116 Ohio St.3d 200, 2007-Ohio-6054, ¶ 36 (quoting Black’s Law Dictionary (8th Ed.2004) 244).

Most tellingly, the Board of Education’s “retroactivity” challenge cannot possibly be a facial challenge. This is so, because in order to prove that the new laws affected the City’s right to tax exemption, the Board of Education would have to first demonstrate that the City was *not* entitled to exemption under the old laws. However, that issue is not settled, and was actually the subject of the controversy in the City’s original appeal, prior to the new laws’ passage. Indeed, like a legal malpractice claim, the Board of Education would have to conduct a hearing-within-a-hearing, just to determine whether the City’s property was taxable prior to passage of the new laws—and not just the City’s property, but *any such property*. In other words, the Board of Education cannot possibly make out the claim that the new laws are unconstitutionally retroactive in all cases and in all situations, because their claim rests on an unsettled legal premise.

Thus, this Court should refuse to consider the Board of Education’s constitutional challenges because they are as-applied challenges that were not supported at the BTA by hearing

or competent evidence. If this Court finds that the BTA improperly dismissed the case, the proper remedy would be remand to develop an evidentiary record for the Board of Education's as-applied challenges. But even if this Court considers the merits of the Board of Education's constitutional challenges, the Board of Education's claims will still fail, as explained below.

**C. A tax provision contained within an appropriations bill does not violate the Ohio Constitution's one-subject rule. By their very nature, a tax provision and an appropriations bill are knit together by the common thread of revenue and budgeting.**

The inclusion of R.C. 5709.084 in 2011 Am.Sub.H.B. 153 does not violate the one-subject rule. The one-subject rule is set forth at Section 15(D), Article II of the Ohio Constitution and provides that “[n]o bill shall contain more than one-subject, which shall clearly be expressed in its title.”

In an effort to avoid interfering with the legislative process, the Ohio judiciary accords the General Assembly “great latitude in enacting comprehensive legislation by not construing the one-subject provision so as to unnecessarily restrict the scope and operation of laws, or to multiply their number excessively, or to prevent legislation from embracing in one act all matters properly connected with one general subject.” *State ex rel. Dix v. Celeste, et al.*, 11 Ohio St.3d 141, 145 (1984). Indeed, the courts recognize that “there are rational and practical reasons for the combination of topics on certain subjects.” *Id.*

Only a “manifestly gross and fraudulent violation” of the one-subject rule will render a statute unconstitutional. *In re Nowak*, 104 Ohio St.3d 466, 2004-Ohio-6777, ¶ 54; *Comtech Systems, Inc. v. Limbach*, 59 Ohio St.3d 96, 99 (1991). Moreover, “[t]o conclude that a bill violates the one-subject rule, a court must determine that 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. Employees Assn.*, 2004-Ohio-6363, ¶ 28 (quoting *Beagle v. Walden*, 78 Ohio St.3d 59, 62 (1997)).

“[T]he one-subject rule is not directed at plurality of topics but at disunity in the subject.” *Comtech Systems, Inc.*, 59 Ohio St.3d at 99. Accordingly, “the mere fact that a bill embraces more than one topic is not fatal, as long as a common purpose or relationship exists between the topics.” *Hoover v. Bd. of Franklin Cty. Commrs.*, 19 Ohio St.3d 1, 6 (1985). The analysis turns primarily on a “case-by-case, semantic and contextual” examination of the “particular language and subject matter” of the bill “rather than extrinsic evidence of fraud or logrolling.” *Riverside v. State*, 190 Ohio App.3d 765, 2010-Ohio-5868 ¶ 39 (internal quotations omitted).

The challenged exemption provision at issue here, R.C. 5709.084, is contained within an appropriations bill—namely, the biennial budget bill for fiscal years 2012-2013. *See* 2011 Am.Sub.H.B. 153. “[B]udget bills by their nature will contain a multiplicity of items united by the common subject of appropriations for the operation of governmental services in the state of Ohio.” *State ex rel. Ohio Roundtable v. Taft*, 10th Dist. No. 02AP-911, 2003-Ohio-3340, ¶ 48. “Application of the one-subject rule is complicated when the challenged provision is part of an appropriations bill, which of necessity contains many different provisions.” *State ex rel. Ohio Civ. Serv. Employees Assn.*, 2004-Ohio-6363, ¶ 30.

