

In the  
**Supreme Court of Ohio**

TALAWANDA CITY SCHOOL  
DISTRICT BOARD OF EDUCATION,

Appellant,

v.

JOSEPH W. TESTA,  
TAX COMMISSIONER OF OHIO

Appellee.

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:  
: Case No. 2014-1798  
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:

: Appeal from Ohio Board of Tax Appeals  
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: BTA Case No. 2012-1224  
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**APPELLEE TAX COMMISSIONER'S MERIT BRIEF**

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## TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES .....	iii
STATEMENT OF THE CASE AND FACTS .....	1
A. Procedural Posture .....	2
B. Statement of Relevant Facts.....	4
ARGUMENT .....	6
 <u>Proposition of Law No. I:</u>	
 <i>Under the school board exemption in R.C. 3313.44, real property owned by school boards must be used exclusively for public school purposes in order to qualify for exemption.</i>	
 <i>Bd. of Ed. of City Sch. Dist. of Cincinnati v. Bd. of Tax Appeals</i> , 149 Ohio St. 564 (1948), <b>approved and followed.</b> ....	
A. Realty is exempt under the R.C. 3313.14 school board exemption only where school boards act within their limited statutory powers by holding property in trust exclusively for public school purposes .....	8
B. The school board exemption requires exclusive public school use today the same as it did when the <i>Cincinnati</i> Court so held in 1948, in light of the attendant circumstances when the school board exemption was originally enacted in 1873, and notwithstanding <i>Denison v. Bd. of Tax Appeals</i> , 2 Ohio St.2d 17 (1965) and legislative amendment in 2010.....	13
C. Consistent with the fundamental principle to strictly construct tax exemption statutes against exemption, the General Assembly must provide express statutory language in order to exempt property <i>leased from</i> a public institution for non-public use.....	16
1. Realty is generally not exempt when <i>leased from</i> a public institution for non-public and commercial purposes .....	16

- 2. Through the “abandoned school property” exemption in R.C. 5709.86, the General Assembly has provided express criteria that must be satisfied for exemption to apply where property is leased from school boards.

Where each statutory requirement for exemption is not satisfied, such leased property fails to qualify for exemption under both the school board exemption and the specific abandoned school property exemption .....20

- 3. Case law interpreting the former “park district exemption” in former R.C. 5709.10 does not abrogate the longstanding meaning of the school board exemption requiring exclusive public use

When the General Assembly repealed the park district exemption in 1982, it effectively reinstated the “exclusive public use” requirement for park district property pursuant to R.C. 5709.08.....23

Proposition of Law No. II:

*Under R.C. 5717.02, a notice of appeal does not confer jurisdiction over issues upon the Board of Tax Appeals, and derivatively upon this Court on appeal, unless the issues are clearly specified in the BTA notice of appeal*

*Moraine Heights Baptist Church v. Kinney*, 12 Ohio St.3d 134, 138 (1984), **approved and followed**.....26

- A. The subject realty does not qualify for the public schoolhouse exemption under R.C. 5709.07(A)(1) because it is leased to a private farmer for commercial farming purposes. Division (B) of R.C. 5709.07 is likewise inapplicable because Talawanda’s property is not “held under the authority of a college or university of learning in this state.” .....28

- B. The Commissioner’s choice not to exercise his purely permissive and discretionary authority under R.C. 5715.27(H) to consider exemption for years subsequent to those listed on the application for exemption is not subject to review by the BTA or this Court .....31

CONCLUSION.....34

CERTIFICATE OF SERVICE

APPENDIX (separately attached with table of contents thereto)

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page(s)</b>
<i>Anderson Maltbie Partnership v. Levin</i> , 127 Ohio St.3d 178, 2010-Ohio-4904.....	<i>passim</i>
<i>Atwell v. Bd. of Park Comms.</i> , 2 Ohio St.2d 257 (1965).....	23
<i>Bd. of Ed. of Canfield Local Sch. Dist. v. Olenick</i> , (7th Dist. Ohio 1975), 1975 WL 180420.....	2, 9
<i>Bd. of Ed. of Cincinnati v. Volk</i> , 72 Ohio St. 469 (1905).....	7
<i>Bd. of Ed. of City Sch. Dist. of Cincinnati v. Bd. of Tax Appeals</i> , 149 Ohio St. 564, 568 (1948).....	<i>passim</i>
<i>Bd. of Park Comrs. of Troy v. Bd. of Tax Appeals</i> , 160 Ohio St. 451, 454 (1954).....	17
<i>Bethesda Healthcare, Inc. v. Wilkins</i> , 101 Ohio St.3d 420 .....	19
<i>Carney v. Cleveland City Sch. Dist. Pub. Lib.</i> , 169 Ohio St. 65, syllabus (1959) .....	11, 12, 17, 33
<i>Church of God in N. Ohio, Inc. v. Levin</i> , 124 Ohio St.3d 36, 2009-Ohio-5939, 918 N.E.2d 981 .....	22
<i>Cincinnati College v. State</i> , 19 Ohio 110 (1850).....	17, 18
<i>Cleveland v. Perk</i> , 29 Ohio St.2d 161, 165 (1972).....	17
<i>Columbus City Sch. Dist. v. Testa</i> , 130 Ohio St.3d 344, 2011-Ohio-5534.....	<i>passim</i>
<i>Davis v. Cincinnati Camp-Meeting Ass'n</i> 57 Ohio St. 257 (1897).....	18

<i>Delmond v. Board Investors Co.</i> , 35 Ohio Op. 419, 424 (8th Dist. 1947), <i>aff'd</i> , 148 Ohio St. 301 (1947).....	13, 30
<i>Denison v. Bd. of Tax Appeals</i> , 2 Ohio St.2d 17 (1965).....	7, 13, 14
<i>Dialysis Clinic, Inc. v. Levin</i> , 127 Ohio St.3d 215, 2010-Ohio-5071.....	10
<i>Div. of Conserv. and Nat. Resources v. Bd. of Tax Appeals</i> , 149 Ohio St. 33 (1948).....	17
<i>Gerke v. Purcell</i> , 25 Ohio St. 229, 247 (1874).....	6, 9, 13
<i>HealthSouth Corp. v. Levin</i> , 121 Ohio St.3d 282, 2009-Ohio-584.....	32
<i>In re Applications of the Univ. of Cincinnati v. Bd. of Ed. of City Sch. Dist. of Cleveland</i> , 153 Ohio St. 142 (1950).....	1, 7, 8
<i>Maitland v. Ford Motor Co.</i> , 103 Ohio St.3d 463 (2004).....	15, 25
<i>Meeks v. Papadopoulos</i> , 62 Ohio St.2d 187 (1980).....	13, 15
<i>Michelin Tire Corp. v. Kosydar</i> , 45 Ohio App.2d 107 (1975).....	32
<i>Miller v. Fairley</i> , 141 Ohio St. 327 (1943).....	13
<i>Montgomery Cty. Park Dist. v. Kinney</i> , 61 Ohio St.2d 88 (1980).....	23, 24
<i>Moraine Heights Baptist Church v. Kinney</i> , 12 Ohio St.3d 134 (1984).....	5, 26, 27
<i>Muskingum Watershed Conserv. Dist. v. Walton</i> , 21 Ohio St.2d 240 (1970).....	23
<i>Osborne Bros. Welding Supply, Inc. v. Limbach</i> , 40 Ohio St.3d 175 (1988).....	27

<i>Parma Heights v. Wilkins</i> , 105 Ohio St.3d 463 (2005).....	7, 16, 19
<i>R.W. Sidley, Inc. v. Limbach</i> , 66 Ohio St.3d 256 (1993).....	33
<i>Satullo v. Wilkins</i> , 111 Ohio St.3d 399, 2006-Ohio-5856.....	2
<i>State ex rel. Baciak v. Bd. of Ed. of Cleveland City Sch. Dist.</i> , 55 Ohio L. Abs. 185, 88 N.E.2d 808 (8th Dist. 1949).....	10
<i>State ex rel. Boss v. Hess</i> , 113 Ohio St. 52 (1925).....	29
<i>State ex rel. Williams v. Glander</i> , 148 Ohio St. 188 (1947).....	18
<i>Sylvania Church of God v. Levin</i> , 118 Ohio St.3d 260, 2008-Ohio-2448.....	4
<i>Univ. of Cincinnati v. Limbach</i> , 51 Ohio St.3d 6 (1990).....	17
<i>Verberg v. Bd. of Ed. of the City Sch. Dist. of Cleveland</i> , 135 Ohio St. 246 (1939).....	9
<i>Weir v. Day</i> , 35 Ohio St. 143 (1878).....	10, 11, 12
<i>Willys-Overland Motors, Inc. v. Evatt</i> , 141 Ohio St. 402 (1943).....	32

**Administrative Decisions**

<i>Bd. of Ed. of Col. City Sch. Dist. v. Tracy</i> , BTA Case No. 92-A-598 (Apr. 23, 1993), unreported .....	1, 9
<i>Bd. of Ed. of Groveport Madison Local Sch. v. Limbach</i> , BTA Case No. 89-E-39-42 (Nov. 29, 1991), unreported.....	1
<i>Gallipolis City Sch. v. Kinney</i> , BTA Case No. 81-D-377 (Apr. 25, 1983), unreported .....	1, 9
<i>London City Sch. Bd. of Ed. v. Zaino</i> , BTA Case No. 2000-B-1478 (Jan. 12, 2001), unreported .....	1, 6, 8

