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EQUITY DUBLIN ASSOCIATES AND	:	
SHSCC #2 LIMITED PARTNERSHIP,	:	
	:	
Appellees,	:	
	:	Case No. 2014-0168
v.	:	
	:	
	:	Appeal from Ohio Board of Tax Appeals
JOSEPH W. TESTA, TAX COMMISSIONER	:	
OF OHIO, BOARD OF EDUCATION OF THE	:	Case Nos. 2011-1792 and 2011-1795
COLUMBUS CITY SCHOOL DISTRICT,	:	
AND BOARD OF EDUCATION OF DUBLIN	:	
CITY SCHOOL DISTRICT	:	
	:	
Appellants	:	

I. INTRODUCTION / SUMMARY

This appeal involves real property tax exemption claims brought by Equity Dublin Associates and SHSCC#2 Limited Partnership (the appellees herein), as owners/lessors of realty *leased for profit* to Columbus State Community College, a duly organized “community college district” within the meaning of R.C. 3354.01(A).

Joining the appellant Tax Commissioner are two co-appellants with interests vital to this matter, the Board of Education of Dublin City School District and the Board of Education of the Columbus City School District (“co-appellants” or “the School Boards”)¹. Ohio’s primary and secondary schools receive the vast majority of Ohio’s real property tax revenues. School boards throughout this state rely on this revenue as their primary funding source to fulfill Ohio’s

¹ The subject commercial real estate owned by appellee Equity Dublin Associates is located in the Dublin City School District and the subject commercial real estate owned by appellee SHSCC#2 Limited Partnership is located in the Columbus City School District.

constitutional obligation to its citizens of providing a “thorough and efficient system of common schools,” as mandated under Article 6, Section 2 of the Ohio Constitution.

We ask the Court to affirm the BTA’s denial of real property tax exemption under R.C. 3354.15’s “community college exemption” but to reverse the BTA’s partial grant of exemption under the R.C. 5709.07(A)(4)’s “public college exemption.” In granting partial exemption under R.C. 5709.07(A)(4), the BTA’s decision directly conflicts with the General Assembly’s express intent in enacting R.C. 3354.15 as the only statute directly relating to real property tax exemption for “community college districts.”

Further, the BTA disregarded a controlling decision from this Court on this issue. *Athens Cty. Aud. v. Wilkins*, 106 Ohio St. 3d 293, 2005-Ohio-4986 (“*Athens County*”). In that case, a commercial owner/lessor sought real property tax exemption under two separate exemption statutes: R.C. 3357.14 (the real property tax exemption specifically relating to “technical college districts”) and R.C. 5709.07(A)(4) (the more general real property tax exemption relating to “public colleges”).

This Court in *Athens County* determined that the General Assembly enacted R.C. 3357.14 as the only real property tax exemption directly related to “technical college districts,” thereby rendering the “public college exemption” in R.C. 5709.07(A)(4) inapplicable. *Id.* at ¶ 13 (citing *Rickenbacker Port Auth. v. Limbach*, 64 Ohio St. 3d 628, 631).

Just as the General Assembly enacted an exclusive, directly-related exemption for “technical college districts” that was at issue in *Athens County*, it likewise has enacted an exclusive exemption directly related to “community college districts:” R.C. 3354.14. Indeed, the General Assembly employed *precisely the same statutory language* in both the “technical college district exemption” in R.C. 3357.14 and the “community college district exemption” in R.C.

3354.15. Under *Athens County*, having failed to meet the requirements for exemption under R.C. 3354.15, the appellee for-profit owners/lessors cannot attempt to qualify under R.C. 5709.07(A)(4).

But, even if the Court were to overturn its *Athens County* holdings and effectively ignore the General Assembly's express legislative intent in enacting R.C. 3345.15, the BTA's grant of partial exemption under R.C. 5709.07(A)(4) would be erroneous for two independent reasons.

First, *jurisdictionally*, the appellee commercial real estate owners failed to raise any R.C. 5709.07(A)(4) exemption claim in their real property tax exemption applications, as mandated under R.C. 5715.27(A) and the specific requirements set forth on the Commissioner's prescribed real property tax application form. Consequently, by this failure, the appellee commercial realty owners failed to confer jurisdiction on the Commissioner, and subsequently on the BTA, to consider any R.C. 5709.07(A)(4) exemption issue. Such notification requirements "run to the core of procedural efficiency," and, therefore, are mandatory, jurisdictional requirements. *Shinklev. Ashtabula Cty. Bd. of Revision*, 135 Ohio St. 3d 227, 2013-Ohio-397, ¶¶17, 18; *CNG Dev. Co. v. Limbach*, 63 Ohio St. 3d 28, 31-32 (1992); *Akron Std. Div. of Eagle-Picher Industries, Inc. v. Lindley*, 11 Ohio St. 3d 10, 12, (1984).

