

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

vs.

Preble County  
Budget Commission, et al.,

Appellees.

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**REPLY BRIEF OF APPELLANT GASPER TOWNSHIP BOARD OF TRUSTEES**

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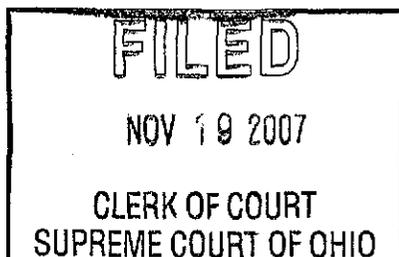
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In all of the case law cited by Appellees in their merit briefs, not one case has been presented that involves the facts and issue involved in the present appeal. Moreover, Appellees have pointedly avoided discussing the Twelfth District Court of Appeal's discussion of misdelivery of a properly addressed notice of appeal in *Mercantile Stores v. Tracy* (Nov. 2, 1998), Butler App. No. CA98-04-085, unreported and the BTA's decision in *Hampton v. Zaino* (Oct. 24, 2003), BTA No. 2003-A-626, unreported.<sup>1</sup> Both of these cases directly support Gasper's position that it should not be penalized for misdelivery of the certified mailing containing its notice of appeal.

The village Appellee's have also raised issues in support of the BTA's dismissal of Gasper's notice of appeal that were either not raised before the BTA or not considered determinative by the board. None of these contentions has any merit.

First, the political subdivision Appellees attempt to characterize Gasper's fiscal officer's October 6, 2004 correspondence to the board's chief attorney examiner as a notice of appeal. Whether the foregoing correspondence could be construed as a notice of appeal is immaterial. What is material, however, is that Gasper did file a notice of appeal with the BTA on October 15, 2004 and that the board found that filing to constitute Gasper's notice of appeal.<sup>2</sup> Even if the October 6, 2004 correspondence could be construed as a notice of appeal, there is no prohibition either in law or under the board's

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<sup>1</sup> Both of these cases are discussed in Gasper's merit brief.

<sup>2</sup> See BTA decision at page 2, "The record before us establishes that Gasper filed an appeal with this board on October 15, 2004, challenging the budget commission's apportionment and distribution of the 2005 ULGF and ULGRAF based upon alternate formulas."

rules of practice that prohibit the filing of a second notice of appeal from the same action of a budget commission within the thirty day appeal period established under R.C. 5705.37.

Second, the village Appellees present the same argument made in their motion to dismiss at the BTA. Specifically, the political subdivision Appellees argue that the budget commission's failure to send them notice of Gasper's appeal via certified mail and file proof of such notice with the board destroys the board's subject matter jurisdiction. This argument is unsupported by the case law construing R.C. 5705.37. Moreover, if such a result could be obtained by the omission of a budget commission under these circumstances, then budget commissions could avoid the inconvenience of defending their actions at the BTA by failing to serve notice of R.C. 5705.37 appeals on appellee subdivisions. The village Appellees further argue that Gasper had a duty to ensure that the budget commission notified them of its appeal. R.C. 5705.37 imposed no such requirement on Gasper and for the board or this court to rule that such a duty does exist would impermissibly enlarge the statute.

Finally, and perhaps most importantly, all of the foregoing arguments of the village Appellees are properly the subject of a cross-appeal, which they chose not to pursue and are therefore deemed waived. *Lenart v. Lindley* (1980), 61 Ohio St.2d 110, 115, 399 N.E.2d 1222, fn. 1 (appellee's attempt to assert alternative grounds for affirmance of BTA decision was barred by failure to file cross-appeal).

### **Conclusion**

Based upon all of the foregoing and the arguments contained in its merit brief, the Court should rule that Gasper performed the affirmative requirements imposed upon it by

R.C. 5705.37 and reverse the decision of the BTA as an abuse of discretion or otherwise contrary to law.

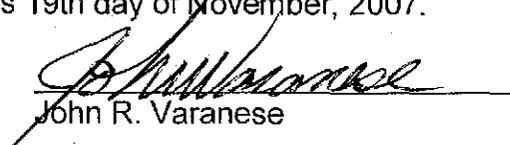
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**CERTIFICATE OF SERVICE**

I certify that a copy of Appellant Gasper Township Board of Trustees' Reply Brief was served upon counsel for the parties listed below by ordinary U.S. mail, postage prepaid, at the addresses noted below on this 19th day of November, 2007.

  
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