

IN THE SUPREME COURT OF OHIO

Gasper Township Board of Trustees, : Case No. 07-1282
: :
Appellant, : Appeal from the
: : Ohio Board of Tax Appeals
: : Case No. 2004-T-1152
v. : :
: :
Preble County Budget Commission, et al., : :
: :
Appellees. : :

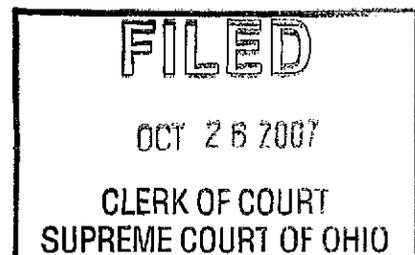
**MERIT BRIEF OF APPELLEES VILLAGES OF ELDORADO, GRATIS, LEWISBURG,
NEW PARIS, WEST ALEXANDRIA, WEST MANCHESTER AND VERONA**

John W. Bentine (0016388)
Elizabeth J. Watters (0054055)
Lark T. Mallory (0078631)
CHESTER, WILLCOX AND SAXBE, LLP
65 E. State Street, Suite 1000
Columbus, OH 43215-3413
(614) 221-4000
(614) 221-4012 – Facsimile
COUNSEL FOR APPELLEES
VILLAGES OF ELDORADO, GRATIS,
LEWISBURG, NEW PARIS, VERONA,
WEST ALEXANDRIA & WEST MANCHESTER

John R. Varanese (0044176)
88 East Gay Street, Ste. 1000
Columbus, Ohio 43215
(614) 220-9440
(614) 220-9441 – Facsimile
COUNSEL FOR APPELLANT
GASPER TOWNSHIP BOARD
OF TRUSTEES

Richard F. Hoffman (0071205)
101 East Sandusky St. Ste. 320
Findlay, Ohio 45840-3235
(614) 559-0605
(614) 559-0632 – Facsimile
COUNSEL FOR APPELLEE
PREBLE COUNTY BUDGET COMMISSION

APPELLEE VILLAGE OF CAMDEN
c/o Rebecca Wilson, Clerk
383 Sugar Valley Drive
Camden, Ohio 45311



APPELLEE DIXON TOWNSHIP

c/o Catherine S. Combs, Clerk
928 Dove Road
Eaton, Ohio 45320

APPELLEE VILLAGE OF CAMDEN

c/o Rebecca Wilson, Clerk
383 Sugar Valley Drive
Camden, Ohio 45311

APPELLEE VILLAGE OF COLLEGE CORNER

c/o Jennifer Woods, Clerk
209 Main Street
College Corner, Ohio 45003

APPELLEE VILLAGE OF WEST ELKTON

c/o William T. Crawford, Clerk
150 S. Main Street, POB 42
West Elkton, Ohio 45070

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF FACTS 1

ARGUMENT 7

Proposition of Law: The Ohio Board of Tax Appeals Did Not Err
In Ruling That It Did Not Have Subject Matter Jurisdiction
Over An Appeal Where Appellant Failed To Comply With
The Filing Requirements of R.C. 5705.37 And None Of The
Appellees, Whose Rights Were Substantiall Affected By The
Appeal, Where Given Notice Of The Filing Of Appellant’s Notice of Appeal 7

CONCLUSION 19

CERTIFICATE OF SERVICE 20

TABLE OF AUTHORITIES

Cases

<i>Board of Edn. of Mentor Exempted Village School Dist. v. Lake Cty. Bd. Of Revision</i> (1980), 61 Ohio St.3d 332, 401 N.E.2d 435	9
<i>Breidenback v. Mayfield</i> (1988), 37 Ohio St.3d 138	12
<i>Broad & Jackson, Ltd. v. Ashtabula County Board of Revision</i> (11 th Dist. 2006), unreported, 2006 WL 1313090	13
<i>Budget Comm. of Brown Cty. v. Georgetown</i> (1986), 24 Ohio St.3d 33, 492 N.E.2d 826.....	9
<i>Cincinnati v. Budget Comm. of Hamilton Cty.</i> (1988), 35 Ohio St.3d 252, 253, 520 N.E.2d 232	8
<i>City of Cincinnati v. Budget Commission of Hamilton Cty.</i> (1979), 59 Ohio St.2d 43, 391 N.E.2d 734.....	9
<i>City of Girard v. Trumbull County Budget Commission</i> (1994), 70 Ohio St.3d 187, 1994-Ohio-169, 638 N.E.2d 67	8
<i>Fox v. Eaton Corp.</i> (1976), 48 Ohio St.3d 236, 358 N.E.2d 536, overruled on other grounds by <i>Manning v. Ohio State Library Bd.</i> (1991), 62 Ohio St.3d 24, 577 N.E.2d 650.....	12
<i>Fulton v. State, ex rel. General Motors Corp.</i> (1936), 130 Ohio St. 494	14
<i>Huber Heights Circuit Courts, Ltd. v. Carne</i> (1996), 74 Ohio St.3d 306, 1996-Ohio-157, 658 N.E.2d 744.....	10
<i>Jenkins v. Keller</i> (1966), 6 Ohio St.2d 122.....	12
<i>In re Kerry Ford, Inc.</i> (1995), 106 Ohio App.3d 643, 66 N.E.2d 1157.....	12
<i>Painesville v. Lake County Budget Commission</i> (1978), 56 Ohio St.2d 282, 383 N.E.2d 896	8
<i>Queen City Valves, Inc. v. Peck</i> (1954), 161 Ohio St. 579, 120 N.E.2d 310.....	8
<i>State ex rel. Westchester v. Bacon</i> (1980), 61 Ohio St.2d 42	17
<i>State of Ohio, ex rel. City of Englewood, et al. v. Montgomery County Budget Commission</i> (2 nd Dist. 1982), unreported, 1982 WL 3819	17
<i>Village of North Perry v. Lake County Budget Commission</i> (1994), 70 Ohio St.3d 46, 1994-Ohio-28, 635 N.E.2d 1264	9