Tax provisions that are contained within an appropriations bill that either broaden or narrow the objects upon which a tax may be levied have repeatedly withstood one-subject scrutiny. *See, e.g., Comtech*, 59 Ohio St.3d 96; *Riverside*, 2010-Ohio-5868 ¶ 44 (“provisions in appropriations bill directly related to taxation and revenue generation have survived one-subject scrutiny.”). Indeed, just like an appropriations bill, the core purpose of a tax provision is to provide (or limit) funding for state government, such as school funding. Therefore, because tax

provisions and appropriations bills are knit together by the common thread of funding state government (and its political subdivisions), the Ohio judiciary has uniformly rejected challenges predicated on the one-subject rule.

This Court has upheld the constitutionality of an appropriations bill that contained an amendment to various sections of a sales tax statute relating to automatic data processing and computer services. *Comtech*, 59 Ohio St.3d at 99. The taxpayer argued that the bill violated the one-subject rule because it contained a variety of topics. *Id.* However, the Court disagreed and held that the bill did not constitute “a manifestly gross and fraudulent violation of the one-subject rule.” *Id.* The Court reasoned that it was constitutionally permissible for an appropriations bill to “contain a new object of taxation because the tax funds government operations described elsewhere in the Act.” *Id.*

The reasoning of *Comtech* was later followed by the Tenth District in *Riverside v. State*, 190 Ohio App.3d 765, 2010-Ohio-5868. In the *Riverside* case, Justice French (then Judge), writing for a unanimous panel, rejected a one-subject challenge to a tax provision contained within the 2008-2009 biennial budget bill. The tax provision prohibited municipal corporations “from taxing the income of non-resident, civilian employees and contractors working” within the boundaries of a United States air force base. *Id.* at ¶ 4.

The court explained that “[a]lthough appropriations bills encompass many items bound by the thread of appropriations, revenues and expenditures compose the core of an appropriations bill.” *Id.* at ¶ 44 (citing *State ex rel. Ohio Roundtable*, 2003-Ohio-3340, ¶ 50). The court then observed that the tax provision had a “direct effect on the State’s funding for the City” because the provision restricted “the City’s ability to generate revenue \* \* \* .” *Id.* ¶ 45. In conclusion, the court held that because the tax provision “relates to the single subject of state appropriations

and because there are discernable practical, rational, legitimate reasons for combining the provision with the Budget Bill, we conclude that [the provision] does not violate the one-subject rule.” *Id.* at ¶ 52.

The overarching purpose of 2011 Am.Sub.H.B. 153—like all previous biennial budget bills—is “to make operating appropriations for the biennium beginning July 1, 2011, and ending June 30, 2013; and to provide authorization and conditions for the operation of programs, including reforms for the efficient and effective operation of state and local government.” 2011 Am.Sub.H.B. 153, at title. And the contours of R.C. 5709.084 fit squarely within the overarching purpose of Am.Sub.H.B. 153.

Effective September 29, 2011, Am.Sub.H.B. 153 amended R.C. 5709.084 by adding the following provision:

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 effect of the amendment to R.C. 5709.084 was that it exempted qualifying convention centers from falling within the class of objects that were previously subject to both the real property tax and the personal property tax. Most, though not all, of the tax revenue derived from the levy of the real property tax and the personal property tax flows through to the local governments of this State. And, indeed, school districts receive the lion’s share of real property tax revenue.

In the bill, the General Assembly made sweeping changes to school district funding, including repealing the “Evidence Based Model” for school funding and replacing it with funding based upon a “wealth-adjusted portion of their state operating funds.” *See*, Legislative

Service Commission, Final Bill Analysis, 2011 Am.Sub.H.B. No. 153, 129th General Assembly, <http://www.lsc.state.oh.us/analyses129/h0153-ph-129.pdf>, at 118. Under the Act, “the Department of Education must compute and pay each \* \* \* school district, for fiscal years 2012 and 2013, an amount based on the district’s per pupil amount of funding paid for fiscal year 2011” subject to certain adjustments. *Id.* at 120. “The act also provides supplemental funding for each of fiscal years 2012 and 2013 to guarantee each district operating funding that is equal to at least the amount of state operating funding, less federal stimulus funding, the district received for fiscal year 2011 under the EBM.” *Id.*

In other words, the budget bill made significant revisions to school district funding, and obligated the State to certain funding responsibilities for local school districts. While R.C. 5709.084 removes one source of school district funding (real property tax on certain convention centers), it also creates new and different obligations on the state to calculate and provide local school district funding overall. Moreover, the budget bill contained provisions to allow the Auditor of State to evaluate and impose measures to control local governments that are in fiscal distress. *Id.* at 390-97.