*Talawanda City Sch. Dist. Bd. of Ed. v. Testa*,  
BTA Case No. 2012-1224 (Sep.26, 2014), unreported..... 1, 5, 6

*Westerville City Sch. Dist. Bd. of Ed. v. Testa*,  
BTA Case No. 2012-2661 (Jan. 23, 2015), unreported ..... 8

**Statutes**

R.C. 1.01 ..... 7, 15

R.C. 1.47(B)..... 22

R.C. 321.34 ..... 19

R.C. 321.341 ..... 19

R.C. 3313.17 ..... 6, 9

R.C. 3313.44 ..... *passim*

R.C. 3349.17 ..... 17

R.C. 5709.07 ..... *passim*

R.C. 5709.10 (former).....23, 24

R.C. 5709.08 ..... *passim*

R.C. 5709.86 ..... 20

R.C. 5715.27 ..... *passim*

R.C. 5715.271 ..... 17

R.C. 5717.02 ..... 1

R.C. 5717.04 ..... 2, 5

**Session Laws**

70 Ohio Laws 195, 215, §72 (60th G.A.) ..... 7

1910 Ohio Laws 995, 1012 (78th G.A.) ..... 7

120 Ohio Laws 475, 523 (95th G.A.) ..... 7

S.B. 19 (120th G.A.) ..... 22

Am. Sub. S.B. 181 (128th G.A.) ..... 7, 15

**Ohio Attorney General Opinions**

1953 Op. Att’y Gen. No. 2534..... 11

1992 Op. Att’y Gen. No. 92-016 ..... 11

1999 Op. Att’y Gen. No. 99-007 ..... 12, 30

2012 Op. Att’y Gen. No. 2012-037 ..... 11

**Constitutional Provisions**

Ohio Const. Art. I..... 14

Ohio Const. Art. XII § 2 ..... 29

**Other Authority**

Ohio Legislative Service Commission Bill Analysis for  
Am. Sub. S.B. 181 (128th G.A.)..... 15

## STATEMENT OF THE CASE AND FACTS

This appeal involves a real property tax exemption claim for the 2010 tax year filed by Talawanda City School District Board of Education (“Talawanda”), as owner of realty located in Butler County, Ohio. Talawanda seeks exemption under “the school board exemption,” currently codified as R.C. 3313.44 but originally enacted in 1873, for land that it admittedly leases to a private farmer to commercially farm soybeans and corn. In the proceedings below, the Board of Tax Appeals upheld the Tax Commissioner’s denial of exemption due to the exclusively commercial use of the property. *Talawanda City Sch. Dist. Bd. of Ed. v. Testa* BTA Case No. 2012-1224 (Sep.26, 2014), unreported, at 2, Appx. 8-10.<sup>1</sup>

Indeed, Ohio courts of appeal and the BTA have uniformly applied the school board exemption to allow exemption only where property is used exclusively for public school purposes. *Bd. of Ed. of City Sch. Dist. of City of Cincinnati v. Bd. of Tax Appeals*, 149 Ohio St. 564, 568 (1948); *In re Applications of the Univ. of Cincinnati v. Bd. of Ed. of City Sch. Dist. of Cleveland*, 153 Ohio St. 142 (1950) (Hart, J., concurring); *Westerville City Sch. Dist. Bd. of Ed. v. Testa*, BTA Case No. 2012-2661 (Jan. 23, 2015), unreported (office space leased to for-profit corporation taxable), Appx. 11-13; *London City Sch. Bd. of Ed. v. Zaino*, BTA Case No. 2000-B-1478 (Jan. 12, 2001), unreported (property leased for private commercial farming taxable), Appx. 14-23; *Bd. of Ed. of Col. City Sch. Dist. v. Tracy*, BTA Case No. 92-A-598 (Apr. 23, 1993), unreported (commercial parking lot taxable), Appx. 24-26; *Bd. of Ed. of Groveport Madison Local Sch. v. Limbach*, BTA Case Nos. 89-E-39-42 (Nov. 29, 1991), unreported (vacant land exempt based upon prospective use), Appx. 27-29; *Gallipolis City Sch. v. Kinney*, BTA

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<sup>1</sup> For purposes of this brief, the statutory transcript of evidence that the Commissioner certified to the Board of Tax Appeals pursuant to R.C. 5717.02 will be referenced as “S.T. \_\_\_.” Citations to the hearing transcript from the evidentiary hearing before the BTA will be referenced as “Hr. Tr. \_\_\_.” The appellant’s supplement will be referred to as “Supp. \_\_\_”, the appellee Commissioner’s second supplement will be referred to as “TC Supp. \_\_\_,” and the appendix to this brief will be referred to as “Appx. \_\_\_.”

Case No. 81-D-377 (Apr. 25, 1983), unreported (realty leased to individual as private residence taxable), Appx. 30-34; *Bd. of Ed. of Canfield Local Sch. Dist. v. Olenick*, (7th Dist. Ohio 1975), 1975 WL 180420, unreported, (holding that school building exempt as used exclusively for school purposes under the school board exemption), *reversed on other grounds*, 45 Ohio St.2d 300 (1976), Appx. 39-44.

When the well-settled law is applied to the uncontroverted facts, Talawanda's claim to exemption for commercially farmed property fails. On the tax lien date for the tax year at issue here, January 1, 2010, Talawanda held the 34-acre subject realty and leased it to Jim Gifford exclusively for commercial farming purposes. Hr. Tr. 21-23, Supp. 6-7; S.T. 64, TC Supp. 66. Mr. Gifford paid Talawanda \$2,200 to lease the subject realty to farm soybeans and corn. Hr. Tr. 22, Supp. 7. The exclusive use of the property, then, is exclusively commercial and private in nature rather than public, and far removed from public school purposes. Consequently, Talawanda's commercially farmed property does not qualify for exemption because the school board exemption does not apply where, as here, school boards use property exclusively for non-public school purposes.

Accordingly, this Court should affirm the BTA's decision and order so holding as reasonable and lawful. R.C. 5717.04; *Satullo v. Wilkins*, 111 Ohio St.3d 399, 2006-Ohio-5856, ¶ 14, citing *Col. City Sch. Dist. Bd. of Ed. v. Zaino*, 90 Ohio St.3d 496, 497 (2001) ("In reviewing a BTA decision, this court looks to see if that decision was 'reasonable and lawful.'").

#### **A. Statement of Relevant Facts**

The relevant facts are not in dispute. On March 20, 2009, Talawanda purchased tracts of land including the subject realty for the purpose of constructing a new high school. Hr. Tr. 12, Supp. 4; S.T. 50, 55, TC Supp. 52, 57. Prior to that time and until September 26, 2009, Leo Erik

lived on the subject realty. The subject realty comprises 34-acres situated on the southern portion of the land that Talawanda purchased to construct a new high school. Hr. Tr. 18, Supp. 6. Upon acquiring the land, Talawanda indeed constructed a new high school on the property. Talawanda did not, however, develop the subject realty on the southern portion of the land. Hr. Tr. 38, 45, Supp. 11-12. Instead, Talawanda leased the subject realty to a private farmer for commercial farming purposes. Hr. Tr. 38, 45, Supp. 11-12.

At first, pursuant to a lease agreement entered into on July 29, 2009, Talawanda leased the entire 34-acre subject property to Jim Gifford for farming purposes. S.T. 64, TC Supp. 66; Hr. Tr. 21, Supp. 6. Talawanda Treasurer Mike Davis testified at BTA hearing that Talawanda leased the property to Jim Gifford for \$65 per acre per year for each acre of the 34 acres in the subject property, which totaled roughly \$2,200 in rent to Talawanda per year. Hr. Tr. 22, Supp. 7. Pursuant to an early termination clause, the Talawanda-Gifford lease was terminated in 2010. Hr. Tr. 24, Supp. 7.

Subsequently, on June 3, 2010, Talawanda entered into a lease with Adam Smith for just 17 acres of the subject property. See, 2010 Talawanda-Smith Lease Agreement, Supp. 51-54. Pursuant to the 2010 lease, Adam Smith farmed soybeans and corns on the property and Talawanda continued to charge \$65 per acre as rent. Hr. Tr. 26, Supp. 8. The 2010 Adam Smith lease ended in June 2012, at which time the parties continued their agreement as before, with Adam Smith paying Talawanda \$65 per acre per year in rent. See Hr. Tr. 39, Supp. 11.

Then on April 15, 2013, Talawanda entered into another lease with Adam Smith, pursuant to which Adam Smith continued to rent the same 17 acres as before. Hr. Tr. 40, Supp. 11; See, 2013 Talawanda-Smith Lease Agreement, Supp. 55-59. As of the time of the

BTA hearing, Adam Smith continued to farm the subject realty pursuant to the 2013 Adam Smith lease. Hr. Tr. 29, Supp. 8.