Statutes

R.C. 4903.21 16
R.C. 5703.056 4
R.C. 5705.27 6
R.C. 5705.37 *passim*
R.C. 5717.05 10
R.C. 5747.55 8,9

Other Authority

Ohio Civ.R. 12(H)(3) 12
S.Ct. Prac. R. V, Section 4 17

**MERIT BRIEF OF APPELLEES VILLAGES
OF ELDORADO, GRATIS, LEWISBURG, NEW PARIS,
WEST ALEXANDRIA, WEST MANCHESTER AND VERONA**

STATEMENT OF FACTS

Appellees Villages of Eldorado, Gratis, Lewisburg, New Paris, West Alexandria, West Manchester and Verona (“Appellees Villages”) do not contest Appellant Gasper Township Board of Trustees’ (“Gasper”) Statement of Facts (App. Br. at 1-2) except as follows:

Contested Fact – The October 6, 2004 Appeal

Appellees Villages do not agree with Gasper’s assertion that it filed its Notice of Appeal with the Ohio Board of Tax Appeals (“BTA”) on October 15, 2004. (App. Br. p. 1). The record in this case is that Gasper filed a Notice of Appeal with the BTA on October 6, 2004, not October 15, 2004 – nine (9) days before Gasper took formal action approving the appeal of the distribution of funds by the Preble County Budget Commission (the “Budget Commission”) from its Local Government Fund and the Local Government Revenue Assistance Fund for 2005. The Notice of Appeal filed on October 6, 2004, which is the first document in the record on appeal, was in the form of a letter by the Gasper Township Clerk on Gasper letterhead and addressed to the BTA in care of its chief. The letter/notice of appeal enclosed correspondence, calculations/spreadsheets and documentation in support of Gasper’s request for relief and assertion to the BTA that the Budget Commission’s 2005 calculations were wrong. The notice of appeal/letter included a complaint about the distribution of local government funds by the Budget Commission for the year 2005, and a formal request that the BTA take action and “review” the method of distribution adopted by the Budget Commission.

The Notice of Appeal was accepted by the BTA, was filed with the BTA on October 6, 2004, and was treated by the BTA as a formal notice of appeal by Gasper under Ohio law. Upon receiving the Notice of Appeal on October 6, 2004, the BTA opened an appeal file on behalf of Gasper and assigned Case No. 2004-T-1152 to the filed October 6, 2004 appeal. The Chief Attorney Examiner Bradford P. Arnold then wrote to the Gasper Clerk on October 8, 2004 – the second document in the record on appeal – advising Gasper that the October 4, 2004 letter filed on October 6, 2004 would be “treated, at this time, as a notice of appeal” of “action taken by the Preble County Budget Commission regarding the distribution of Undivided Local Government and Revenue Assistance Funds.” Examiner Arnold also advised Gasper that the treatment of Gasper’s October 4, 2004 letter as a notice of appeal “should not be interpreted to suggest that the filing has been deemed to satisfy all the jurisdictional prerequisites imposed by statute since such issues are subject to review at any time.” *Id.* Chief Attorney Examiner Arnold then concluded his letter by advising Gasper that as a result of Gasper’s October 4, 2004 correspondence, Gasper would be accorded an opportunity to pursue its claims before the BTA, should the filing be found to vest jurisdiction in the board. *Id.*

The October 6, 2004 Notice of Appeal was never dismissed or voluntarily withdrawn. The case number for Gasper’s appeal of the 2005 ULGF and ULGRAF distribution by the Budget Commission was never changed after October 6, 2004. And this notice of appeal was considered to be the appeal of Gasper by the BTA for all purposes.

Shortly after the appeal was filed by Gasper, the BTA formally advised Gasper and the Auditor for Preble County on October 26 & 27, 2004, that “[a] notice of appeal

was filed with the Board of Tax Appeals on 10/06/2004” by Gasper Township, and that “[t]he matter has been docketed as Case No. 2004-1152 and assigned to STEVEN L. SMISECK, Hearing Examiner for the Board.” (emphasis added). The BTA also advised Gasper that its appeal filed with the BTA on October 6, 2004 “will be scheduled either for a hearing on the merits, or for a mediation conference. . . . [and] [i]n all future correspondence with the Board regarding this matter, please utilize the case number assigned above.” *Id.* This case number was used for Gasper’s appeal throughout the appeal process, and the BTA decision and order from which Gasper is appealing was issued in Case No. 2004-T-1152, docketed on October 6, 2004.