Second, *substantively*, even if the Court were to abandon *Athens County* and hold that R.C. 3354.15's "community college exemption" does not render the R.C. 5709.07(A)(4) "public college exemption" inapplicable, any such R.C. 5709.07(A)(4) exemption claim would fail in any event. Indeed, under R.C. 5709.07(B), the exemption in R.C. 5709.07(A)(4) is expressly made inapplicable to "leasehold estates," including the leasehold interests held by Columbus Community College in the subject realty.

As a consequence, the Commissioner requests that this Court affirm the BTA's decision with respect to exemption under R.C. 3354.15 and reverse the BTA's decision with respect to exemption under R.C. 5709.07(A)(4).

II. STATEMENT OF CASE AND FACTS

A. Substantive Facts

The facts pertinent to the substantive issues of this appeal are largely undisputed. Namely, throughout the 2002-2005 tax years at issue, the appellant commercial real estate owners leased the subject properties to the Columbus State Community College ("CSCC") at fair market value rent, with a view to profit from the lease transactions, as well as to realize a potential profit from the sale of the real estate at some future date.²

The Commissioner, however, disputes, in part, the additional factual assertions in the opening BTA merit brief of Equity Dublin Associates and SHSCC #2 Limited Partnership concerning the contractual obligations assumed by the CSCC under the lease agreements. In their joint opening brief, the commercial owners/lessors asserted that, under both of the lease agreements, CSCC, as "tenant" or lessee, was contractually bound to pay all of the real property taxes on the leased property. Actually, the lease documentation for the two appeals is distinctly different in this respect.

The real property lease relating to the real property at issue in BTA No. 2011-1795 (referred to as the "SHSCC Lease"), as in effect for the 2002, 2003 and 2004 tax years at issue,

² See the lease agreements in the statutory transcript of evidence certified to the Board in BTA Case No. 2011-Q-1792 ("ST.I") and in BTA Case No. 2011-Q-1795 ("ST.II") at ST.I. 28-63, and ST.II 13-24, 28-32, and 51-87, respectively.

imposes on CSCC, as lessee, the obligation to pay real property taxes regarding the leased premises.³ The provision of the lease contractually obligating the tenant to pay real property taxes on the premises is set forth on page 6 of that lease in paragraph B. 12, captioned “Taxes.” See ST.II. 56.

However, regarding the real property lease relating to the real property at issue in BTA No. 2011-1792 (referred to in the BTA briefs as the “EDA Lease”), the lease in effect for the 2002, 2003 and 2004 tax years at issue does *not* impose on the lessee CSCC the obligation to pay the real property taxes. Instead, CSCC was contractually obligated to pay only those property taxes that pertained to its own fixtures, furniture, and other personal property, but not on the real property owned by the landlord.

See specifically, Section 19.1, captioned “Taxes,” of the original lease (at ST.I. 29), which provides as follows

Tenant shall pay before delinquency any and all taxes, assessments, license fees, and public charges levied, assessed or imposed and which become payable during the Lease **upon Tenant’s fixtures, furniture, appliances and personal property installed or located in the Leased Premises.**

(Emphasis added.)

None of the addenda to that lease change the provisions of Section 19 of the lease.

In their opening BTA merit brief, the commercial owners/lessors relied on this same Section 19 of the lease as we do here (see their opening BTA brief at 2 in the Factual Background section under the caption “A. The EDA Lease”). But, their BTA brief failed to

³ The specific contractual terms of the lease agreement regarding BTA No. 2011-1795, are reproduced at pages of the statutory transcript of that appeal (a 15-page lease agreement dated June 6, 1996), ST.II. 51-65.

quote the actual language of the lease and, in paraphrasing that provision, omits any mention of the key limiting language bolded above.

In its Decision and Order below, the BTA agreed with the Commissioner's analysis of the real property tax provisions of these respective lease agreements. See the BTA Decision and Order at 5, fn. 5 (confirming the accuracy of the Commissioner's representations in his brief regarding the lease obligations).

B. Facts Applicable to Jurisdictional Issue and Procedural Posture

As the commercial real property owners of the subject properties, Equity Dublin Associates and SHSCC#2 Limited Partnership applied for real property tax exemption for the 2005 tax year and sought remission of previously paid real property taxes for the 2002-2004 tax years. They did so pursuant to timely filed applications for real property tax exemption on the Commissioner's prescribed form, DTE Form 23.⁴ See Equity Dublin Associates' application, reproduced at ST.I. 14-20; and SHSCC#2 Limited Partnership's application, reproduced at ST.II. 39-45.

As required on Line 13, page two of their respective applications for real property tax exemption, Equity Dublin Associates and SHSCC#2 Limited Partnership set forth the sections of the Revised Code under which they claimed real property tax exemption. ST.I. Each application identified two statute sections: R.C. 3354.15(a) and R.C. 3358.10. See ST.I. 15 (Equity Dublin Associate's application) and ST.II. 40 (SHSCC#2 Limited Partnership's application). Neither application set forth R.C. 5709.07(A)(4) as a statutory exemption claim. Id. And further, Equity Dublin Associates and SHSCC#2 Limited Partnership never added R.C.