During the tax lien date for the tax year at issue in this appeal, January 1, 2010, Talawanda leased the entire 34-acre subject realty to Jim Gifford for commercial farming purposes. Hr. Tr. 21-23, Supp. 6-7; S.T 64, TC Supp. 66. Thus, for purposes of the present appeal, the entire subject realty should be considered as used exclusively for commercial farming purposes. *Sylvania Church of God v. Levin*, 118 Ohio St.3d 260, 2008-Ohio-2448, ¶ 9 (construing R.C. 5715.27(F)).

**B. Procedural Posture**

In the proceedings below, Talawanda applied for exemption from real property taxation for tax year 2010 and remission of taxes and penalties for tax years 2008 and 2009. S.T. 15, TC Supp. 5 (application for exemption). However, Talawanda is eligible for exemption only in 2010 because that is the first year in which Talawanda owned the subject realty on the tax lien date. *Sylvania Church of God*, at ¶ 9 (construing R.C. 5715.27(F)); Hr. Tr. 13, Supp. 4.

Through his final determination, the Commissioner denied exemption under R.C. 3313.44 and former R.C. 5709.07 for the subject realty, but granted exemption for other property Talawanda purchased to build a high school. The Commissioner specifically granted exemption for the portion of the subject realty used exclusively for school purposes, but denied exemption for the portion of the property used exclusively for commercial farming purposes. S.T. 2, TC Supp. 3-4 (final determination). The Commissioner reasonably and lawfully found that property held by a school board must be used for public school purposes, not commercial purposes, to be entitled to exemption. S.T. 1, TC Supp. 3. The Commissioner further found that the property did not qualify for exemption pursuant to the “public schoolhouse exemption” under

former R.C. 5709.07(A)(1) because the property was “leased or otherwise used with a view to profit” as prohibited thereunder. S.T. 2, TC Supp. 4.

Talawanda appealed the Commissioner’s final determination to the BTA solely on the basis that Talawanda is entitled to exemption under R.C. 3313.44 for all real property it owns regardless of use. See, Talawanda BTA Notice of Appeal, at 2, Appx. 190-192. In its appeal to the BTA, Talawanda did not contest the Commissioner’s denial of exemption under the public schoolhouse exemption in former R.C. 5709.07(A)(1). As a result, the BTA did not address the public schoolhouse exemption in its decision and order below.

On September 26, 2014, following an evidentiary hearing, the BTA affirmed the Commissioner’s final determination denying exemption for the subject realty pursuant to R.C. 3313.44. The BTA denied exemption due to the exclusive use of the subject realty for commercial farming of soybeans and corn. *Talawanda City Sch. Dist. Bd. of Ed. v. Testa* (Sep.26, 2014), BTA Case No. 2012-1224, unreported, at 2, Appx. 8-10. The BTA held that property owned by school boards must be used for public school purposes in order to qualify for exemption under R.C. 3313.44, as follows: “not only must title to a subject property be vested in a school board, but also that the property must be used for school purposes.” *Id.*, citing with approval *London City Schools Bd. of Ed. v. Zaino* (Jan. 12, 2001), 2000-B-1478, Appx. 8-9.

On October 17, 2014, Talawanda timely filed a notice of appeal with this Court as of right pursuant to R.C. 5717.04. Through its appeal, Talawanda alleges that the subject realty is exempt pursuant to the school board exemption under R.C. 3313.44. Talawanda additionally claims exemption pursuant to R.C. 5709.07 and R.C. 5709.08, even though those provisions were not raised in its BTA notice of appeal or at any time during the BTA proceedings.<sup>2</sup> Due to Talawanda’s failure to contest R.C. 5709.07 and R.C. 5709.08 in its notice of appeal to the BTA,

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<sup>2</sup> Talawanda abandoned its argument pursuant to R.C. 5709.08 in its merit brief before this Court.

this Court lacks jurisdiction over those claims now. *Moraine Heights Baptist Church v. Kinney*, 12 Ohio St.3d 134, 138 (1984). Thus, the sole issue before this Court is whether the subject commercial farm property qualifies for exemption pursuant to R.C. 3313.44. As explained more fully below, the exclusive use of the property for private commercial farm use defeats exemption.

## ARGUMENT

### Proposition of Law No. I:

*Under the school board exemption in R.C. 3313.44, real property owned by school boards must be used exclusively for public school purposes in order to qualify for exemption.*

*Bd. of Ed. of City Sch. Dist. of Cincinnati v. Bd. of Tax Appeals*, 149 Ohio St. 564 (1948), **approved and followed**.

The farm property leased from Talawanda to a private farmer to commercially farm soybeans and corn is taxable rather than exempt because property must be used exclusively for public school purposes in order to qualify for exemption under the school board exemption. *Bd. of Ed. of City Sch. Dist. of Cincinnati v. Bd. of Tax Appeals*, 149 Ohio St. 564, 568 (1948) (“*Cincinnati*” or “the *Cincinnati* case”).

As the Board of Tax Appeals held below, school board property is not exempt where school boards exceed their statutory powers and fail to use property for school purposes. *Talawanda City Sch. Dist. Bd. of Ed. v. Testa* (Sep.26, 2014), BTA Case No. 2012-1224, at 2, citing *London City Schools Bd. of Ed. v. Zaino* (Jan. 12, 2001), 2000-B-1478, Appx. 8-9. In other words, exemption is defeated for school board property where it is not held in trust for public school purposes. *Anderson Maltbie Partnership v. Levin*, 127 Ohio St.3d 178, 2010-Ohio-4904, ¶ 20, quoting *Gerke v. Purcell*, 25 Ohio St. 229, 247 (1874); R.C. 3313.17.

Contrary to Talawanda’s assertions, the exclusive public school use requirement for the school board exemption is as valid today as it was when first enacted in 1873. The General Assembly has not amended the school board exemption to eliminate the exclusive public school use requirement, nor has this Court’s decision in *Denison v. Bd. of Tax Appeals*, 2 Ohio St.2d 17 (1965) somehow abrogated the will of the General Assembly. In pertinent part, the statutory language of the school board exemption today mirrors the language as originally enacted in 1873.<sup>3</sup>

Talawanda’s attempt to exempt property leased *from* public school boards to a private party for non-public use further runs contrary to well-established law. “[W]herever public property is used by a private citizen for a private purpose, that use generally prevents exemption.” *Parma Heights v. Wilkins*, 105 Ohio St.3d 463, ¶ 12 (2005); *see e.g. Columbus City Sch. Dist. v. Testa*, 130 Ohio St.3d 344, 2011-Ohio-5534. Unless and until the General

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<sup>3</sup> The General Assembly first provided a specific exemption for property held by school board in 1873, as follows: “All property, real or personal, vested in any board of education, shall be exempted from tax and from sale on any execution or other writ or order in the nature of an exemption.” 70 Ohio Laws 195, 215, §72 (60th G.A.), Appx. 76-78; *Bd. of Ed. of Cincinnati v. Volk*, 72 Ohio St. 469 (1905), citing R.S. § 3973.

The 1910 codifying commission removed the word “All” from the statute but otherwise retained the statute as codified as G.C. § 4759. 1910 Ohio Laws 995, 1012 (78th G.A.), Appx. 79-81.

In 1943, the General Assembly recodified Ohio laws pertaining to public schools. During the process, the school board exemption was recodified as G.C. § 4834-16 but no language was amended. 120 Ohio Laws 475, 523 (95th G.A.), Appx. 82-85. In *In re Applications of the Univ. of Cincinnati v. Bd. of Ed. of City Sch. Dist. of Cleveland*, this Court noted that G.C. § 4834-16 was enacted on September 16, 1943, but failed to mention that the act merely recodified existing law. 153 Ohio St. 142 (1950).

In 1953, the school board exemption was recodified as R.C. 3313.44 in the transition from the General Code to the Revised Code, but again no language was amended. See, 1953 Ohio Revised Code, Appx. 86-89. Recodification as the Revised Code did not affect the meaning of the statute. R.C. 1.01.

The school board exemption was amended in 2010, when the General Assembly amended R.C. 3313.44 in the following manner (new language underlined and deleted language with a strikethrough): Real or personal property ~~vested in~~ owned by or leased to any board of education for a lease term of at least fifty years shall be exempt from taxation ~~and from sale on execution or other writ or order in the nature of an execution~~. Am. Sub. S.B. 181 (128th G.A.), Appx. 95.

Assembly adopts express statutory language to exempt property *leased from* school boards to a private party for non-public use, such property remains taxable. *Anderson Malibie*, at ¶ 16 (the claimant to exemption bears the burden to “show that the language of the statute ‘clearly express[es] the exemption’ in relation to the facts of the claim.”). For these reasons, and those that follow, this Court should affirm the BTA’s decision and order upholding denial of exemption as reasonable and lawful.

**A. Realty is exempt under the school board exemption only where school boards act within their limited statutory powers by holding property in trust exclusively for public school purposes.**

In every case that has addressed the “school board exemption,” property has been held exempt only where school board property is used exclusively for public school use. Talawanda’s claim to exemption thus runs contrary to *all* decisional law applying the school board exemption. The consistent application of the exemption carries particular force where, as here, the current school board exemption in R.C. 3313.44 mirrors in pertinent part the original language first enacted in 1873.