On October 15, 2004, the Gasper Township Clerk sent a second letter to the BTA on the same Gasper letterhead with regard to the 2005 allocations and distributions. Again, Gasper “respectfully request[ed]” the BTA review the Budget Commission’s 2005 distribution. *Id.* The letter was filed with the BTA on October 18, 2004 in Case No. 2004-T-1152, and “2004T1152” was handwritten on the file copy of the letter. Gasper asserts that this letter was its Notice of Appeal in Case No. 2004-T-1152. Gasper attempted to mail to the Budget Commission the October 15, 2004 letter and accompanying documents that it filed with the BTA on October 18, 2004 – but not the original Notice of Appeal and documentation from October 6, 2004 – under R.C. 5705.37.

Indeed, there is nothing in the record to suggest that an attempt was made by Gasper to file the October 6, 2004 Notice of Appeal with the Budget Commission either in person or by certified mail delivery. Instead, the record reflects Gasper’s attempts to mail documents to the Budget Commission that were subsequently filed with the BTA on

October 18, 2004, after the appeal had already been taken and after the BTA had given Gasper notice that its appeal had been received, docketed, a case had been opened and a hearing examiner assigned to the appeal. These subsequent documents, including the alleged October 15, 2004 Notice of Appeal, were merely treated by the BTA as additional documents filed in Case No. 2004-T-1152.

Gasper's Merit Brief filed with this Court fails to address the fact that Gasper never filed its October 6, 2004 Notice of Appeal with the Budget Commission by any of the means provided in sections 5703.056 and 5705.37 of the Revised Code. Gasper admits that it was the October 15, 2004 letter filed on October 18, 2004 that it attempted to mail to the Budget Commission by certified mail. (App. Br. p. 2).

Additional Facts

Additionally, Appellees Villages add the following to the Statement of Facts relevant to this appeal:

With regard to the June 10, 2005 evidentiary hearing before the BTA, the record is clear that there were no appearances at the hearing by Appellees Villages. The failure of Appellees Villages to appear at the hearing was noted by the BTA in the hearing record. The Budget Commission admits that because it did not receive a copy of the Notice of Appeal as required by R.C. 5705.37, and it did not notify any of the persons who were parties to the proceeding before the Budget Commission, including, but not limited to, Appellees Villages, of the alleged filing of the Notice of Appeal by Gasper as required by R.C. 5705.37. It is also undisputed that the Budget Commission did not file proof of notice to all parties, including Appellees Villages, with the BTA as required by R.C. 5705.37.

When Appellees Villages became aware of the appeal, they retained legal counsel. Chester, Willcox & Saxbe LLP filed its initial notice of appearance on behalf of some of the Appellees Villages on July 7, 2006. On September 19, 2006, Appellees Villages filed a motion to dismiss for lack of jurisdiction. In their motion, Appellees Villages asserted that the BTA did not have subject matter jurisdiction because (i) Gasper failed to file a Notice of Appeal with and/or deliver the Notice of Appeal to the Budget Commission as required by R.C. 5705.37, and (ii) Appellees Villages were not given notice of the appeal and proof of notice to Appellees Villages was not filed with the BTA as required by R.C. 5705.37.

The record on appeal contains the affidavits of (i) Harold E. Yoder, Auditor for Preble County and the Secretary of the Budget Commission, (ii) Martin P. Votel, Prosecutor for Preble County and the Budget Commission Chairperson, (iii) Mindy S. Robbins, Chief Deputy Auditor for Preble County and the individual who records the minutes for the Budget Commission, (iv) Brenda White, Treasurer for Preble County and a member of the Budget Commission, and (v) the respective Clerks for Appellees Villages, who are responsible for receipt of certified mail sent to Appellees Villages. These affidavits, respectively admitted into evidence as Exhibits B through L at the BTA January 9, 2007 evidentiary hearing on the Budget Commission's and Appellees Villages' motions to dismiss, conclusively establish that Gasper failed to file a Notice of Appeal with the Budget Commission, and that the Budget Commission, in turn, failed to notify parties to the proceeding before the Budget Commission of the Notice of Appeal by certified mail and to file proof of such notice with the BTA.

Gaspar neither refutes nor contests the lack of notice to Appellees Villages. *See* Gaspar's Memorandum Contra Appellees Villages' Motion to Dismiss. In fact, Gaspar agreed at the evidentiary hearing "...that under the procedure or under the facts of this case, there are issues, most notably with regards to the Villages getting service." (Jan. 9, 2007 Hearing Tr. 14) (emphasis added.). Even though Gaspar agreed and acknowledged the procedure and facts were "real issues," Gaspar asserted that those issues could be easily remedied without dismissing the Notice of Appeal and Gaspar had complied with the statute based upon an affidavit suggesting that a Ms. Debra Brock received the Notice of Appeal on behalf of the Budget Commission. Jan. 9, 2007 Hearing Tr. P. 14-15.