⁴In compliance with the General Assembly's express mandate in R.C. 5715.27(A), the Commissioner has prescribed DTE Form 23 for purposes of real property tax exemption application.

5709.07(A)(4) as a statutory basis for exemption at any time in the Commissioner's administrative proceedings.

During the Commissioner's administrative proceedings on the exemption applications, the Boards of Education actively participated. Pursuant to R.C. 5715.27(B), the Commissioner had timely notified the Board of Education of Dublin City School District and the Board of Education of the Columbus City School District of the filings of the exemption applications. See, ST.I. 14 and ST.II. 40. Then, in response, pursuant to R.C. 5715.27(C), the Boards of Education timely apprised the Commissioner that they contested the exemption claims and sought to participate in the Commissioner's administrative proceedings on the applications. See ST.I. 13 and ST.II. 33.

Following his review and consideration of the exemption applications, the Commissioner issued his final determinations denying the exemption claims in full under R.C. 3354.15. See the Commissioner's final determinations regarding Equity Dublin Associates and SHSCC#2 Limited Partnership at ST.I. 1-4 and ST.II. 1-4, respectively. In addition to rejecting the R.C. 3354.15 exemption claims, for informational purposes, the Commissioner further explained to the applicants that the subject realty additionally would not qualify for exemption under either the "public schoolhouse" exemption in R.C. 5709.07(A)(1), or the "public college" exemption in R.C. 5709.07(A)(4). As noted, neither Equity Dublin Associates nor SHSCC#2 Limited Partnership had raised any such exemption claim in their respective real property tax exemption applications, or in any written or oral communication in the Commissioner's administrative proceedings thereafter.

In their notices of appeal to the BTA from the Commissioner's final determinations, Equity Dublin Associates and SHSCC#2 Limited Partnership for the first time raised a claim to

exemption under R.C. 5709.07(A)(4) and, in addition, reiterated their claims for exemption under R.C. 3354.15.

The parties waived their rights to a hearing of additional evidence at the BTA, and submitted simultaneous initial and response briefs. Upon review of the briefs, the BTA issued its Decision and Order on December 31, 2013). The BTA denied exemption under R.C. 3354.15, but held that the for-profit owners/lessors (the current appellees) were entitled to a partial real property tax exemption under R.C. 5709.07(A)(4) for the buildings at issue, but not for the parking lots. The Commissioner moved for reconsideration, given this Court's *Athens County* holding at ¶ 13 and for other related and independent reasons. The BTA denied the Commissioner's motion. See the BTA's order on the Motion issued on January 28, 2014.

In their notices of appeal to the BTA from the Commissioner's final determinations, Equity Dublin Associates and SHSCC#2 Limited Partnership for the first time raised a claim to exemption under R.C. 5709.07(A)(4) and reiterated its claim for exemption under R.C. 3354.15.

The parties waived their rights to a hearing of additional evidence at the BTA, and submitted simultaneous initial and response briefs. Upon review of the briefs, the BTA issued its Decision and Order on December 31, 2013). The BTA denied exemption under R.C. 3354.15, but held that the for-profit owners/lessors (the current appellees) were entitled to a partial real property tax exemption under R.C. 5709.07(A)(4) for the buildings at issue, but not for the parking lots. The Commissioner moved for reconsideration, given this Court's *Athens County* holding at ¶ 13 and for other related and independent reasons. The BTA denied the Commissioner's motion. See the BTA's order on the Motion issued on January 28, 2014.

The Commissioner and the School Boards then timely filed appeals as right to this Court pursuant to R.C. 5717.02.

Any further facts will be referenced directly to the evidentiary record in the Law and Argument section which follows.

III. LAW AND ARGUMENT

Proposition of Law No. 1:

Private ownership defeats a claim under the “community college district” exemption in R.C. 3354.15, just as private ownership defeats an exemption claim under the parallel language of the “technical college district” exemption in R.C. 3357.14.

Athens Cty. Aud. v. Wilkins, 106 Ohio St. 3d 293, 2005-Ohio-4986, ¶¶ 9-11, **followed**.

This Court should affirm, as a matter of law, the Commissioner’s and the BTA’s denial of the real property tax exemption claims under R.C. 3354.15, based on the Court’s decision in *Athens Cty. Aud. v. Wilkins*, 106 Ohio St. 3d 293, 2005-Ohio-4986 (“*Athens County*”). In that case, a for-profit commercial real estate owner rented apartments to students at a nearby technical college, pursuant to a management contract with the technical college. On the basis of its contractual relations with the technical college and its students, the commercial owner sought real property tax exemption pursuant to R.C. 3357.14 (the real property tax exemption granted specifically to “technical college districts”).