In this context, and in the wider context of appropriations for government funding, the inclusion of R.C. 5709.084 in the biennial budget bill for fiscal years 2012-2013, 2011 Am.Sub.H.B. 153, does not violate the one-subject rule. Viewed from an economic perspective, the amendment to R.C. 5709.084 adjusted “the amount of revenue available for distribution by the state to local governments \* \* \*.” *Riverside*, 2010-Ohio-5868 at ¶ 49. Because R.C. 5709.084 relates to the purposes of funding and budgeting government operations, it shares a common purpose with 2011 Am.Sub.H.B. 153 and, therefore, does not violate the one-subject rule.

It is of no consequence that R.C. 5709.084 primarily affects budgeting at the local level rather than the state level. As the Tenth District has observed, “[c]ounty budgeting processes are necessarily affected by overall state appropriations even when a specific section of a bill relates only to budgeting of local government funds.” *Cuyahoga Cty. Veterans Services Comm. v. State*, 159 Ohio App.3d 276, 2004-Ohio-6124, ¶ 4 (10th Dist.). Nor does it matter that R.C. 5709.084 places a restriction on—rather than an enlargement of—the amount of tax revenue that flows through to local government: “Restricting funding is as much a part of an appropriations bill as granting funds.” *Id.*

**D. New R.C. 5709.084 operates uniformly throughout the state.**

Section 26, Article II of the Ohio Constitution provides: “All laws, of a general nature, shall have a uniform operation throughout the state \* \* \*.” When assessing whether a statute violates the Uniformity Clause, this Court has instructed:

Section 26, Art. II of the Constitution was not intended to render invalid every law which does not operate upon all persons, property or political subdivisions within the state. It is sufficient if a law operates upon every person included within its operative provisions, provided such operative provisions are not arbitrarily and unnecessarily restricted. And the law is equally valid if it contains provisions which permit it to operate upon every locality where certain specified conditions prevail. A law operates as an unreasonable classification where it seeks to create artificial distinctions where no real distinction exists.

*Desenco, Inc. v. Akron*, 84 Ohio St.3d 535, 542 (1999) (quoting *State, ex rel. Stanton v. Powell*, 109 Ohio St. 383, 385 (1924)).

There are two prongs of this Court’s Uniformity Clause analysis: “(1) whether the statute is a law of a general or special nature, and (2) whether the statute operates uniformly throughout the state.” *Desenco, Inc.*, 84 Ohio St.3d at 541.

The first question is whether the law is of a general or a special nature. The focus of the inquiry must be to the subject matter of the law, not its geographical application. *Id.* at 542. A law is of a general nature “if the subject does or may exist in, and affect the people of, every county, in the state.” *Id.* (quoting *Hixson v. Burson*, 54 Ohio St. 470, 481 (1896)).

Under this standard, R.C. 5709.084 is of a general, not a special nature. The application of the statute is not limited to one particular county, but rather applies equally to every county across the state. Moreover, tax statutes historically have been viewed by the Court to be of a general nature. *State ex rel. Zupancic v. Limbach*, 58 Ohio St.3d 130, 138 (1991).

The second inquiry under the Uniformity Clause analysis is whether the statute operates uniformly across the state. *State ex rel. Zupancic v. Limbach* is the principal Ohio Supreme Court case on this point. 58 Ohio St.3d 130 (1991). In *Zupancic*, this Court addressed “R.C. 5715.27(C), which classifies taxing districts into one(s) containing an electric company plant having production equipment with an initial cost exceeding \$1 billion and ones containing a plant having such property under this amount.” *Zupancic*, 58 Ohio St.3d at 131.

The Court explained that, under Section 26, Art. II, “a statute is deemed to be uniform despite applying to only one case so long as its terms are uniform and it may apply to cases similarly situated in the future.” *Id.* at 138. Accordingly, the Court held that “R.C. 5715.27(C) is a general statute that operates uniformly since it may apply to any taxing district in the state which contains an electric plant with an initial cost of plant production equipment exceeding \$1 billion, it is premised on a calculable cost element of power production, and it operates equally on all taxing districts which fall within its provisions.” *Id.* at 139; *see, also, Kelleys Island Caddy Shack, Inc. v. Zaino*, 96 Ohio St.3d 375, 2002-Ohio-4930 at ¶ 15-16 (“Uniformity does

not require that the statute actually have current application in every county”, so long as it may “apply to cases similarly situated in the future.” (quoting *Zupancic*, 58 Ohio St.3d at 138).