At the January 9, 2007 hearing, however, the testimony of Ms. Brock did not support Gaspar's claims of service on the Budget Commission. Ms. Brock testified that she was an employee of the Preble County Commissioners – not the Budget Commission – and served as the front desk receptionist for the County Commissioners. (Jan. 9, 2007 Hearing Tr. p. 17). According to her testimony, Ms. Brock is not now nor has she ever been an employee of the Budget Commission or of any individual member of the Budget Commission. (Jan. 9, 2007 Hearing Tr. p. 9, 23). Ms. Brock is not an employee of the county auditor, the county prosecutor, or of the county treasurer – the three elected officials who comprise the Budget Commission under R.C. 5705.27. (Jan. 9, 2007 Hearing Tr. p. 20, 23). Additionally, Ms. Brock testified that she was never granted authority in any way, shape or form to act on behalf of the Budget Commission or of any member of the Budget Commission. (Jan. 9, 2007 Hearing Tr. p. 23). It was her belief that she had no authority to act on behalf of the Budget Commission. (Jan. 9, 2007 Hearing Tr. p. 23). Ms. Brock's testimony about her relationship with the County

Commissioners and the Budget Commission was supported by the testimony of Melinda S. Robbins, the Chief Deputy of the Preble County Auditor's office, at the evidentiary hearing. Ms. Robbins maintains the Budget Commission records on behalf of the Auditor, who is Secretary of the Budget Commission *Id.* at 38-42.

Accordingly, the uncontested record is clear that Gasper never filed its October 6, 2004 Notice of Appeal with the Budget Commission. With regard to the October 15, 2004 "Notice of Appeal," which was filed in the already pending appeal triggered by the October 6, 2004 Notice of Appeal, Gasper did not file the pleadings with the Budget Commission in the manner required by Ohio law. Moreover, Appellees Villages never received notice of the appeal, and proof of notice to Appellees Villages was never filed with the BTA as required by Ohio law. As a result, Gasper's appeal was jurisdictionally defective and the BTA came to the only conclusion that it could: it did not have subject matter jurisdiction in Case No. 2004-T-1152.

ARGUMENT

Proposition of Law: The Ohio Board of Tax Appeals Did Not Err In Ruling That It Did Not Have Subject Matter Jurisdiction Over An Appeal Where Appellant Failed To Comply With The Filing Requirements of R.C. 5705.37 And None Of The Appellees Villages, Whose Rights Were Substantially Affected By The Appeal, Were Given Notice Of The Filing Of Appellant's Notice Of Appeal

In its Merit Brief, Gasper asserts that the sole issue for review by the Court is "whether Gasper strictly complied with the requirements imposed upon it by R.C. 5705.37 in order to perfect its appeal to the BTA." (App. Br. p. 3). This assertion is incorrect. The issue for review by the Court is whether the BTA had subject matter jurisdiction over Gasper's appeal. Appellees Villages assert that the BTA did not have jurisdiction for three reasons: (i) First, Gasper did not comply with the jurisdictional

requirement of filing its October 6, 2004 Notice of Appeal with the Budget Commission; (ii) Second, Gasper did not comply with the jurisdictional requirement of filing its October 15, 2004 Notice of Appeal with the Budget Commission; and (iii) Third, Gasper did not ensure that there was compliance with the jurisdictional requirement that the notice of appeal be served by certified mail on necessary parties named as appellees who were parties to the proceeding before the Budget Commission and whose rights would be substantially affected by the appeal.

**1. Ohio Law Requires Compliance With The Mandatory
And Jurisdictional Notice Requirements Of R.C. Section 5705.37**

“The right to appeal granted by R.C. 5705.37 is statutory, and an appellant must follow the statute.” *Cincinnati v. Budget Comm. of Hamilton Cty.* (1988), 35 Ohio St.3d 252, 253, 520 N.E.2d 232, 234. If there has been a failure to comply with the appropriate statutory requirements, the BTA lacks subject matter jurisdiction to hear the appeal. *Painesville v. Lake County Budget Commission* (1978), 56 Ohio St.2d 282, 284, 383 N.E.2d 896. In addition, it is well-established law in Ohio that “. . . [w]here a statute confers the right of appeal, adherence to the conditions thereby imposed is essential to the enjoyment of the right conferred.” *Queen City Valves, Inc. v. Peck* (1954), 161 Ohio St. 579, 581, 120 N.E.2d 310.

R.C. 5747.55 states that an appeal thereunder may be taken “in the manner” provided in R.C. 5705.37. R.C. 5705.37 provides in pertinent part that “[a]n appeal under this section shall be taken by the filing of a Notice of Appeal, either in person or by certified mail, express mail, or authorized delivery service . . . with the board *and* with the commission. . . . Upon receipt of the Notice of Appeal, the commission, *by certified mail*, shall notify all persons who were parties to the proceeding before the commission of the

filing of the Notice of Appeal and shall file proof of notice with the board of tax appeals.” (emphasis added.)