In rejecting the for-profit owner’s R.C. 3357.14 exemption claim, the *Athens County* Court applied the plain meaning of the following language of that exemption statute: “A technical college district **shall not be required to pay any taxes or assessments upon any real or personal property acquired, owned, or used by it** *** (emphasis added).” *Id.* at ¶ 9. The Court held that the 100% ownership of the real property by the for-profit commercial owner, Lee

& L'Heureux Properties, LLC ("L&L"), defeated the R.C. 3357.14 exemption claim of the for-profit commercial owner, as a matter of law, as follows:

In this case, neither Hocking [Hocking Valley Technical College] nor its technical college district is "required to pay any taxes or assessments" on L&L's property. **Since L&L is the sole property owner, it alone is responsible for paying the taxes on the property** (emphasis added).

Id. at ¶ 9.

None of these statutes [i.e., neither R.C. 3357.14 nor the "similar" exemption statutes for state and municipal colleges and universities, community college districts, and university branch districts under R.C. 3345.17, 3349.17, 3354.15, and 3355.11, respectively] **exempt private landowners from paying property taxes on property located near, or even on, a college or university campus.**"

Id. at ¶ 11 (emphasis added).

The Court's holdings in ¶¶ 9 and 11 follow directly from the Ohio statutes under which the General Assembly has imposed the responsibility for payment of real property taxes solely on the "owners" of real property, not on lessees. See R.C. 319.28 and R.C. 323.13. Accordingly, this statutory responsibility may not be avoided by an owner's private agreement with its lessee, or other third party. Even if, by contract or otherwise, a real property lessee voluntarily assumes payment of real property taxes on the property it leases, the owner/lessor remains statutorily responsible. Thus, if the lessee were to contractually default on its obligation to pay taxes, the owner/lessor would still owe the real property taxes. This ultimate legal responsibility may not be "contracted away."

The *Athens County* Court's holding and legal analysis of the "technical college district" exemption in R.C. 3357.14 is equally applicable to the "community college district" exemption in R.C. 3354.15 at issue here. As the Court itself noted, the statutory language delineating the scope of the R.C. 3357.14 exemption for "technical college districts" is "similar to" the General

Assembly's real property tax exemptions for state and municipal colleges and universities, community college districts, and university branch districts under R.C. 3345.17, 3349.17, 3354.15, and 3355.11, respectively. *Athens County* at ¶ 11.

Indeed, in pertinent statutory language, the real property tax exemption granted to “community college districts” pursuant to R.C. 3354.15 at issue here not only is “similar” to that of R.C. 3357.14; it *is identical to* that language. For the Court's convenience, these respective statutes read, in their entirety, as follows:

R.C. 3357.14

The exercise of powers granted by sections 3357.01 to 3357.19, inclusive, of the Revised Code, shall be in all respects for the benefit of the people and for the increase of their knowledge, prosperity, morals, and welfare. **A technical college district shall not be required to pay any taxes or assessments upon any real or personal property acquired, owned, or used by it** pursuant to sections 3357.01 to 3357.19, inclusive, of the Revised Code, or upon the income therefrom, and the bonds issued pursuant to such sections and the transfer of the income therefrom, including any profit made on the sale thereof, shall at all times be free from taxation within the state.

(Emphasis added.)

R.C.3345.14

A community college district shall not be required to pay any taxes or assessments upon any real or personal property acquired, owned, or used by it pursuant to provisions of sections 3354.01 to 3354.18, inclusive, of the Revised Code, or upon the income therefrom, and the bonds issued pursuant to provisions of such sections and the transfer of the income therefrom, including any profits made on the sale thereof, shall at all times be free from taxation within the state.

(Emphasis added.)

In sum, *Athens County* should be dispositive here regarding the Commissioner's rejection of the appellants' R.C. 3354.15 exemption claim. As in *Athens County*, the subject realty is owned by for-profit, commercial owners who, accordingly, bear the exclusive responsibility

under the Revised Code for paying Ohio real property taxes on the property they own and rent to others.

Proposition of Law No. II:

To be exempt from real property taxation, realty must qualify under the statute specifically applicable to that property. Because R.C. 3354.15 is the only statute directly related to real property tax exemption for “community college districts,” R.C. 3354.15 is the exclusive statute under which a claim to exemption based on a community college district’s lease of the property may be considered.

Athens Cty. Aud. v. Wilkins, 106 Ohio St. 3d 293, 2005-Ohio-4986, ¶ 13; *Rickenbacker Port Auth. v. Limbach*, 64 Ohio St. 3d 628, 631 (1992); *Church of God in Northern Ohio, Inc. v. Levin*, 124 Ohio St. 3d 36, 2009-Ohio-5939, ¶ 30, **followed**.

In *Athens County*, the Court held that the R.C. 5709.07(A)(4) “public colleges” exemption from real property taxation does not apply to exemption claims involving technical college districts. The Court so held because the real property tax exemption for technical college districts in R.C. 3357.14 is the exclusive statute directly related to property tax exemptions for technical colleges, as follows:

We turn now to L & L's contention that it is entitled to a property-tax exemption pursuant to R.C. 5709.07(A)(4). In reviewing this claim below, the BTA, citing *Rickenbacker Port Auth. v. Limbach* (1992), 64 Ohio St.3d 628, 631, 597 N.E.2d 494, concluded that because “a property, to be exempt, must qualify under the criteria of the statute specifically applicable to that property,” and because R.C. 3357.14 is the only statutory provision directly related to property-tax exemptions for technical colleges, R.C. 5709.07(A)(4) cannot provide L & L with a property-tax exemption.