The Ohio Supreme Court has *never* allowed exemption pursuant to the school board exemption unless the property is used exclusively for public school purposes. *Bd. of Ed. of City Sch. Dist. of City of Cincinnati v. Bd. of Tax Appeals*, 149 Ohio St. 564, 568 (1948); *In re Applications of the Univ. of Cincinnati v. Bd. of Ed. of City Sch. Dist. of Cleveland*, 153 Ohio St. 142 (1950) (Hart, J., concurring).

The Board of Tax Appeals has followed this Court’s *Cincinnati* decision to deny exemption under R.C. 3313.44 whenever school board-owned property is leased for commercial purposes to private entities. *Westerville City Sch. Dist. Bd. of Ed. v. Testa*, BTA Case No. 2012-2661 (Jan. 23, 2015), unreported (office space leased to for-profit corporation taxable),

Appx. 11-13; *London City Sch. Bd. of Ed. v. Zaino*, BTA Case No. 2000-B-1478 (Jan. 12, 2001), unreported (property leased for private commercial farming taxable), Appx. 14-23; *Bd. of Ed. of Col. City Sch. Dist. v. Tracy*, BTA Case No. 92-A-598 (Apr. 23, 1993), unreported (commercial parking lot taxable), Appx. 24-26; *Gallipolis City Sch. v. Kinney*, BTA Case No. 81-D-377 (Apr. 25, 1983), unreported (realty leased to individual as private residence taxable), Appx. 30-34.

Conversely, where school board-owned property is held for exclusive public school use, it will be entitled to exemption under R.C. 3313.44. *Bd. of Ed. of Canfield Local Sch. Dist. v. Olenick*, (7th Dist. Ohio 1975), 1975 WL 180420, unreported, (holding that school building exempt as used exclusively for school purposes under the school board exemption), *reversed on other grounds*, 45 Ohio St.2d 300 (1976) Appx. 39-44.

R.C. 3313.44 expressly exempts property “owned by” or “leased to” boards of education, as follows:

Real or personal property owned by or leased to any board of education for a lease term of at least fifty years shall be exempt from taxation.

By its plain terms, the school board exemption provides exemption for property owned by school boards and used exclusively for public school purposes, but not to property *leased from* school boards for non-public uses.

The school board exemption does not expressly employ the phrase “exclusive public school use,” but nevertheless requires it, because the condition requiring exclusive public school use is unnecessary due to the “inherently nonprofit” character of “political subdivisions such as school districts.” *Anderson Maltbie Partnership v. Levin*, 127 Ohio St.3d 178, 2010-Ohio-4904, ¶ 20, quoting *Gerke v. Purcell*, 25 Ohio St. 229, 247 (1874).

School boards, as creatures of statute, have only those powers that the General Assembly expressly confers upon them. *Verberg v. Bd. of Ed. of the City Sch. Dist. of Cleveland*, 135 Ohio St. 246, syllabus (1939). Pursuant to R.C. 3313.17, moreover, school boards hold title to property in trust for school purposes. *Weir v. Day*, 35 Ohio St. 143, 146 (1878); *State ex rel. Baciak v. Bd. of Ed. of Cleveland City Sch. Dist.*, 55 Ohio L. Abs. 185, 189, 88 N.E.2d 808, 810 (8th Dist. 1949), Appx. 35-38.

For tax exemption purposes, controlling Ohio Supreme Court precedent holds that school board property must be used exclusively for public school purposes in order to qualify for exemption. In *Bd. of Ed. of City Sch. Dist. of Cincinnati v. Bd. of Tax Appeals* (“*Cincinnati*” or “the *Cincinnati* case”), this Court held that the school board exemption requires such exclusive public school use. 149 Ohio St. 564 (1948). Recognizing an exception to this general rule for vacant land based upon prospective rather than current use, the *Cincinnati* Court held school board property exempt because “[t]he board was without authority or power to purchase it for any other purpose than a public use.” As the Court expressly noted, “the property became subject to exemption from taxation when title vested in the board of education.” *Id.*

The *Cincinnati* Court further held that the school board exemption requires exclusive public school use because it was enacted pursuant to constitutional provisions authorizing exemption only for property *used exclusively for public purposes*. 149 Ohio St. at 567-68. Constitutional provisions are not self-executing; exemption lies only where there is both statutory and constitutional authority for exemption. *Id.* In granting exemption for school property, then, the *Cincinnati* Court necessarily held, as a matter of statutory interpretation, that the school board exemption requires exclusive public use *of the property*. Use of rental proceeds derived from real property to advance public purposes does not constitute use of real property

itself. *Columbus City Sch. Dist. v. Testa*, 130 Ohio St.3d 344, 2011-Ohio-5534, ¶¶ 26-27; *Dialysis Clinic, Inc. v. Levin*, 127 Ohio St.3d 215, 2010-Ohio-5071, ¶ 33.

Without question, the prospective use doctrine is not applicable here as it was in *Cincinnati*. It is well-settled that the prospective use doctrine does not provide exemption for realty that is currently used for commercial use. *Carney v. Cleveland City Sch. Dist. Pub. Lib.*, 169 Ohio St. 65, syllabus (1959). By contrast to the vacant land designated as the future site of a high school in *Cincinnati*, the land here is affirmatively used to commercially farm corn and soybeans. Thus, the prospective use doctrine is thereby rendered inapplicable in this case.

This does not mean that courts necessarily will be required to enjoin school boards from holding property for “casual” or “temporary” commercial use. Rather, casual or isolated non-school-purpose-use, may escape enforcement sanctions. In *Weir v. Day*, after emphasizing that school boards must use their property exclusively for public purposes, this Court explained that this general rule regarding limited school board powers, is subject to practical enforcement limitations: “We do not mean to say that a court of equity will interpose its extraordinary power, by writ of injunction, against every casual or temporary use of such property for other than public school purposes[.]” 35 Ohio St. 143, 146 (1878). As a variant on this theme, several Ohio Attorney General Opinions likewise recognize that school boards, in some situations, may temporarily lease property without sanction, provided the school boards may show that the property could not, as an alternative course of action, be advantageously sold. 1953 Op. Att’y Gen. No. 2534, Appx. 142-146; 2012 Op. Att’y Gen. No. 2012-037, Appx. 169-180; 1992 Op. Att’y Gen. No. 92-016, Appx. 147-152.

The exception to the general rule regarding limited school board powers, however, is distinct from the prospective use doctrine applied, for tax purposes, in *Cincinnati*. Significantly,

this Court in *Anderson/Maltbie Partnership v. Levin* recognized that, for tax purposes, exemption is defeated for publicly-held property where it is leased or otherwise used with a view to profit. 127 Ohio St.3d 178, 2010-Ohio-4904, ¶ 20. But under *Weir v. Day* a lease or for-profit use does not necessarily enjoin the school board from holding the property altogether if “casual” or “temporary.” The key distinction is that exclusively commercial for-profit use defeats property tax exemption under the prospective use doctrine for tax purposes, but does not necessarily enjoin commercial use of school board property. *Compare Carney*, 169 Ohio St. at paragraph one of the syllabus *with Weir*, 35 Ohio St. at 146.

In an attempt to muddy the well-settled law, Talawanda and the *amicus curiae* attempt to apply an inapplicable Ohio Attorney General opinion to this case, namely 1999 Op. Att’y Gen. No. 99-007, Appx. 153-168. Opinion 99-007 addresses a question on the taxability of internet access *services*, not real or personal property. R.C. 3313.44 and R.C. 5709.07, as exemption statutes for *property*, are thus inapplicable to the very question that Opinion 99-007 was requested to answer. In a statement unresponsive to the inquiries involved therein, Opinion 99-007 states that exemption is granted under the school board exemption “regardless of the purpose for which the property is used.” The citation to authority for this statement, however, is the *Cincinnati* case which holds the exact opposite, *i.e.* exclusive public school use *is* required for exemption. By citing *Cincinnati* with approval in the context of exempt *services*, Opinion No. 99-007 does not provide authority for finding commercial real *property* exempt under the school board exemption.

Whatever limited applicability Opinion No. 99-007 has here, it is valid only to the extent it affirms *Cincinnati*; the opinion certainly does not change the longstanding meaning of the school board exemption as explained above. Indeed, this Court’s decisions concerning the

limited authority of Attorney General opinions confirm the conclusion that the *Cincinnati* holding and analysis are controlling, rather than one-sentence dicta in an Attorney General opinion that completely misreads this Court’s holding and analysis in that case. See *Delmond v. Board Investors Co.*, 35 Ohio Op. 419, 424 (8th Dist. 1947), *aff’d*, 148 Ohio St. 301 (1947) (“[w]hile the courts are not bound by the opinions of the attorney general, *in the absence of judicial determination or other authority*, a county administrative officer, such as a county auditor, may properly consider the opinion of the attorney general as respectable authority to follow. We think this is particularly true when the opinion of the attorney general is ... persuasive in reason and logic”) (emphasis added), Appx. 186.

Accordingly, it is well-settled that the school board exemption provides exemption for school board property only where such property is used exclusively for public school purposes.