This Court strictly interprets both R.C. 5747.55 and 5705.37. *See, e.g., City of Cincinnati v. Budget Commission of Hamilton Cty.* (1979), 59 Ohio St.2d 43, 46, 391 N.E.2d 734. The right of appeal granted by R.C. 5705.37 is statutory, and that statutory scheme must be followed. It cannot be waived or “cured” outside of the period allowed to perfect the appeal. If the appealing party fails to assure compliance with the statutory requirements, the BTA lacks subject matter jurisdiction. *City of Cincinnati*, *supra*, 59 Ohio St.2d 43; *Village of North Perry v. Lake County Budget Commission* (1994), 70 Ohio St.3d 46, 47, 1994-Ohio-28, 635 N.E.2d 1264; *Budget Comm. of Brown Cty. v. Georgetown* (1986), 24 Ohio St.3d 33, 492 N.E.2d 826.

In countless cases, this Court has held that failure to comply with the specific statutory provisions of R.C. 5705.37 either divests the BTA of subject matter jurisdiction or renders an appeal untimely. Specifically, **compliance with the mandatory notice requirements of R.C. 5705.37 is necessary to perfect an appeal, and “substantial compliance” with the notice requirements is not sufficient for purposes of R.C. 5705.37.** *See City of Girard v. Trumbull County Budget Commission* (1994), 70 Ohio St.3d 187, 189-90, 1994-Ohio-169, 638 N.E.2d 67; *Village of North Perry*, 70 Ohio St.3d at 46 (Appellant Village of North Perry failed to file its appeal within 30 days of receiving the official certificate of resources. The Board properly dismissed the appeal); *Bd. of Edn. of Mentor Exempted Village School Dist. v. Lake Cty. Bd. of Revision* (1980), 61 Ohio St.3d 332, 399, 401 N.E.2d 435 (affirmed Board of Tax Appeals’ dismissal of a Notice of Appeal because appellant had not filed a copy of the Notice of Appeal with the

Commission of Tax Equalization, a requirement since repealed, regardless of Commissioner's waiver of notice).

In *Huber Heights Circuit Courts, Ltd. v. Carne* (1996), 74 Ohio St.3d 306, 1996-Ohio-157, 658 N.E.2d 744, this Court held that failure to serve notice of the appeal on a party to the hearing before a county board warranted reversal, since the statute prescribing appeal of tax matters was jurisdictional, not procedural, and had to be followed precisely. In *Huber*, appellants failed to serve copies of the notices of appeal from the dismissal of their real property valuation complaints on the board of education. This Court found that the board of education was a party to the proceeding before the county board of revision, and the statutory requirement that all parties to proceedings before the board be served with the notice of the appeal was jurisdictional, requiring appellants to follow the statute precisely to avoid dismissal of their appeal. The Court also found that for an appeal under R.C. 5717.05 the statutory requirements of who may appeal, how one appeals, whom the appellant names as appellees, and how the appellant serves appellees with notice of the appeal are "mandatory and jurisdictional." *Id.* In so ruling, the Court relied upon its prior decisions regarding appeals granted by R.C. 5705.37 and the strict adherence to the conditions of that statute imposed by the Court. As a result, under this Court's analysis in *Huber*, the statutory requirements of R.C. 5705.37 of how one files an appeals, whom the appellant names as appellees and how all of the appellees are served are mandatory and jurisdictional.

2. The Board Did Not Have Subject Matter Jurisdiction Over Gasper's Appeal And Properly Dismissed The Appeal Due To Gasper's Failure To Deliver The October 6, 2004 Notice of Appeal To The Budget Commission

Gasper did not properly perfect its appeal. The uncontested record is clear that the appeal was filed with the BTA on October 6, 2004. Gasper received notice from the BTA on October 8, 2004 and again on October 26, 2004 that its appeal had been filed, its case docketed and a hearing officer was assigned to the case as a result of its October 4, 2004 letter/Notice of Appeal filed on October 6, 2004. Gasper never attempted to file the October 6, 2004 Notice of Appeal with the Budget Commission either in person or by certified mail. It only attempted to send the Budget Commission its alleged October 15, 2004 Notice of Appeal, a document which the BTA filed as a pleading in the already opened appeal, Case No. 2004-T-1152, that was docketed on October 6, 2004.

Gasper never dismissed or withdrew its October 6, 2004 appeal. All proceedings relative to Gasper's appeal of the Budget Commission's 2005 ULGF and ULGRAF allocation and distribution of funds were undertaken in Case No. 2004-T-1152, including the BTA's June 15, 2007 decision and order dismissing the Notice of Appeal for lack of subject matter jurisdiction. As a result, there can be no argument that Gasper complied with the mandatory jurisdictional requirements of R.C. 5705.37. Gasper did not comply with the "affirmative duty" that it admits was imposed upon it by R.C. 5705.37 – delivery of the Notice of Appeal to the Budget Commission. (App. Br. p. 4).