Athens County at ¶ 13 (underlining added).

In the present appeals, the express directive of the *Athens County* Court in ¶ 13 regarding the “technical college district” exemption in R.C. 3357.14 equally applies to the

“community college district” exemption in R.C. 3354.15. In turn, the *Athens County* holding at ¶ 13 itself rests on a bedrock principle of statutory interpretation that, in order for property to be exempt, the property “must qualify under the statute specifically applicable to that property.” This principle permeates real property tax exemption law. See, e.g., *Church of God in Northern Ohio, Inc. v. Levin*, 124 Ohio St. 3d 36, 2009-Ohio-5939, ¶ 30 (expressly approving the *Rickenbacker* holding).

Proposition of Law No. III:

In order for the Court to abandon its previous precedent requires the satisfaction of each of the three-prong criteria set forth in *Galatis*.

The doctrine of *stare decisis* applies directly to the Court’s adherence to *Athens County* in this case. Under that doctrine, the *Athens County* decision provides compelling authority for this Court to reverse the BTA’s decision granting partial exemption under R.C. 5709.07(A)(4) and to uphold the Commissioner’s denial of real property tax exemption. In fact, the criteria this Court has established for overturning its own precedent are simply absent here. See, *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 2003-Ohio-5849; and *Ohio Apt. Assn. v. Levin*, 127 Ohio St. 3d 76, 2012-Ohio-4414.

Under the three-prong *Galatis* test, as reaffirmed in *Ohio Apt. Assn.*, for this Court to overturn its previous decision in *Athens County*, the following criteria must be affirmatively demonstrated: “(1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it.” *Ohio Apt. Assn.* at ¶ 30 (quoting paragraph one of the syllabus of *Galatis*).

The BTA’s decision erred in failing to find that the *stare decisis* standard, as set forth in *Galatis* and reaffirmed in *Ohio Apt. Assn.*, has not been met, and could not be met, here. **First,**

the Court's holding in *Athens County* was not wrongly decided by either the Court or by the BTA in its decision in that case. **Second**, no changes in circumstances have occurred that would render continued adherence to the decision no longer justified. **Third**, the *Athens County* decision does not defy practical workability. **Fourth**, abandoning the precedent *would* create an undue hardship because, as detailed below, real property tax exemptions are in "derogation of equal rights," and place a disproportionate tax burden on all other taxpayers. *Cincinnati College v. State*, 19 Ohio St. 110, 115 (1850); *Bethesda Healthcare, Inc. v. Wilkins*, 101 Ohio St.3d 420, 2004-Ohio-1749, ¶ 19; *Anderson/Maltbie Partnership*, at ¶ 16; *Ares, Inc. v. Limbach*, 51 Ohio St.3d 102 (1990).

In the BTA proceedings below, Equity Dublin Associates and SHSCC#2 Limited Partnership did not allege or attempt to demonstrate that ¶ 13 of this Court's *Athens County* decision should be overturned. Similarly, because the BTA itself did not apply ¶ 13 of *Athens County*, the BTA made no attempt to suggest to this Court why, or even if, such holding should be overturned.

Proposition of Law No. IV:

Real property tax exemption statutes are in derogation of the equal rights of all other taxpayers, and thus must be "strictly construed," with any doubt as the application of the exemption to be resolved *against* the exemption claimant.

Cincinnati College v. State, 19 Ohio St. 110, 115 (1850); *Bethesda Healthcare, Inc. v. Wilkins*, 101 Ohio St.3d 420, 2004-Ohio-1749, ¶ 19; *Anderson/Maltbie Partnership v. Levin*, 127 Ohio St.3d 178, 2010-Ohio-4904, ¶ 16, **followed**.

The well-established rule in Ohio is that all property is taxable. R.C. 5709.01. Tax exemptions are a matter of legislative grace and exceptions to the rule. *Seven Hills Schools v. Kinney*, 28 Ohio St.3d 186 (1986). Thus, tax exemption statutes, such as R.C. 3354.15 and R.C.

5709.07(A)(4), must be strictly construed because they are “in derogation of equal rights.” *Cincinnati College v. State*, 19 Ohio St. 110, 115 (1850); *Bethesda Healthcare, Inc. v. Wilkins*, 101 Ohio St.3d 420, 2004-Ohio-1749, ¶ 19; *Anderson/Maltbie Partnership*, at ¶ 16; *Ares, Inc. v. Limbach*, 51 Ohio St.3d 102 (1990).

This principle of strict construction requires the statute’s language to be construed against the exemption or benefit conferred, meaning the onus is on the taxpayer to show that the language of the statute “clearly express[es] the exemption” in relation to the facts of the claim. *Anderson/Maltbie Partnership*, at ¶ 16 (quoting *Ares, Inc.*, 51 Ohio St.3d at 104). “In all doubtful cases,” the claim must be resolved against the asserted statutory exemption. *Anderson/Maltbie Partnership* at ¶ 16.