Furthermore, “the Uniformity Clause prohibits arbitrary geographic distinctions, not reasonable measures that have a geographic element or disparate geographic effect.” *City of E. Liverpool v. Columbiana County Budget Comm’n*, 114 Ohio St.3d 133, 2007-Ohio-3759, ¶ 15. If a statute has disparate geographic results but “achieves a legitimate governmental purpose and operates equally on all persons or entities included within its provisions,” it satisfies the Uniformity Clause. *Id.* at ¶ 15 (citing *Zupancic*, 58 Ohio St.3d 130, at syllabus). This Court rejected the assertion that a statutory population threshold is “the fingerprint of a special law.” *Id.* at ¶ 18.

Based on the foregoing authority, R.C. 5709.084 does not violate the Uniformity Clause. R.C. 5709.084 has universal application; it applies to *any* convention center located in a county having a population of more than one million two hundred thousand, and any convention center owned by the largest city in a county having a population between seven hundred thousand and nine hundred thousand. It is of no consequence that only one convention center currently satisfies the requirements of R.C. 5709.084, because uniform application is all that is required. *Zupancic*, 58 Ohio St.3d 130. The only limitation imposed by the statute is the population thresholds. R.C. 5709.084 does not limit or restrict other cities or other counties from qualifying for the convention center exemption in the future, unlike the island tax statute in *Put-In-Bay Island Taxing Dist. Auth. v. Colonial, Inc.*, 65 Ohio St.3d 449 (1992). The population thresholds are “open-ended,” and any city may qualify under these thresholds “given a sufficient change in circumstances.” *Kelleys Island*, 2002-Ohio-4930 at ¶ 19.

- E. **The new laws are not unconstitutionally retroactive, as they have been applied in this case in a manner that does not affect the vested rights of any of the parties to this suit.**

The retroactivity clause is set forth at Section 28, Article II of the Ohio Constitution and provides that “[t]he general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts.” In this case, the new laws do not implicate the Retroactivity Clause, because the laws are prospective in nature and do not impose a new “burden” on any party or change any of the parties’ “vested rights.”

“A statute is ‘substantive’ if it impairs or takes away vested rights, affects an accrued substantive right, imposes new or additional burdens, duties, obligation, or liabilities as to a past transaction, or creates a new right.” *State v. Cook*, 83 Ohio St.3d 404, 411 (1998) (citing *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St.3d 100, 107 (1988)). On the other hand, laws of a remedial nature lawfully may be given retrospective application. *Cook*, 83 Ohio St.3d at 411. Remedial laws “include laws that merely substitute a new or more appropriate remedy for the enforcement of an existing right.” *Id.*

This Court has already explained that laws like these, which merely determine how money will be apportioned among various political subdivisions, have only prospective application and do not violate the Retroactivity Clause. In *Cleveland v. Zangerle*, this Court considered a law (the Intangible Tax Act), enacted on June 11, 1931, that imposed a tax and directed how the revenue from the tax should be distributed among political subdivisions. 127 Ohio St. 91 (1933). Portions of the Act pertaining to the apportionment among political subdivisions were subsequently held unconstitutional. *Id.* at 92. In response, on March 22, 1933, the General Assembly passed a new law, which set forth a different method for apportionment of the funds previously collected under the old law, in an effort to overcome the

old law's constitutional infirmities. *Id.* at 91. Although the money had already been collected, the City of Cleveland brought a constitutional challenge to the new law's apportionment method, including a retroactivity clause challenge. *Id.*

This Court held that the new law was not unconstitutionally retroactive, explaining that the City had no right to the tax money, and thus could claim no right was impaired by the new law—despite the fact that the money had already been collected and the previous method of apportionment would have benefited the City:

No governmental subdivision of the state has any vested right, at least until distribution is made, in any taxes levied and in the process of collection. Until such distribution is made the Legislature of Ohio is fully competent to divert the proceeds among those local subdivisions as it deems best to meet the emergencies which it finds to exist.

*Zangerle*, 127 Ohio St. at 92-93.

This Court explained that the new laws “so far as they relate to the future distribution of the proceeds of the taxes, are not retroactive, but prospective, in character, and are not violative of Section 28 of Article II of the Constitution.” *Id.* Thus, although the money had already been collected and the method of apportionment had changed since collection, the law was still viewed as prospective in nature, because the City had no right to money that had not yet been distributed. *Id.*

Similarly, in this case, *no money has been collected from the City* and consequently the funds derived from the purported tax levied on the City *have not been distributed*. The City's application for exemption for the new convention center parcel had not been determined when the new laws came into effect. Thus, the City's application for exemption was still pending and no final conclusion on exemption had taken place when the new laws became effective.