Although this is the first time that Appellees Villages have raised the issue of the BTA's lack of subject matter jurisdiction based upon Gasper's failure to file its October 6, 2004 Notice of Appeal with the Budget Commission, as the Court is aware, the lack of subject matter jurisdiction may be raised at any time in the proceedings, including for the

first time on appeal. See *Breidenback v. Mayfield* (1988), 37 Ohio St.3d 138, 139; *Fox v. Eaton Corp.* (1976), 48 Ohio St.3d 236, 238, 358 N.E.2d 536, overruled on other grounds by *Manning v. Ohio State Library Bd.* (1991), 62 Ohio St.3d 24, 577 N.E.2d 650, syllabus para. 1; Civ.R. 12(H)(3) (“Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.”); *Jenkins v. Keller* (1966), 6 Ohio St.2d 122, syllabus para. 5. As the Tenth District Court of Appeals noted in *In re Kerry Ford, Inc.* (1995), 106 Ohio App.3d 643, 651, 66 N.E.2d 1157:

It is well settled that lack of subject-matter jurisdiction may be raised at any stage of the proceedings. Parties may not, by stipulation or agreement, confer subject-matter jurisdiction on a court or administrative body where such jurisdiction does not otherwise exist. Further, ‘[i]t is a fundamental proposition that just as parties cannot confer subject matter jurisdiction by consent, subject matter jurisdiction cannot be acquired based upon a theory of estoppel or waiver arising from the acts of the parties or their agents.’ (Citations omitted) (emphasis added).

Consequently, Appellees Villages are not estopped from raising with this Court the effect and impact of Gasper’s October 6, 2004 Notice of Appeal and its failure to comply with the jurisdictional filing and notice provisions of R.C. 5705.37 with regard to the notice that triggered its appeal.

3. The Board Did Not Have Subject Matter Jurisdiction Over Gasper’s Appeal And Properly Dismissed The Appeal Due To Gasper’s Failure To Deliver The October 15, 2004 Notice of Appeal To The Budget Commission

Assuming for purposes of argument only that this Court were to accept Gasper’s likely assertion that the Notice of Appeal filed with the BTA on October 6, 2004 was not a Notice of Appeal for purposes of R.C. 5705.37 and that Gasper was not required to file the October 6, 2004 notice with the Budget Commission in order to perfect its appeal and

only had to file its October 15, 2004 Notice of Appeal, the BTA still properly dismissed Gasper's appeal for lack of subject matter jurisdiction because Gasper did not serve a copy of its October 15, 2004 Notice of Appeal on the Budget Commission, as required by R.C. 5705.37.

It is undisputed that a copy of Gasper's October 15, 2004 Notice of Appeal was sent by certified mail. It is also undisputed that the notice was accepted by Ms. Debra Brock, an employee of the Preble County Commissioners. Moreover, Gasper does not dispute that the members of the Budget Commission were not served with the Notice of Appeal.

Rather, Gasper insists that all that was needed for Gasper to perfect its appeal and vest subject matter jurisdiction with the BTA was for Gasper to deliver the Notice of Appeal, properly addressed to the Budget Commission, to the postal service for certified mail filing prior to the expiration of the thirty day appeal period. (App. Br. p. 4) (emphasis added). If this Court were to agree with Gasper's argument that would mean that actual **receipt** by the proper parties is not necessary under the statute and that mislabeled/misdirected mail that is sent to the wrong parties is all that is needed to perfect an appeal. This result is nonsensical and flies directly in the face of prior Ohio Supreme Court decisions and the clear and plain meaning of R.C. 5705.37.

There is no support for Gasper's contention that an attempt to mail a Notice of Appeal to the Budget Commission is sufficient to vest the BTA with jurisdiction. In fact, Ohio law is directly to the contrary. In *Broad & Jackson, Ltd. v. Ashtabula County Board of Revision*, 2006 WL 1313090, unreported, the Eleventh District Court of Appeals held that the burden is upon the appealing party to ensure that the Notice of

Appeal is **received** in a timely manner. Here, Gasper was on notice that there was a problem with the appeal when the Budget Commission did not file any proof of notice to all parties before the Budget Commission with the BTA. When the Gasper Clerk wrote to the BTA on February 9, 2005, to note that the State had not received a response from the Budget Commission, she noted that the Budget Commission failed to respond to other requests and that the “State may never get a response.” With that in mind, rather than following up to verify that all necessary actions had been taken and that the Budget Commission had, in fact, received the Notice of Appeal, Gasper deliberately choose to take no action and to assume the risks of going forward with an appeal that was not properly perfected.