As applied here, these guiding principles further support and cement the Ohio Supreme Court’s controlling guidance in *Athens County*. As noted, “in all doubtful cases” an exemption claim must be resolved against the asserted statutory exemption. That principle should apply with particular force where, as here, the Commissioner has applied the controlling guidance of the Ohio Supreme Court on the very statutory language in controversy. (See the Commissioner’s opening brief at 4 showing that the pertinent statutory language of the “technical college” real property tax exemption at issue in *Athens County* (R.C. 3357.14) is *exactly the same* as the pertinent statutory language of the “community college” real property tax exemption in R.C. 3554.15 at issue here).

Proposition of Law No. V:

Legislative inaction in the face of long-standing interpretation suggests legislative intent to retain the existing law.

Maitland v. Ford Motor Co., 103 Ohio St.3d 463, at ¶26 (2004), **followed**.

It has now been over seven years from the Court's issuance of *Athens County*, yet the General Assembly has chosen not to amend either the "public college" exemption in R.C. 5709.07(A)(4) or any of the specific real property tax exemption statutes for state and municipal colleges and universities, community college districts, university branch districts, and technical college districts set forth in R.C. 3345.17, 3349.17, 3354.15, 3357.14, respectively. This legislative blessing of the Court's *Athens County* holdings provides strong support buttressing the reasonableness and lawfulness of the Commissioner's final determinations. *Maitland v. Ford Motor Co.*, 103 Ohio St. 3d 463, 2004-Ohio-5717, ¶ 26 ("legislative inaction in the face of long-standing interpretation suggests legislative intent to retain the existing law."); *General Electric Co. v. DeCourcy*, 60 Ohio St.2d 68, 70 (1979).

Proposition of Law No. VI:

When a real property tax exemption applicant fails to timely identify a particular statutory basis for exemption in its real property tax exemption application, as required by the Commissioner's prescribed application form, the applicant fails to invoke the Commissioner's jurisdiction, and subsequently the jurisdiction of the BTA, to consider that statutory basis for exemption.

As a matter of subject matter jurisdiction, Equity Dublin Associates and SHSCC#2 Limited Partnership failed to confer jurisdiction on the Commissioner, and subsequently on the BTA, to consider any claim to exemption under R.C. 5709.07(A)(4). Specifically, as real property tax exemption applicants, the appellee for-profit commercial property owners/lessors failed to set forth any R.C. 5709.07(A)(4) exemption claim in their timely filed real property tax

exemption applications, as required on the application form the General Assembly has directed the Commissioner to prescribe pursuant to R.C. 5715.27(A).

Applicants for real property tax exemption must set forth the statutory grounds for exemption in their applications in order to invoke a right to the Commissioner's consideration of those grounds. This is so because, as this Court uniformly has held, the timely notification to the taxing authority of tax issues and amounts in support of claimed tax relief "runs to the core of procedural efficiency," and, thus, is a mandatory, jurisdictional requirement. *Shinkle v. Ashtabula Cty. Bd. of Revision*, 135 Ohio St.3d 227, 2013-Ohio-397, ¶¶17, 18; *CNG Dev. Co. v. Limbach*, 63 Ohio St. 3d 28, 31-32 (1992); *Akron Std. Div. of Eagle-Picher Industries, Inc. v. Lindley*, 11 Ohio St. 3d 10, 12, (1984).

As applied here, under the express requirements of the application form that the Commissioner has issued pursuant to the General Assembly's mandate, the applicant is required to identify the statutes under which real property tax exemption is sought. See Line 13, page two of the Commissioner's prescribed form. ST.I. 15; ST.II. 40. Consequently, real property tax exemption applicants do not invoke a right to the Commissioner's review and consideration of a statutory basis for exemption unless the applicants have identified that statutory basis in their real property tax exemption applications. The BTA consistently has so held and this Court has affirmed. See, e.g., *NBC-USA Housing, Inc.–Five v. Levin*, 125 Ohio St. 3d 394, 2010-Ohio-1553, ¶ 10, affirming BTA No. 2007-A-110 (July 14, 2009) at 5, fn. 1.⁵

⁵ See also, *Camp Cotubic, Inc. v. Testa*, BTA Case No. 2011-4597 (Apr. 8, 2014); *Church of God in N. Ohio v. Wilkins*, BTA Case No. 2007-N-102 (Nov. 25, 2008) at fn. 1; *New Covenant Believers Church v. Zaino*, BTA Case No. 2002-B-926, (May 21, 2004); *Oikos Community Development Corporation v. Zaino*, BTA Case No. 2000-T-2037, (Nov. 9, 2001); and *St. Mark Coptic Orthodox Church v. Testa*, BTA Case No. 2011-Q-1330, (Jun. 13, 2013), all of which are reproduced in the Appendix.