**B. The school board exemption requires exclusive public school use today the same as it did when the *Cincinnati* Court so held in 1948, in light of the attendant circumstances when the school board exemption was originally enacted in 1873, and notwithstanding *Denison v. Bd. of Tax Appeals*, 2 Ohio St.2d 17 (1965) and legislative amendment in 2010.**

Read together with R.C. 3313.17 and the limited powers of school boards, the word “vested” and now the phrase “owned by” in the school board exemption means “owned and used exclusively for public school purposes.” See *Anderson Maltbie Partnership v. Levin*, 127 Ohio St.3d 178, 2010-Ohio-4904, ¶ 20, quoting *Gerke v. Purcell*, 25 Ohio St. 229, 247 (1874). “[S]tatutes are to be read in light of the attendant circumstances and conditions, and are to be construed as they were intended to be understood, when they were passed.” *Meeks v. Papadopulos*, 62 Ohio St.2d 187, 191 (1980) (quoting *Miller v. Fairley*, 141 Ohio St. 327, paragraph two of the syllabus (1943)). With respect to the school board exemption, the statutory language should be given the same meaning that it had when first enacted in 1873 and as

continuously through today as interpreted through decisional law, most notably the *Cincinnati* case. 149 Ohio St. 564 (1948). *Gerke* recognized the limited powers of school boards in 1874 just one year after the school board exemption was first enacted in 1873. Against a backdrop of limited school board powers, school board realty is exempt under the school board exemption only where it is used exclusively for public school purposes.

Talawanda nevertheless insists that its commercial farm property should be exempt because the school board exemption allegedly does not require realty to be used exclusively for public school purposes in order to qualify for exemption. To support its position, Talawanda places great significance on *Denison v. Bd. of Tax Appeals*, 2 Ohio St.2d 17 (1965). In *Denison*, this Court interpreted a 1931 amendment to the Ohio Constitution to remove all limits on the General Assembly's power to grant real or personal property tax exemption, save Article I of the Ohio Constitution (most notably the equal protection clause).

The argument does not withstand analysis, however, because this Court already reaffirmed the exclusive public school use requirement under the school board exemption in 1948 through *Cincinnati*.<sup>4</sup> The *Cincinnati* case was decided well after the 1931 constitutional amendment discussed in *Denison*. BTA precedent and the 7th District's *Olenick* decision were also decided after both the 1931 and the *Denison* decision itself. Further, *Denison* makes no mention of the uniform body of case law addressing the school board exemption including *Cincinnati* case, let alone the school board exemption itself. Constitutional amendments are not self-executing, and even if they were, a 1931 amendment would not change the meaning of a statute as construed in 1948 and thereafter. *Denison* simply does not change the meaning of the *statutory* school board exemption as Talawanda suggests. See, Talawanda initial brief, at 12.

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<sup>4</sup> In *Cincinnati*, the "duplicate year of 1947" was at issue, which will be referred to herein as "1948." 149 Ohio St. at 564-65.

Tellingly, the statutory language of the school board exemption today mirrors in pertinent part the statutory language that the *Cincinnati* Court construed in 1948 to require exclusive public school use for exemption to apply. There is no reason to infer a change in the law based upon legislative inaction. *Maitland v. Ford Motor Co.*, 103 Ohio St.3d 463, ¶26 (2004) (“legislative inaction in the face of long-standing interpretation suggests legislative intent to retain the existing law.”).

The school board exemption has been amended only one time since 1948.<sup>5</sup> In 2010, the General Assembly replaced the word “vested” with “owned by or leased to.” Am. Sub. S.B. 181 (128th G.A.), Appx. 95.<sup>6</sup> The amendment did not affect the “exclusive public school use” requirement under the statute, but merely clarified that “vested” means “owned by or leased to.” The Ohio Legislative Service Commission Bill Analysis further confirms that the 2010 amendment did not affect the exclusive public school use requirement. That is because the LSC bill analysis for Am. Sub. S.B. 181 is conspicuously silent as to the exclusive public school use requirement and property leased *from* school boards. Appx. 123 (“Tax exemption for school property”). Again, there is no reason to infer a departure from existing law under *Cincinnati*. Reliance on LSC bill analysis in this case is appropriate moreover because that analysis “inform[s] the members of the General Assembly.” *Meeks v. Papadopoulos*, 62 Ohio St.2d 187, 190-191 (1980).

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<sup>5</sup> The *amicus curiae* suggest that recodification of Ohio laws as the Revised Code in 1953 somehow affected the meaning of the school board exemption. R.C. 1.01, however, expressly provides that recodification did *not* change the meaning of the General Code, as follows: “The enactment of the Revised Code shall not be construed to affect a right or liability accrued or incurred under any section of the General Code prior to the effective date of such enactment[.]”

<sup>6</sup> Am. Sub. S.B. 181 specifically amended R.C. 3313.44 in the following manner (new language underlined and deleted language with a strikethrough): Real or personal property ~~vested in~~ owned by or leased to any board of education for a lease term of at least fifty years shall be exempt from taxation ~~and from sale on execution or other writ or order in the nature of an execution.~~ Appx. 95.

Simply put, the requirement for exclusive public school use continues after the 2010 amendment as it always has before. There is no hint that the General Assembly, through S.B. 181, intended to depart from the controlling decisional law precedent holding that school boards must use property exclusively for public school use to qualify for exemption. Nor did the *Denison* decision change the meaning of the school board exemption that it did not even address.

**C. Consistent with the fundamental principle to strictly construe tax exemption statutes against exemption, the General Assembly must provide express statutory language in order to exempt property *leased from a public institution for non-public use.***

**1. Realty is generally not exempt when *leased from a public institution for non-public and commercial purposes.***

The well-settled requirement for “exclusive public school use” under the school board exemption is also consistent with Ohio tax exemption law for other publicly-held property. Realty leased *from* a public entity to a private party exclusively for commercial use does not qualify for exemption absent express statutory authorization. In *Parma Heights v. Wilkins*, this Court denied exemption for a publicly-held ice rink leased to a private operator. 105 Ohio St.3d 463 (2005). As the *Parma Heights* Court expressly held, “wherever public property is used by a private citizen for a private purpose, that use generally prevents exemption.” *Id.* at ¶ 12.

Similarly in *Columbus City Sch. Dist. Bd. of Ed. v. Testa*, The Ohio State University, a public entity, sought exemption for a building leased to private tenants including a McDonald’s restaurant and residential tenants. 130 Ohio St.3d 344, 2011-Ohio-5534, ¶¶ 6-8. This Court denied exemption under the state university exemption, R.C. 3345.17, even though the income from the rental property was applied to advance veterinary education. As the Court held, “allowing an exemption for property leased to a commercial tenant is particularly troubling, since it makes the tax exemption inure to the benefit of a commercial enterprise rather than the

intended nonprofit beneficiary.” *Id.* at ¶ 27. This same policy rationale for denying exemption applies to the school board exemption.

Indeed, time and again, this Court has denied exemption for publicly-held property leased to a private party for private use. *See e.g., Cleveland v. Perk*, 29 Ohio St.2d 161, 165 (1972) (publicly-held airport terminal leased to private businesses taxable); *Carney v. Cleveland*, 173 Ohio St. 56, 58 (1962) (publicly-held airport hangers leased to private parties taxable); *Bd. of Park Comrs. of Troy v. Bd. of Tax Appeals*, 160 Ohio St. 451, 454 (1954) (publicly-held sports arena leased to private corporation taxable); *Div. of Conserv. and Nat. Resources v. Bd. of Tax Appeals*, 149 Ohio St. 33 (1948) (publicly-held land leased to fish hatchery business taxable).

Express statutory authorization is therefore necessary to exempt property leased from a public entity. Perhaps the longest standing and most well-settled principle of Ohio tax law is that the claimant to exemption bears the burden to “show that the language of the statute ‘clearly express[es] the exemption’ in relation to the facts of the claim.” *Anderson Maltbie Partnership v. Levin*, 127 Ohio St.3d 178, 2010-Ohio-4904, at ¶ 16; *Cincinnati College v. State*, 19 Ohio 110 (1850); R.C. 5715.271.

Here, there is no express statutory authorization to exempt property leased *from* school boards to a private party based upon the use of the proceeds. Had the General Assembly intended such an exemption, they would have expressly so provided by statute. The municipal college exemption under R.C. 3349.17, for example, expressly provides exemption for municipally owned property where “the rents, issues, profits, and income of which are used exclusively for the use, endowment, or support of such institution.” *See Columbus City Sch. Dist.*, at ¶¶ 26-27, discussing *Univ. of Cincinnati v. Limbach*, 51 Ohio St.3d 6 (1990). In the absence of express statutory authorization, property owned by or leased to a school board

qualifies for exemption under the school board exemption only where it is used exclusively for public purposes.

Contrary to the assertions of the *amicus curiae*, the strict construction principle applies in the same manner to public property and private property. *Columbus City Sch. Dist.*, at ¶ 16, citing *Anderson/Maltbie*, at ¶ 16. Tax exemption statutes are a matter of legislative grace that must be strictly construed against exemption because they are in derogation of equal rights of non-benefitting taxpayers. *Anderson/Maltbie*, at ¶ 16. “In all doubtful cases exemption is denied.” *Id.*

The *amicus curiae* make a misguided attempt to upend this fundamental strict construction principle. Brief of *amicus curiae*, at 5-6. The *amicus curiae* rely upon *Davis v. Cincinnati Camp-Meeting Ass’n* for the false proposition that the strict construction principle must be “relaxed in relation to exemption of religious, charitable, and educational institutions.” 57 Ohio St. 257 (1897). This argument must be swiftly rejected, as the Court in *Davis* stands for the opposite proposition in citing the seminal case of *Cincinnati College v. State* with approval; expressly, tax exemption statutes must be strictly construed against exemption. The *Davis* Court merely recognized that the existence of a charge for services does not necessarily defeat the presence of charitable activity, but that statement addressing the meaning of “charity” surely does not address the strict construction principle.