While Gasper may argue that serving an employee of the Preble County Commissioners was sufficient to demonstrate substantial compliance with the notice requirement, these arguments have been repeatedly and soundly rejected by this Court in similar circumstances. *See, e.g., Fulton v. State, ex rel. General Motors Corp.* (1936), 130 Ohio St. 494, syllabus para. 1 (the term “filed” when used with regard to filing by mail requires the actual delivery of the item into the custody and control of the addressee). There must be full and complete compliance with the conditions and procedure under and by which an R.C. 5705.37 appeal is taken. If Gasper’s argument were accepted, then service of any county official would be sufficient to constitute service of the Budget Commission. That is, Gasper could have fulfilled its duty to serve the Budget Commission by serving the office of the elected Sheriff, the elected Recorder, an elected county Judge, or the elected county Coroner. (Jan. 9, 2007 Hearing Tr. p. 41). Clearly, neither the statute nor Ohio law supports such a proposition. It is necessary

under R.C. 5705.37 that both the BTA and the Budget Commission, or at least one of its members, actually receive the Notice of Appeal. Because Gasper did not properly file its appeal and did not comply with all of the specific requirements for bringing its appeal, the BTA was required to dismiss it for lack of jurisdiction.

4. The Board Did Not Have Subject Matter Jurisdiction Over Gasper's Appeal And Properly Dismissed The Appeal Due To The Lack Of Notice Given To Appellees Villages

Although the BTA found that it did not need to address Appellees Villages' motion to dismiss because the Budget Commission's motion to dismiss was determinative, the BTA further lacked subject matter jurisdiction to hear Gasper's appeal because the appeal was defective due to the Budget Commission's failure to notify Appellees Villages of the filing of the appeal and to file proof of such notification with the BTA, as required by R.C. 5705.37. Appellees Villages were not given notice of the filing of the Notice of Appeal by certified mail and proof of such notice was not filed with the BTA – mandatory, jurisdictional requirements of R.C. 5705.37.

Gasper does not dispute that Appellees Villages were parties to the proceedings before the Budget Commission and were statutorily required to receive notice of the filing of its Notice of Appeal by certified mail. Gasper does not dispute that proper and statutorily required notice was never provided to Appellees Villages of the filing of the Notice of Appeal, a fact which the Villages established at the January 9, 2007 hearing. (Hearing Tr., Exhibits F through L). In fact, Gasper does not dispute Appellees Villages' contention that the jurisdictional statute for bringing an appeal to the BTA requires that proof of the notice given to parties to the proceedings before the Budget Commission must be filed with the BTA, and that no such proof of notice was filed with the BTA in

Gaspar's appeal. And, most telling, Gaspar has never disputed Appellees Villages' assertion that the constitutional protections of due process and equal protection under the law required that Appellees Villages receive notice of any appeal of their allocated share of the ULGF and ULGRAF, and that the BTA did not have jurisdiction to change or vary their allocation without Appellees Villages having been properly named as interested parties and properly given notice under R.C. 5705.37.

Gaspar, as the appellant, was under a continuing duty to ensure that all elements of R.C. 5705.37 were met in order to properly prosecute its appeal and vest the BTA with subject matter jurisdiction. That is, it was Gaspar's obligation to ensure that the Budget Commission provided all necessary parties with notice of the filing of its Notice of Appeal and certified such notice to the BTA. The reason why Ohio law requires actual, direct notice to all necessary parties and proof of such notice being filed with the BTA is so that the BTA is assured that all parties in interest have received the necessary, constitutional due process notice that their rights are at issue and may be adversely affected. Appellees Villages were required to receive notice of the filing of an appeal by Gaspar in order to vest the BTA with subject matter jurisdiction over any matter affecting their legal rights, including their rights with regard to the Budget Commission's 2005 ULGF and ULGRAF allocation and distribution of funds. They did not receive the statutorily required notice of filing of the appeal, and thus, the BTA had no subject matter jurisdiction to hear any claims affecting their legal rights.

The Ohio Supreme Court has held in other areas that the appropriate action for an appellant to take where a governmental agency has failed in the performance of its duties regarding service or notice is a writ of mandamus. For example, R.C. 4903.21 requires

that upon service or waiver of service of the Notice of Appeal the Ohio Public Utilities Commission (“PUCO”) shall transmit to the Clerk of the Supreme Court a complete transcript of the proceeding. If the PUCO does not transmit the transcript within 30 days, it is the duty of the Appellant to file for a writ of mandamus to compel the PUCO to file the transcript. An appeal is dismissed if after the expiration of 33 days, neither the transcript nor a complaint for a writ has been filed. *See S. Ct. Prac. R. V*, section 4.

For a writ of mandamus properly to issue three conditions must be met. The court must find that the relator has a clear legal right to the relief prayed for, the respondent is under a clear legal duty to perform the requested act, and the relator has no plain and adequate remedy at law. *State of Ohio, ex rel. City of Englewood, et al. v. Montgomery County Budget Commission* (2nd Dist. 1982), unreported, 1982 WL 3819 citing *State ex rel. Westchester v. Bacon* (1980), 61 Ohio St. 2d 42. A writ of mandamus to compel the Budget Commission to act would have been proper in this case.