Further, under the express language of R.C. 5713.08 (A), the Commissioner may grant real property tax exemption *only* for tax years for which a valid and timely application for real property tax has been filed. As a creature of statute, the Commissioner is vested only with those powers conferred by the General Assembly. Thus, by failing to raise any R.C. 5709.07(A)(4) claim in their real property tax exemption applications, Equity Dublin Associates and SHSCC#2 Limited Partnership thereby failed to confer jurisdiction on the Tax Commissioner, and subsequently on the BTA, to consider any claim to exemption on the basis of R.C. 5709.07(A)(4).

Proposition of Law No. VII:

Under the express prohibition in R.C. 5709.07(B), the R.C. 5709.07(A)(4) exemption is not available to a community college's leasehold estate.

Substantively, even if the Court were to abandon *Athens County* and hold that R.C. 3354.15's "community college exemption" does not render the R.C. 5709.07(A)(4) "public college exemption" inapplicable, any such R.C. 5709.07(A)(4) exemption claim would fail, in any event.

In addition to failing to follow *Athens County*, the BTA erred in granting partial exemption under R.C. 5709.07(A)(4) because, under R.C. 5709.07(B), the exemptions set forth in R.C. 5709.07(A) "shall not extend to leasehold estates or [of] real property held under the authority of a college or university of learning in this state [.] [bracketed language added]."⁶ As

⁶ The General Assembly first adopted the language now codified in R.C. 5709.07(B) in 1852. 50 Ohio Laws 135, 137 (1852), Appx. 59. As originally adopted in 1852, the statutory language in current R.C. 5709.07(B) referred to "leasehold estates, of real property held under the authority of any college or university[.]" Through an 1859 amendment, the General Assembly moved a comma such that the sentence read, "leasehold estates of real property, held under the authority of any college or university[.] 56 Ohio Laws 175, 177 (1859), Appx. 64. Another amendment in 1864 removed the comma altogether. 61 Ohio Laws 39 (1864), Appx. 69. The language was not amended again until 1910 when the commission codifying Ohio laws "did a little legislating on

applied here, this quoted language of R.C. 5709.07(B) applies to bar exemption for the subject property under R.C. 5709.07(A)(4) because the subject property is held “as a leasehold interest or [of] real property” under the authority of Columbus State Community College.

The BTA erred in failing to apply this clear statutory bar, relying, instead on this Court’s decision in *Cleveland State Univ. v. Perk*, 26 Ohio St. 2d 1 (1971). See the BTA’s Order denying the Commissioner’s motion for reconsideration at 3. Appx. 91. However, the *Perk* decision failed to consider the R.C. 5709.07(B) prohibition and thus is simply inapposite concerning the meaning and application of the Division (B) prohibition. In fact, this Court’s post-*Perk* case law has applied the R.C. 5709.07(B) prohibition to bar exemption under R.C. 5709.07(A)(4). *Case W. Res. Univ. v. Wilkins*, 105 Ohio St. 3d 276, 2005-Ohio-1649, ¶¶ 47-48.

its own account” and replaced “of” with “or” such that the pertinent statutory language now reads, “leasehold estates or real property held under the authority of a college or university[.]” 2 *The General Code of the State of Ohio Being an Act to Revise and Consolidate the General Statutes of Ohio Passed by the General Assembly of Ohio February 1910*, p. 1151; *Benjamin Rose Institute v. Myers*, 92 Ohio St. 252, 259 (1915) (noting that the codifying commission “did a little legislating on its own account” to amend the charitable real property tax exemption), Appx. 72. The “or” remains in the statutory language today, through amendments in 1988 and 2005. Am. S.B. 71, 142 Ohio Laws, Part I, 147 (1988), Appx. 75; Am.Sub. H.B. No. 66, 151 Ohio Laws, Part III, 4398 (effective June 30, 2005), Appx. 80.

The 1910 codifying commission’s replacement of “of” with “or” may be a scrivener’s error because, taken literally, R.C. 5709.07(B) would defeat exemption under R.C. 5709.07(A)(4) in nearly all instances. That is, the R.C. 5709.07(A)(4) exemption applies only to “real property” held by a college or university and R.C. 5709.07(B) defeats “real property held under the authority of a college or university.” To give meaning to the language now found in R.C. 5709.07(B), as this Court did in *Case West. Res. Univ.* in 2005, R.C. 5709.07(B) should be interpreted as it read prior to 1910: “leasehold estates of real property held under the authority of [a] college or university.” See *Church of God in N. Ohio, Inc. v. Levin*, 124 Ohio St.3d 36, 2009-Ohio-5939, ¶ 30 (“Taken together, these circumstances would amount to a violation of the precept that we should construe statutes to give effect to all the enacted language), citing R.C. 1.47(B).