The *amicus curiae* further take the backwards position that publicly-held property is presumed exempt under exemption statutes. Brief of *amicus curiae*, at 5. *State ex rel. Williams v. Glander*, 148 Ohio St. 188, 201 (1947). The *amicus curiae* are wrong. The *Williams* Court made this statement as a matter of pure dicta, stating that the case would have been resolved the same way “even without benefit of the [backwards] rule of strict construction. *Id.* at 196

(bracketed language added). Moreover, never again has a majority of this Court has cited *Williams* with approval for this proposition.

Instead, this Court has repeatedly and uniformly held that all tax exemption statutes must be strictly construed, private or public property alike. In 2005, in denying exemption to public-held property under the “public property” exemption in R.C. 5709.08, this Court held “[a]ny statutes exempting property from taxation ‘must be strictly construed.’” *Parma Heights*, at ¶ 10, citing *Bethesda Healthcare, Inc. v. Wilkins*, 101 Ohio St.3d 420, ¶ 19. Once again in 2011, this Court recognized the strict construction principle as applied to publicly-held property. *Columbus City Sch. Dist.*, at ¶ 16, citing *Anderson/Maltbie*, at ¶ 16.

The *amicus curiae* finally contend that it would be “an absurd result for a board of education to levy taxes in order to tax itself to pay itself.” Brief of *amicus curiae*, at 11. The *amicus curiae* make this conclusory statement as if it were self-evident, ignoring the many political subdivisions to which property tax revenue is disbursed. In fact, several other political subdivisions other than school boards are recipients of property tax revenue, including counties, municipalities, townships, and various other special districts according to the taxable values and total millage levied by each. See R.C. 321.34, R.C. 321.341, providing for advance payment of property tax revenue to various local authorities.

Cities, counties, and other political subdivisions require revenues to fund the government services they provide, just as do school boards. The interests of other political subdivisions and their constituents thus rebut the amici’s inflammatory claim that the taxation of commercial property held by a school board is “absurd.” Quite the contrary is true; as noted, the General Assembly’s enactment of tax exemptions is a matter of legislative grace and must be strictly construed *against* the claimed exemption because exemption places a disproportionate burden on

all other taxpayers. Here, the real property at issue is held by a commercial farmer lessee and is taxed the same other commercially used leased property, consistent with the strict construction principle.

Under the strict construction principle, then, property is *not* exempt where it is leased *from* a public entity to a private party for non-public use, absent express statutory authorization. The claimant bears the burden to show clear entitlement to exemption.

**2. Through the “abandoned school property” exemption in R.C. 5709.86, the General Assembly has provided express criteria that must be satisfied for exemption to apply where property is leased from school boards.**

**Where each statutory requirement for exemption is not satisfied, such leased property fails to qualify for exemption under both the school board exemption and the specific abandoned school property exemption.**

The school board exemption does not exempt property leased *from* school boards. Instead, by separate statutory exemption in R.C. 5709.86, the General Assembly has granted exemption for a limited subset of property leased from school boards, “abandoned school property.” Under R.C. 5709.86, property leased from a school board may qualify for exemption only if specific criteria are all satisfied. As an initial matter, there is no question that, as the *amicus curiae* concedes, the commercial realty at issue here does *not* qualify for exemption under the abandoned school property exemption. The “abandoned school property” exemption provides three requirements that must be satisfied in the conjunctive to exempt property held by a school board and leased to a third party for non-school purposes:

- The property must have been used for school purposes for at least ten years prior to the lease;
- The school board holding the property must pass a resolution to declare the property “Abandoned school property”; **and**
- The school board must certify a copy of the resolution to the Tax Commissioner.

Talawanda has not satisfied any of these strict requirements with the subject property, let alone all three. *First*, the subject property has not been used for school purposes for ten years, but instead, for all known periods, the property has been used exclusively for residential and commercial farming purposes. Treasurer Davis testified that Leo Erik used the property as a residence until Talawanda acquired the property in 2009. Hr. Tr. 19-21, Supp. 6. Thus, the property was not used for school purposes for any period of time, let alone for at least ten years prior to Talawanda's acquisition.

*Second*, Talawanda has not passed the statutorily-required resolution declaring the property "abandoned school property." As Treasurer Davis testified, there was no act of the school board authorizing Talawanda to enter into the lease with Jim Gifford in this case.<sup>7</sup> Hr. Tr. 32, Supp. 9. Thus, the Talawanda Board did not pass a motion to declare the subject realty "abandoned school property," nor is there a written resolution to that effect.

*Third*, because Talawanda has not passed the required resolution, it could not have filed the resolution with the Commissioner. Talawanda has therefore failed to satisfy each of the strict requirements to exempt property leased *from* a school board to a private party for non-public use. The subject realty thus fails to qualify for exemption under both the specific abandoned school property and more general school board exemption.

If the school board exemption were construed as Talawanda and the *amicus curiae* suggest, *i.e.* to grant exemption to school boards for commercially farmed property, then all three of the express statutory requirements set forth above would be rendered meaningless. Under that interpretation, *any* property that a school board leased to others would be exempt, not just in

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<sup>7</sup> The Talawanda school board also did not pass a resolution declaring the property "abandoned school property" when it entered into leases with Adam Smith on June 3, 2010 and on April 15, 2013. Hr. Tr. 33-34, 39-40, Supp. 9-11; 2013 Talawanda-Smith Lease Agreement), Supp. 55-59.

situations when the school board has satisfied the specific statutory criteria in R.C. 5709.86. But Talawanda cannot use its novel interpretation of the school board exemption to escape the strict requirements under the abandoned school property exemption. To give effect to all statutory language, the general school board exemption must be read in harmony with more specific “abandoned school property exemption.” R.C. 1.47(B); *Church of God in N. Ohio, Inc. v. Levin*, 124 Ohio St.3d 36, 2009-Ohio-5939, 918 N.E.2d 981, ¶ 30 (“a property owner may not evade the limitations imposed with respect to a specific tax exemption by claiming exemption under a broad reading of other exemption statutes”).

The General Assembly did not intend to enact superfluous language. By enacting the abandoned school property exemption in 1994, the General Assembly recognized that it would be impermissible for a school board to lease land for a non-school purposes absent express statutory authority. S.B. 19 (120th G.A.), Appx. 136-141. Otherwise, there would be no reason to adopt the language in the abandoned school property exemption regarding property leased *from* a school board. Neither Talawanda nor the *amicus* have explained the enactment of the abandoned school property exemption, which would be rendered superfluous in part if, as they assert, all property leased from a school board is already exempt pursuant to the school board exemption.

Consistent with a strict construction approach to tax exemption statutes, then, Talawanda must be denied exemption under the general school board exemption and the more specific abandoned school property exemption alike. *Anderson/Maltbie Partnership v. Levin*, 127 Ohio St.3d 178, 2010-Ohio-4904, ¶ 16 (“claimant to exemption bears the burden to “show that the language of the statute ‘clearly express[es] the exemption’ in relation to the facts of the claim.”).

**3. Case law interpreting the former “park district exemption” in former R.C. 5709.10 does not abrogate the longstanding meaning of the school board exemption requiring exclusive public use. When the General Assembly repealed the park district exemption in 1982, it effectively reinstated the “exclusive public use” requirement for park district property pursuant to R.C. 5709.08.**

Talawanda misguidedly relies heavily upon cases addressing the park district exemption under former R.C. 5709.10 to argue that the exemption it seeks, to qualify its commercially leased property under R.C. 3313.44, does not require exclusive public use. Namely, Talawanda relies upon *Atwell v. Bd. of Park Comms.*, 2 Ohio St.2d 257 (1965) and *Montgomery Cty. Park Dist. v. Kinney*, 61 Ohio St.2d 88 (1980).<sup>8</sup>

Talawanda’s reliance on these decisions is clearly misplaced. *First*, as a statutory enactment separate and apart from the school board exemption, the park district exemption, of course, is inapplicable here. In diametric opposition to the case law developed under the school board exemption, moreover, the meaning of the former park district exemption statute at issue in *Atwell* and *Montgomery Cty. Park Dist.* had not been established by a long line of precedent holding that park district property is exempt only where “used exclusively for public [park] purposes.” By contrast, the Ohio Supreme Court and BTA have uniformly interpreted the school board exemption at issue here to require property to be used exclusively for public school purposes, most notably in the *Cincinnati* case.

