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HB 126 Almost Two Years Later - Implementation Status

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In April 2022, Ohio Governor DeWine signed Am Sub. House Bill 126, 134th General Assembly (HB 126); a significant restriction on the activities of local Boards of Education (BOEs) in pursuing property taxpayers for increases in tax. Ohio is one of a very limited number of states that allows this third-party interference in the property tax assessment process. The risk of BOE action has been a very significant concern for investors considering investments in the state. Prior to this law, BOEs could initiate these cases at any time and for any reason.

Here is a summary of the significant changes:

1. Limits the initiation of complaints by non-property owners, excluding certain tenants, to the county board of revision (BOR) to situations where (1) "the property was sold" in a recent arm's length sale; (2) before the tax year for which the complaint is filed; and, the sale price exceeds the current assessment by 10% and \$500,000 (adjusted for inflation).
2. The BOEs must first notify the property owner of the intent to file and pass a resolution authorizing the filing.
3. Prohibits BOEs from initiating appeals to the Ohio Board of Tax Appeals (BTA) from a decision of the BOR.
4. Eliminates the process of "out-of-court" settled agreements between property owners and BOEs.

Where Does the New Law Stand Today? A Divided State

While any new tax legislation typically has a period of implementation and sorting as to what the new language really means, HB 126 was a challenge from the outset because of the stark differences in how the changes were initially received.

First, the good news. The vast majority of BOEs and their counsel are following the new law. The biggest open question, discussed below in more detail, is interpreting what “the property was sold” truly means, but this is otherwise being followed.

The bad news is that this does not apply everywhere. Primarily in Central Ohio, BOE counsel is choosing to ignore the law and instead has initiated a constitutional challenge to the restrictions placed upon the BOEs. This has not gone unnoticed by the Ohio General Assembly, but, as litigation swells the dockets of the BTA, county common pleas courts and district courts of appeals, remedial legislation is stalled in the Ohio House of Representatives.

This status report focuses on efforts to judicially overturn the new law, ignore its meaning or efforts to circumvent the restrictions placed upon BOEs by HB 126. A detailed analysis of each of these issues is beyond the scope of this summary. However, if you would like more information, please contact the author or your Vorys attorney.

What Does “The Property Was Sold” Mean?

The new jurisdictional requirements for a complaint to be initiated by a non-property owner require 1) a sale; and 2) a sale price that exceeds an established threshold. This is significant. When a deed interest in a property is sold for value, Ohio requires the filing of a conveyance fee statement (DTE-100) and the payment of a conveyance fee that is calculated on the sale price. In these transactions, the sale price is readily available, and the jurisdictional requirements related to a sale, the timing of the sale and whether the sale exceeds the jurisdictional requirements are met on the face of the form. A party initiating such a complaint can establish that it has jurisdiction to do so.

However, the form is not filed when a legal entity owning property is sold. In those instances, the sale price is not recorded and is not a public record. A party filing a complaint does not have access to discovery or subpoena power at the BOR level to provide access to such information. The sale requirement needs to be read with the jurisdictional threshold requirement which together appear to support the position that a recorded sale is required. BOEs are challenging this position and litigation is on-going throughout the state.

While this litigation is on-going, the Ohio General Assembly has also taken steps to clarify the intent of HB 126. Am. Sub. House Bill 187 and House Bill 344, 135th General Assembly, (HB 187 and HB 344, respectively) are intended to retroactively address the HB 126 changes. Pertinent here would be to specify that the sale price *as recorded on the conveyance fee statement* would need to exceed the statutory threshold. Since only deed transfers are recorded on the conveyance fee statements, entity sales would not trigger a tax increase filing under the proposed legislation. **For this reason, all contemplated acquisitions should use this structure.** HB 187 passed the Senate 31-0 in December 2023 and has been pending in the House since that time for a concurrence vote. The timing of that vote is unclear as of this writing. HB 344 is still pending in the House Ways and Means Committee.

Notification Requirements Have Not Provided Any Protections

The BOEs have been following the new statutory notification to property owners. The thought was that these open hearings to authorize the filing of a complaint would give property owners a meaningful opportunity to talk to decision-makers before a complaint is initiated and minimize unnecessary complaints. That has not happened.

In most cases, the affected BOE's accept without question the request from counsel and the BOE Treasurer to file the complaint. Complaints have been avoided only a few times out of hundreds of instances.

The Attempt to Limit Appeals Has Led to More Appeals

As HB 126 was going through the legislative process, the Senate sought to eliminate the right of BOE to initiate any complaint. A "grand compromise" was reached. It allowed BOE complaints, subject to the restrictions discussed above, but the BOE could not initiate appeals to the BTA. The BOE could participate only when the property owner appealed.

Again, a split across the state emerged. Most BOEs are respecting this change in law and the legislative intent behind it to limit the number of appeals. It is the Central Ohio BOEs, and one particular BOE counsel, that are ignoring these limits and creating ways to get around the restrictions. These "work arounds" include taking liberties with timing and tax years as well as expanding the forum of appeal.

As a result, at least in Central Ohio, the number of appeals has doubled since the passage of HB 126. Many cases are stayed pending the outcome of appeals and possible remedial legislation. In the interim, property owners are in a limbo that HB 126 was intended to avoid.

Constitutional Challenges to HB 126

In March 2023, several Franklin County BOEs and the retired Treasurer of the Columbus BOE (who is one of the "strawmen") filed a complaint in Franklin County Common Pleas Court (2023-CV-001706). The Ohio Attorney General filed a Motion to Dismiss. A group of property owners, led by Vorys, filed a motion to intervene and support for the AG's motion to dismiss. The motions remain pending. The hearing originally scheduled for March did not go forward, and the parties await further guidance from the court.

One of the "strawmen," is also lead counsel for the BOEs. That lawyer filed an appeal to the BTA in his own name in several Delaware County matters and raised constitutional arguments. The BTA has stayed the numerous other appeals, but a "lead" case went to hearing on February 20, 2024. The BTA does not have jurisdiction over constitutional matters but is required to allow the BOE to make a record through a hearing. On March 15, 2024, the BTA issued its decision upholding the dismissal below and stating that it did not have jurisdiction over the constitutional claims. An appeal to the district court of appeals is likely.

In summary, the changes made by HB 126 were intended to stabilize the real estate market in Ohio by addressing punitive actions initiated by BOEs. The majority of BOEs have followed and complied with the new statutes and their underlying objectives. Others have ignored them. They have crafted ways to work around them and have challenged the authority of the General Assembly to regulate the actions of a

government body that the General Assembly itself created by statute.

A full and complete analysis of each of these issues is beyond the scope of this summary. This is intended to raise awareness of these issues pending. Please reach out to the author or your Vorys attorney if you have any questions.