The General Assembly's 2005 amendments to R.C. 5709.07(A)(4) and (B) confirm that R.C. 5709.07(B) is an express statutory bar precluding exemption for property leased to a college or university, subject only to the express exceptions to that prohibition contained therein. Specifically, the General Assembly amended R.C. 5709.07(B) and R.C. 5709.07(A)(4) to provide only a very limited exception to R.C. 5709.07(B)'s express bar of "leasehold estates" from the R.C. 5709.07(A)(4) exemption. This *limited* exception applies only to certain land and buildings used by *state universities* but controlled by *non-profit* entities exempt from federal income taxation under Section 501(c)(3) of the Internal Revenue Code. See current R.C. 5709.07(A)(4)(a)-(c) and (B) as amended pursuant to Am.Sub. H.B. No. 66, 151 Ohio Laws, Part III, 4398 (effective June 30, 2005), Appx. 96-97.

The limited exemption for certain real property leased to state universities by Section 501(c)(3) entities, as enacted under House Bill No. 66, would not apply here for at least two fundamental reasons. First, Columbus State Community College is not a "state university," and, second, the appellee commercial owners/lessors here are not non-profit entities exempt from federal income tax under I.R.C. Section 501(c)(3).

The BTA's Decision and Order, by contrast, would render the General Assembly's June 30, 2005 amendments to R.C. 5709.07(A)(4) and (B) entire meaningless because, under the BTA's erroneous view, *all* commercial buildings owned by private landowners but leased to colleges or universities could qualify for exemption under R.C. 5709.07(A)(4), not just those meeting the specific and limited requirements in current R.C. 5709.07(A)(4)(a)-(c) and (B).

In fact, the General Assembly's June 30, 2005 amendments clarify that the R.C. 5709.07(A)(4) exemption cannot apply to buildings that are "used with a view to profit." The BTA correctly determined that Columbus State leases the land and buildings in this case

pursuant to a for-profit lease. *BTA Decision and Order*, at 10. The BTA, however, erroneously held that an owner's use of its property with a view to profit" defeats only an exemption for the land but not for buildings thereon. *BTA Decision and Order*, at 9.

Pursuant to current R.C. 5709.07(A)(4)(a) (as amended in 2005), leased space in "housing-related facilities," *i.e.* buildings, "shall not be considered an activity with a view to profit for purposes of division (A)(4)." This *limited* exception to the requirement that buildings not be used with a view to profit applies narrowly to buildings used as "housing-related facilities" for state universities. If all buildings could be "used with a view to profit" and still found exempt under R.C. 5709.07(A)(4), there would be no need for the exception for housing-related facilities. The statutory language would have no meaning, contrary to the General Assembly's clear directive. Moreover, this *limited* exception does not apply here, among other reasons, because the owner is a for-profit corporation using the building with a view to profit. To give meaning to R.C. 5709.07(A)(4)(a), then, R.C. 5709.07(A)(4) must be read to mean that buildings used with a view to profit are not exempt from taxation. *See Church of God in N. Ohio, Inc. v. Levin*, 124 Ohio St.3d 36, 2009-Ohio-5939, ¶ 30, citing R.C. 1.47(B).

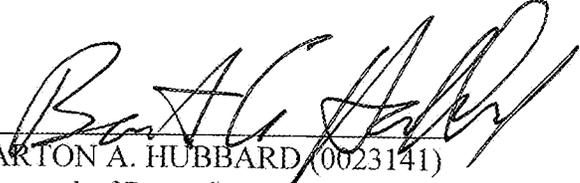
Finally, this Court has consistently denied property tax exemption for property used with a view to profit. *E.g., Cincinnati College v. State*, 19 Ohio St. 110, 115 (1850); *Anderson/Maltbie Partnership v. Levin*, 127 Ohio St.3d 178, 2010-Ohio-4904, ¶ 22; *Benjamin Rose Institute v. Myers*, 92 Ohio St. 252, 259 (1915); *Hubbard Press v. Tracy*, 67 Ohio St. 3d 564, 566 (1993); *Lutheran Book Shop v. Bowers*, 164 Ohio St. 359 (1955) (all holding that property used with a view to profit is not entitled to exemption).

IV. CONCLUSION

For the above reasons, the Court should reverse the BTA's partial grant of exemption pursuant to R.C. 5709.07(A)(4) and uphold the Commissioner's final determinations denying real property tax exemption under R.C. 3354.15 and R.C. 5709.07(A)(4).

Respectfully submitted,

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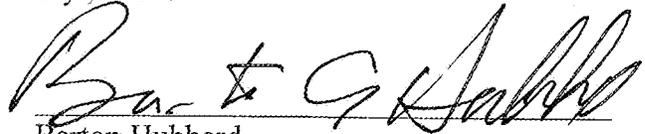

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Appellant Tax Commissioner's Merit Brief were served upon Matthew Anderson, Luper, Neidenthal & Logan, 50 W. Broad Street, Suite 1200, Columbus, Ohio 43215, counsel for Appellants, and Kimberly Allison, Rich & Gillis Law Group, LLC, 6400 Riverside Drive, Suite D, Dublin, Ohio 43017, counsel for Appellee Boards of Education, by U.S. regular mail this 12th day of May, 2014.

A handwritten signature in black ink, appearing to read "Barton Hubbard", is written over a horizontal line.

Barton Hubbard
Assistant Attorney General