Moreover, even if this Court were to assume that Gasper properly filed a Notice of Appeal with the Budget Commission by authorized delivery service, Gasper still was required to ensure jurisdictional notice to necessary parties named as appellees, and had the right and ability under R.C. 5705.37 to require the Budget Commission comply with the statutory mandate of notifying the parties to the proceeding before the Budget Commission in question – Appellees Villages – of the filing of the Notice of Appeal by certified mail. It is undisputed that Gasper did not ensure compliance with the notice requirements for necessary parties and the Budget Commission members did not individually nor the Budget Commission as a public body provide Appellees Villages with notice, by certified mail, of the filing of the Notice of Appeal by Gasper.

As noted above, R.C. 5705.37 requires that upon receipt, the Budget Commission *shall* notify all persons who were parties to the proceeding before the Budget Commission of the filing of the Notice of Appeal by certified mail. Thus, R.C. 5705.37 places a clear, mandatory, statutory duty on the Budget Commission to perform the required act. Absent action by the Budget Commission, Gasper had no other remedy at law to comply with the provisions of R.C. 5705.37. Accordingly, Gasper clearly would have met the requirements for a writ of mandamus and should have filed for such writ.

Here, it is clear that Gasper, as well as the BTA, were aware that the Budget Commission had failed to respond to the appeal in any way – the Budget Commission did not respond to the notices and did not file a notice with the BTA reflecting the giving of notice to Appellees Villages. The record is clear that the Gasper Clerk monitored the proceedings and complained to the BTA when proper actions were not being taken. Although everyone, including the BTA, noted that Appellees Villages did not appear at the hearing on the merits of the appeal, Gasper chose to go forward and chose to ignore the readily apparent jurisdictional defects to its appeal. Additionally, in the face of information that the Budget Commission had not complied with the statutory requirements, Gasper waited until Appellees Villages received a copy of the Board's order before taking any action.

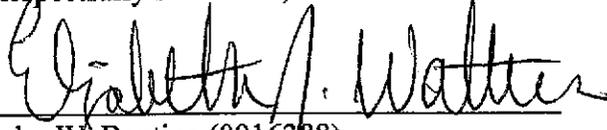
Finally, the prejudice to Appellees Villages – not Gasper – is obvious. Because they were not provided with timely notice of the filing of the appeal, Appellees Villages used the allocated funds in previous fiscal years. They did not adjust their budgets to reflect the possible loss of funds. It is unfair and much too late to try to correct Gasper's

numerous failures to perfect its appeal at this point without notice to and an opportunity to be heard by the parties directly affected by Gasper's appeal.

CONCLUSION

For the reasons set forth above, Appellees Villages of Eldorado, Gratis, Lewisburg, New Paris, West Alexandria, West Manchester and Verona request that this Court affirm the June 15, 2007 Decision and Order of the Ohio Board of Tax Appeals dismissing Ohio Board of Tax Appeals Case No. 2004-T-1152 for lack of subject matter jurisdiction.

Respectfully submitted,



John W. Bentine (0016388)

Elizabeth J. Watters (0054055)

Lark T. Mallory (0078631)

CHESTER, WILLCOX & SAXBE LLP

65 East State Street, Suite 1000

Columbus, Ohio 43215

(614) 221-4000/(614) 221-4012 (fax)

Counsel for Appellees Villages of Eldorado, Gratis,

Lewisburg, New Paris, West Alexandria, West

Manchester and Verona

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Merit Brief was served by regular U.S. mail, postage prepaid, on this 26th day of October, 2007 to the Attorney for Appellant at the following address:

Attorney for Appellant
John R. Varanese, Esq.
85 East Gay Street, Suite 1000
Columbus, Ohio 43215

and by regular U.S. mail, postage prepaid, to the parties noted below this 25th day of October, 2007:

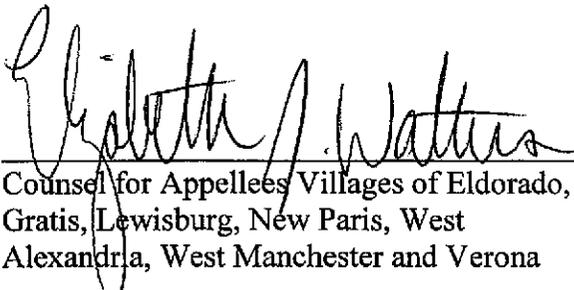
Village of Camden
c/o Rebecca Wilson, Clerk
383 Sugar Valley Drive
Camden, Ohio 45311

Dixon Township
c/o Catherine S. Combs, Clerk
928 Dove Road
Eaton, Ohio 45320

Village of College Corner
c/o Jennifer Woods, Clerk
209 Main Street
College Corner, Ohio 45003

Richard F. Hoffman (0071205)
101 East Sandusky St. Ste. 320
Findlay, Ohio 45840-3235
(614) 559-0605
(614) 559-0632 – Facsimile
**COUNSEL FOR APPELLEE
PREBLE COUNTY BUDGET
COMMISSION**

Village of West Elkton
c/o William T. Crawford, Clerk
150 S. Main Street, POB 42
West Elkton, Ohio 45070


Counsel for Appellees Villages of Eldorado,
Gratis, Lewisburg, New Paris, West
Alexandria, West Manchester and Verona