*Second*, the park district cases simply did not address or consider the General Assembly’s limited grant of powers to public entities pursuant to which those public entities’ may use public

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<sup>8</sup> Talawanda also relies on *Muskingum Watershed Conserv. Dist. v. Walton*, 21 Ohio St.2d 240 (1970), where this Court held the subject realty, park grounds open to the public for hunting and hiking, was exempt as public property used exclusively for public purposes under R.C. 5709.08. The only mention of the form park district exemption in that case is a brief reference to *Atwell*, as follows: “[T]he property involved in *Atwell* belonged to a park district ... which is the sole criteria for tax exemption under [former] R.C. 5709.10.” The statement is pure dicta because the former park district exemption was not even at issue in *Muskingum*. Factually, moreover, the property at issue in *Muskingum* was, in fact, used exclusively for public purposes.

property only for exclusively public purposes. See 61 Ohio St.2d at 88-91. As the appellant correctly notes, the *Montgomery Cty. Park Dist.* stated that “[the former park district exemption] extends a tax exemption to property owned by park districts, regardless of use.” *Id.* at 88. But, Talawanda ignores that the *Montgomery Cty. Park Dist.* Court, in stark contrast to *Cincinnati*, did not provide any analysis or reasoning for this conclusion. In the absence of any such analysis or reasoning, the Court’s unexplained statement in *Montgomery Park Dist.* is not only inapposite, it is unpersuasive when compared to the reasoning and analysis in *Cincinnati*.

*Third*, as a factual matter, in neither of these cases did the Court find that park districts’ use of the realty at issue was not used exclusively for public purposes. In fact, in *Atwell*, this Court held exempt a publicly owned and operated golf course under the park district exemption, affirming the BTA’s decision which had held that, as property both owned and operated by the park district, the property was “used exclusively for public purposes.” 2 Ohio St.2d 257 (1965). And, in *Montgomery Cty. Park District*, the Court and BTA did not undertake to determine whether the park district used the property for exclusive public use, holding that the property qualified for exemption, regardless of use. 61 Ohio St.2d at 88-89.

*Fourth*, the swift legislative response to *Montgomery Park Dist.* defeated the notion that park district property is exempt regardless of use. That is, the General Assembly quickly responded to abrogate the *Montgomery Cty.* Court’s holding that park district property is exempt regardless of use. In 1982, shortly after *Montgomery Cty.* was decided in 1980, the General Assembly amended R.C. 5709.10 to remove the park district exemption. 139 Ohio Laws 2375, HB 293 (114th G.A.), Appx. 70-75. By repealing the specific “park district” exemption statute, the General Assembly thereby subjected park district property to exemption under a different statute, namely the generally applicable “public property” exemption in R.C. 5709.08. Because

R.C. 5709.08 requires a showing of “exclusive public use” in order for property to qualify as exempt, by repealing the specific “park district” exemption, the General Assembly effectively legislated an “exclusive public use” requirement for park district property. Simply put, the General Assembly’s express disapproval of *Montgomery Cty. Park Dist.* through corrective legislation was swift and emphatic.

By sharp contrast to the legislative response to *Montgomery Cty.*, the General Assembly *has not* acted to amend the school board exemption in R.C. 3313.44. In fact, the *Cincinnati* case has remained controlling Ohio Supreme Court precedent since it was first handed down more than 65 years ago. The practical effect of the General Assembly’s inaction with respect to the school board exemption is to approve of the uniform body of decisional law holding that there is an exclusive public school use requirement under the school board exemption. As discussed, the case law affirming the “exclusive public school use” requirement under the school board exemption has particularly strong force where, as here, there is long-standing legislative inaction to change the law and expectations. *Maitland v. Ford Motor Co.*, 103 Ohio St.3d 463, at ¶26 (2004) (“legislative inaction in the face of long-standing interpretation suggests legislative intent to retain the existing law.”).

The cases construing the former park district exemption therefore do not abrogate the longstanding exclusive public school use requirement under the school board exemption.

Based upon the foregoing, property owned by school boards must be used exclusively for public school purposes in order to qualify as exempt under the school board exemption, namely R.C. 3313.44. As applied to the uncontroverted facts, this well-settled legal proposition forecloses Talawanda’s exemption claim. There is no question that Talawanda’s lease of the subject realty to a farmer to commercially farm soybeans and corn was in effect on January 1,

2010, which is the tax lien date for the 2010 tax year at issue. Exemption is thus defeated because such commercial lease use is not public school use at all, let alone the “exclusive” public school use required for exemption. The decision and order of the BTA upholding the Commissioner’s denial of exemption below should be affirmed here as reasonable and lawful.

**Proposition of Law No. II:**

*Under R.C. 5717.02, a notice of appeal does not confer jurisdiction over issues upon the Board of Tax Appeals, and derivatively upon this Court on appeal, unless the issues are clearly specified in the BTA notice of appeal.*

*Moraine Heights Baptist Church v. Kinney*, 12 Ohio St.3d 134, 138 (1984), **approved and followed.**

Talawanda raises additional arguments before this Court for the first time on appeal that are jurisdictionally barred because they were not contested through its notice of appeal to the BTA. *First*, Talawanda argues that the property it leases to a private farmer for commercial farming is exempt pursuant to the public schoolhouse exemption under R.C. 5709.07(A)(1). Though addressed and rejected in the Commissioner’s final determination, Talawanda chose not to raise the public schoolhouse exemption on appeal to the BTA. See Talawanda’s notice of appeal to the BTA, Appx. 190-192. Indeed, as even the *amicus curiae* concede, the subject realty is *not* exempt pursuant to the public schoolhouse exemption. Brief of *amicus curiae*, at 12-13. Thus, it is understandable that Talawanda decided to abandon its claim to the public schoolhouse exemption by omitting it from its notice of appeal to the BTA.

*Second*, in its appeal to this Court pursuant to R.C. 5717.04, Talawanda argues for the first time, that this Court should decide exemption for years subsequent to the 2010 tax year at issue. Talawanda did not raise this claim in its notice of appeal to the BTA either. See, Talawanda BTA notice of appeal, Appx. 190-192. Indeed, Talawanda’s application requested

exemption for the 2010 tax year only, and remission of taxes and penalties for 2008 and 2009. S.T. 15; TC Supp. 17 (application for exemption). Talawanda did *not* request a hearing or consideration of more current tax years at any time during the proceedings before the Commissioner. And, even if Talawanda had done so, the Commissioner's consideration of tax exemption for more current tax years is purely discretionary, and limited only to tax years that commence prior to the Commissioner's issuance of his final determination. See, R.C. 5715.27(H) and the Commissioner's full discussion of that permissive statutory authority, below under sub-section 2 of this Proposition of Law No. II.

To summarize the jurisdictional issues, in its notice of appeal to the BTA, Talawanda did not specifically assign as error either: (a) the failure of the Commissioner to exempt the subject realty under the public schoolhouse exemption in R.C. 5709.07(A); or (b) the failure to consider exemption for post-2010 tax years. Consequently, the BTA had no opportunity to make findings or rule on these claims. Reviewing courts including this Court are derivatively barred from hearing the claim as error on appeal. *Moraine Heights Baptist Church v. Kinney*, 12 Ohio St.3d 134, 138 (1984); *Osborne Bros. Welding Supply, Inc. v. Limbach*, 40 Ohio St.3d 175 (1988).

As a protective matter only, however, in the event that the Court were to reach the merits of Talawanda's claim to exemption under the public schoolhouse exemption, that claim would nonetheless fail on the merits, as more fully explained below in the following section 1 of this Proposition of Law. Further, in section 2, the Commissioner fully discusses the nature of his exercise of authority under R.C. 5715.27(H) as purely discretionary, which he chose not to exercise in this case.

1. **The subject realty does not qualify for the public schoolhouse exemption under R.C. 5709.07(A)(1) because it is leased to a private farmer for commercial farming purposes. Division (B) of R.C. 5709.07 is likewise inapplicable because Talawanda's property is not "held under the authority of a college or university of learning in this state."**

The subject realty that Talawanda leases to a commercial farmer exclusively for farming purposes does not qualify for the public schoolhouse exemption under R.C. 5709.07(A)(1) because the realty is "leased or otherwise used with a view to profit."

Former R.C. 5709.07 applicable to the 2010 tax year provides, in pertinent part:

The following property shall be exempt from taxation: (1) Public schoolhouses, the books and furniture in them, and the ground attached to them necessary for the proper occupancy, use, and enjoyment of the schoolhouses, and **not leased or otherwise used with a view to profit.**

*Anderson/Maltbie Partnership*, 127 Ohio St.3d 178, 2010-Ohio-4904, ¶ 17. The claim to exemption under the public schoolhouse exemption thus fails because the subject realty is leased to a private party contrary to the express language of the exemption statute. *See id.* at ¶ 21.

Talawanda nevertheless argues that its property is exempt pursuant to Division (B) of R.C. 5709.07, which provides as follows:

This section shall not extend to leasehold estates or real property **held under the authority of a college or university of learning in this state;** but leaseholds, or other estates or property, real or personal, the rents, issues, profits, and income of which is given to a municipal corporation, school district, or subdistrict in this state exclusively for the use, endowment, or support of schools for the free education of youth without charge shall be exempt from taxation as long as such property, or the rents, issues, profits, or income of the property is used and exclusively applied for the support of free education by such municipal corporation, district, or subdistrict. Division (B) of this section shall not apply with respect to buildings and lands that satisfy all of the requirements specified in divisions (A)(4)(a) to (c) of this section.

