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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, 134<sup>th</sup> 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 limited number of states that allows this third-party interference in the property tax assessment process. Prior to enactment of this law, BOEs could initiate cases seeking increases in value at any time and for any reason. The risk of BOE action has been a significant concern for investors considering investments in the state.

Here is a summary of the significant changes brought about by HB 126:

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 formal 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" settlement 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 the other requirements in the law are being followed by the BOE.

The bad news is that this BOE behavior does not apply evenly throughout Ohio's 88 counties. Primarily in Central Ohio, BOE counsel is choosing to ignore the law and 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 the BOE's efforts to judicially overturn the new law, ignore its meaning and other 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 change 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 deed interest transactions, the sale price is readily and publicly 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 DTE 100 form. A party initiating a complaint under this set of circumstances can establish that it has jurisdiction to do so using public records.

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 obtain access to such information. The sale requirement of HB 126 should be read with the jurisdictional threshold requirement which together 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, 135<sup>th</sup> General Assembly, (HB 187 and HB 344, respectively) are intended to retroactively address and clarify the HB 126 changes. These changes include specifying 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 entity 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 required new statutory notification to property owners. The thought was that these open hearings at the BOE to authorize the filing of a complaint would give property owners a meaningful opportunity to talk to decision-makers before a complaint is initiated, ultimately serving as a means to minimize unnecessary complaints. That has not happened.

In most cases, the affected BOEs 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 in cases at the BTA 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 to limit the number of appeals. It is the Central Ohio BOEs, and one particular BOE counsel, that are ignoring these limits and attempting to create ways to get around the restrictions. These “work arounds” include taking liberties with timing of sales transactions 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) challenging the constitutionality of HB 126. The Ohio Attorney General filed a Motion to Dismiss. A group of property owners, led by Vorys, filed a motion to intervene supporting 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 about HB 126. 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. The lawyer filed an appeal to the Fifth District Court of Appeals in own name. The case has been fully briefed by the parties and oral argument was held on October 10, 2024. Vorys is monitoring for a decision from this Court, which could come as soon as the end of 2024.

## Where Things Stand as We Near the End of 2024

In summary, the changes made by HB 126 were intended to stabilize the real estate market in Ohio by addressing punitive increase complaints initiated by BOEs. The majority of BOEs have followed and complied with the new statutes and the underlying objectives. Other BOEs 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.