Accordingly, as in *Zangerle*, the laws that relate to the future collection of taxes for the school district and the distribution of those proceeds, are only prospective in nature.

Again, this is a big picture issue. The General Assembly adjusts funding and allocation of state resources among political subdivisions as it sees fit, with no right of recourse by the political subdivision over money not yet distributed. In this case, the adjustment made by the General Assembly was the determination that cities should not suffer a tax bill on their qualifying convention center properties. As an expected attendant consequence, the General Assembly determined that such city property would not be a part of the base for school district funding through real property taxation. If the Board of Education is able to challenge such legislative allocation at all, it is through the statutory process. But when a board of education abandons its statutory right to participate, it cannot devise new methods to challenge the actions of the General Assembly.

The lead case cited by the Board of Education actually supports this rule. In *State ex rel. Struble v. Davis*, this Court considered a law that exempted certain property of interurban railroad companies. 132 Ohio St. 555 (1937). The law went into effect October 19, 1933, and exempted property beginning January 1, 1932. *Id.* at 566. Subsequently, the law was amended and effective June 6, 1935, and provided exemption from January 1, 1935. *Id.* This Court held that “an 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.” *Id.* at 567 (emphasis added); *see, also Gulf Ref. Co. v. Evatt*, 148 Ohio St.228, 237-38 (1947) (“the assessment in question does not become final as to either the appellant or the Tax Commissioner until all administrative and judicial review thereof is

completed.”). Thus, the *Struble* decision, in tandem with the holding in *Zangerle*, confirms that no retroactivity problem exists in this case: no assessment of the City’s property had become completed, nor were taxes finally assessed and due and payable by the City. And, the Board of Education had no vested right to the real property tax income under prior law, because that income was never distributed.

The remainder of the Board of Education’s cited authority is inapposite, because the laws at issue in those cases were held unlawfully retroactive precisely because they reached back to affect completed acts or vested rights. *See, Perk v. City of Euclid*, 17 Ohio St.2d 4, 7, 244 (1969) (statute that allowed for remission of delinquent taxes operated unequally against taxpayers who had timely paid); *Cincinnati Sch. Dist. Bd. of Edn. v. Hamilton Cty. Bd. of Revision*, 91 Ohio St.3d 308, 316-17 (2001) (statute permitted the unlawful filing of a second valuation complaint in a triennium, which prejudiced county official’s reasonable expectation of finality in valuation); *Rubbermaid, Inc. v. Wayne Cty. Aud.*, 95 Ohio St.3d 358, 361, (2002) (“Prior to the enactment of this legislation, county officials had a vested legal right to have Rubbermaid’s complaint dismissed as invalid, since it was filed by an unauthorized individual. The legislation strips county officials of this right.”). In this case, there is no vested right of the Board of Education at stake nor a completed act.

Prior to passage of the new laws, the Board of Education never had any intention of receiving real property tax proceeds from the convention center property for the years it now seeks, and so, has no change in substantive rights as a matter of fact. Stips at 6-9, Admissions No. 3-4, 7. That is to say, the new laws do not change a vested right or settled expectation to tax proceeds from the City, because the Board of Education never sought, and was never entitled to those tax proceeds in the first place. By its inaction, the Board of Education was statutorily

prohibited claiming any right to those funds. Thus, the tax money that the Board of Education seeks will not make up for the loss of funds, but is instead a windfall.

The City, on the other hand, stands to lose considerable current funding if it is forced to pay a \$12 million tax bill. Supp. at 6. And it is unfair to expect the City to come up with this money now, when it had no expectation all along that the Board of Education would or could participate.

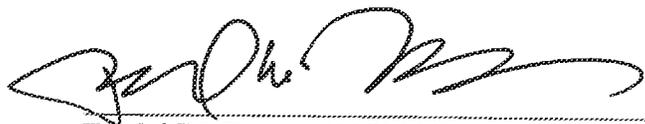
In light of the foregoing, the Board of Education has no vested right in "windfall" funds to which it was never entitled. The new laws are constitutional.

### CONCLUSION

For the foregoing reasons, this Court should dismiss this appeal brought by the Board of Education and affirm the decision and order of the Board of Tax Appeals.

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**CERTIFICATE OF SERVICE**

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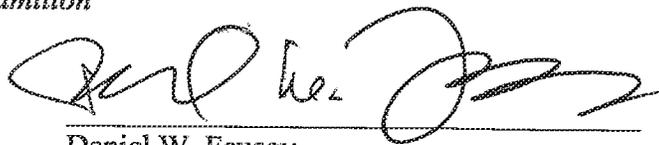
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