Talawanda specifically argues that its property is exempt pursuant to the language in

Division (B) that provides exemption for leased property where “the rents, issues, profits, and income” of the property is given to school districts.

Talawanda is mistaken. By its plain terms, Division (B) addresses only property held by a “college or university of learning in this state.” Since Talawanda owns the subject realty and is not a college or university, Division (B) is entirely inapplicable here.

The limiting language for the exemptions contained in Division (A) is telling that Division (B) applies only to the public colleges exemption under R.C. 5709.07(A)(4). The public schoolhouse exemption under R.C. 5709.07(A)(1), the house of public worship exemption under R.C. 5709.07(A)(2), and the church camp exemption under R.C. 5709.07(A)(3) are all limited by the statutory language “not leased or otherwise used with a view to profit.”

The public colleges exemption in R.C. 5709.07(A)(4), on the other hand, is limited only by the language “not used with a view to profit” and does not mention leases. The reason subdivision (A)(4) does not prohibit exemption for leased property is because leased public college property is specifically addressed in Division (B). Under Division (B), property leased from public colleges is sometimes exempt, in those expressly identified situations where income from the property is applied exclusively to educational purposes. But Division (B) does not qualify the exemptions under subdivisions (A)(1), (A)(2), or (A)(3), which specifically prohibit exemption for leased property in stark contrast to subdivision (A)(4).

Talawanda relies heavily upon *State ex rel. Boss v. Hess* to suggest that Division (B) *does* apply to the public schoolhouse exemption. 113 Ohio St. 52 (1925). But this argument in clear conflict with the plain language of R.C. 5709.07(A)-(B), as discussed above, was never actually litigated. In *State ex rel. Boss v. Hess*, the respondent county auditor simply conceded that Division (B) authorized exemption unless constrained by Ohio Const. Art. XII § 2. Had the

Court addressed the statutory question in *Boss*, it would have been readily apparent that the owner of the subject realty, the trustees of Woodward High School, was not a “college or university of learning.” Thus, the subject realty there was not “held under the authority” of such institutions and Division (B) was therefore wholly inapplicable to the property in *Boss*.

Talawanda also relies upon an innocuous footnote in *Anderson/Maltbie* partnership to wrongly suggest that Division (B) is applicable here. 127 Ohio St.3d 178, 2010-Ohio-4904, ¶ 33 n.4. This footnote merely cites Division (B) for the proposition that “there may be situations in which an exemption could be allowed under R.C. 5709.07 even though the property generated rental income for the owner.” This footnote, which was dicta in *Anderson/Maltbie*, does not have any implication for the subject realty here.

Still further, Talawanda and the *amicus curiae* rely, as they did with the school board exemption, upon Ohio Attorney General Opinion No. 99-007, Appx. 153-168. As discussed in Proposition of Law No. I, Opinion 99-007 addresses a question on the taxability of internet access *services*, not real or personal property. R.C. 3313.44 and R.C. 5709.07, as exemption statutes for property, are thus inapplicable to the questions that Opinion 99-007 addresses. Opinion 99-007 discusses Division (B) of R.C. 5709.07 in the context of a primary school, but the discussion carries no weight because, to the extent the opinion addresses property rather than services, it is contrary to law. *See Delmond v. Board Investors Co.*, 35 Ohio Op. 419, 424 (8th Dist. 1947), *aff'd*, 148 Ohio St. 301 (1947) (“[w]hile the courts are not bound by the opinions of the attorney general, in the absence of judicial determination or other authority, a county administrative officer, such as a county auditor, may properly consider the opinion of the attorney general as respectable authority to follow. We think this is particularly true when the opinion of the attorney general is ... persuasive in reason and logic”), Appx. 186.

For these reasons, this Court lacks jurisdiction and should refrain from ruling on Talawanda's claim that its property leased for commercial farming is exempt as a public schoolhouse under R.C. 5709.07(A)(1)-(B). Should the Court address the question, it should find that the plain language of Division (B) is inapplicable to the school board property here. Division (B) applies only to property "held under the authority of a college or university of learning in this state," which Talawanda is not.

**2. The Commissioner's choice not to exercise his purely permissive and discretionary authority under R.C. 5715.27(H) to consider exemption for years subsequent to those listed on the application for exemption is not subject to review by the BTA or this Court.**

Even if Talawanda had claimed exemption for tax years subsequent to 2010 in its BTA notice of appeal, the BTA would not have had subject matter jurisdiction to grant the relief that Talawanda requested. Most fundamentally, the Board lacks subject matter jurisdiction because the Commissioner's authority to consider years more current to those on the application for exemption is purely *permissive* and *discretionary*.

R.C. 5715.27(H) provides as follows:

**If the commissioner or auditor determines that the use of property or other facts** relevant to the taxability of property that is the subject of an application for exemption or a complaint under this section **has changed** while the application or complaint was pending, **the commissioner** or auditor **may** make the determination under division (F) of this section [whether property is subject to taxation or exempt therefrom] separately for each tax year beginning with the year in which the application or complaint was filed or the year for which remission of taxes under division (C) of section 5713.08 of the Revised Code was requested, and including each subsequent tax year **during which the application or complaint is pending before the commissioner** or auditor. (Emphasis and bracketing added).

As the underscored language of R.C. 5715.27(H) establishes, the General Assembly has conferred discretionary and conditional authority upon the Commissioner to consider exemption

for tax years “during which the application or complaint is pending before the commissioner.” Specifically, the Commissioner “**may**” consider exemption for subsequent years if (and only if) the Commissioner “determines” that circumstances changed in subsequent years.

In the present case, the Commissioner made no determination as to conditions in subsequent years and Talawanda did not assert a change in conditions during the proceedings before the Commissioner. Instead, the Commissioner issued his determinations making findings with respect to the 2008, 2009, and 2010 tax years. The Commissioner did *not* issue any final determination with respect to subsequent tax years including 2011 and beyond. Thus, the Commissioner’s final determination set forth a detailed review of the relevant law governing the matter and held that, in this case, the subject realty is not exempt for 2008 through 2010 because it is not used for public school purposes. Thus, under the plain meaning of R.C. 5715.27(H), the express condition on which the Commissioner “may” exercise his *permissive right* to decide exemption for subsequent tax years was not met.

If the General Assembly had intended to impose on the Commissioner a *mandatory duty* to address subsequent tax years pursuant to R.C. 5715.27(H), the General Assembly would have used the phrase “shall” instead of the word “may.” In the personal property tax, for example, the General Assembly enacted a mandatory duty using the word “shall” after this Court construed the word “may” as discretionary. *HealthSouth Corp. v. Levin*, 121 Ohio St.3d 282, 2009-Ohio-584, 903, ¶¶ 20-21, citing *Willys-Overland Motors, Inc. v. Evatt*, 141 Ohio St. 402 (1943) and *Michelin Tire Corp. v. Kosydar*, 45 Ohio App.2d 107, 108 (1975). Thus, by employing the phrase “may make the determination [whether property is subject to taxation or exempt therefrom]” in R.C. 5715.27(H), the General Assembly expressly imposed *permissive authority*,

rather than a *legal duty*, on the Commissioner to decide exemption for years subsequent to those on the application.

Accordingly, even assuming *arguendo* that the Commissioner determined that there were changed conditions at some time during 2011 or beyond (he did not), the BTA and this Court would lack subject matter jurisdiction to review that issue. The Commissioner would have had to additionally determine whether the subject realty was exempt during subsequent years to form a basis for appeal. But again, the General Assembly has *not* imposed any legal duty on the Commissioner to decide exemption for subsequent years to the years listed on the application for exemption. The BTA, and derivatively this Court, thus lack jurisdiction over Talawanda's untimely raised issue. For the BTA or this Court to hold otherwise would impermissibly contravene the General Assembly's express legislative will. *R.W. Sidley, Inc. v. Limbach*, 66 Ohio St.3d 256, 257(1993).

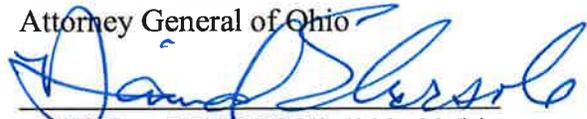
To the extent that Talawanda is arguing that conditions in years subsequent to 2010 affected the exempt status of the subject realty for 2010 tax year, Talawanda is again mistaken. It is well-settled under Ohio law that commercial use of property defeats exemption pursuant to the prospective use doctrine. *Carney v. Cleveland City Sch. Dist. Pub. Lib.*, 169 Ohio St. 65, syllabus (1959). Thus, as discussed in Proposition of Law No. I, the commercial farming on the property defeats exemption notwithstanding subsequent developments regarding the use of the property while the case is on appeal.

## CONCLUSION

The uncontroverted facts establish that Talawanda leases the subject realty to a private farmer to commercially farm soybeans and corn. By the plain terms of R.C. 3313.44 as construed in light of attendant circumstances regarding limited powers of school boards, and in conformance to a uniform body of decisional law, the commercially farmed property at issue fails to qualify as exempt because it is not used exclusively for public school purposes. Thus, this Court should affirm as reasonable and lawful the BTA's decision and order below upholding the Commissioner's denial of exemption.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Appellee Tax Commissioner's Merit Brief was served upon the following by U.S. regular mail on this 19th day of March, 2015:

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