IN THE SUPREME COURT OF OHIO

Polaris Amphitheater Concerts, Inc.,	:	Case No. 07-0347
Appellant,	:	
v.	:	Appeal from the Ohio Board of Tax Appeals, Case No. 2004-V-1294
Delaware County Bd. of Revision, et al.,	:	
Appellees.	:	

MOTION OF APPELLEE BOARD OF EDUCATION OF THE OLENTANGY LOCAL SCHOOL DISTRICT FOR RECONSIDERATION OF THIS COURT'S DECISION

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MOTION FOR RECONSIDERATION OF APPELLEE BOARD OF EDUCATION OF THE OLENTANGY LOCAL SCHOOL DISTRICT

Now comes Appellee Board of Education of the Olentangy Local School District and moves this Court to reconsider its decision rendered in this matter on May 29, 2008, pursuant to Rule XI, Section 2, of this Court's rules. In *State ex rel. Rust v. Lucas County Bd. of Elections*, 101 Ohio St. 3d 63; 2004 Ohio 9; 800 N.E.2d 1162 [P3], this Court stated that "[u]nder S. Ct. Prac.R. XI, we are authorized to 'correct decisions which, upon reflection, are deemed to have been made in error'" citing to *Buckeye Community Hope Found. v. Cuyahoga Falls* (1998), 82 Ohio St.3d 539, 541, 697 N.E.2d 181, and *State ex rel. Huebner v. W. Jefferson Village Council* (1995), 75 Ohio St.3d 381, 383, 662 N.E.2d 339.

Appellee Board of Education respectfully requests this Court to reconsider its holding that Appellee Board of Education was required to file a cross-appeal which alleged that some error was made by the BTA when the Board of Education was not aggrieved, prejudiced or injured in any way by the decision of the BTA; and (2) that the "total valuation" of Appellant's property including all of its components is not before the BTA on remand.

Appellee Board of Education Could Not Have Filed A Cross-Appeal Because It Was Not Aggrieved, Prejudiced Or Injured In Any Way By The Decision Of The Decision Of The Ohio Board Of Tax Appeals.

In its decision in the present case, the Court cited to its decision in *Dayton-Montgomery Cty. Port Auth. v. Montgomery Cty. Bd. of Revision*, 113 Ohio St.3d 281, 2007-Ohio-1948, 865 N.E.2d 22, where this Court stated the following as to filing a cross-appeal:

"To preserve the question properly, *either party aggrieved by the BTA's land valuation* - the auditor or the board of education - should have filed its own appeal and specified the error. * * * Since that did not occur, we have no jurisdiction to correct the land valuation, and it follows that

on remand the BTA likewise has no authority to depart from its previous finding that the land should be valued at $ 133,290." *Dayton* at ¶ 32-33 (emphasis added).

However, immediately preceding this quotation the Court in *Dayton* also stated:

"The Port Authority made no assignment of error concerning the land value. But even if it had, the Port Authority is arguably *not a proper party* to assert that issue in its appeal, since it was benefited, *not aggrieved*, by that error. See, generally, *Ohio Contract Carriers Assn., Inc. v. Pub. Util. Comm.* (1942), 140 Ohio St. 160, 23 O.O. 369, 42 N.E.2d 758, syllabus (appeals may be prosecuted "only to correct errors injuriously affecting the appellant"). *Dayton* at ¶ 32-33 (emphasis added).

In *Ohio Contract Carriers Assn., Inc. v. Pub. Util. Comm.* (1942), 140 Ohio St. 160, 23 O.O. 369, 42 N.E.2d 758, this Court stated:

"It is fundamental that appeal lies only on behalf of a *party aggrieved.* Unless an appellant can show that his rights have been invaded, no error is shown to have been committed by the court or body which entered the final order.

As stated in 2 American Jurisprudence, 941, Section 149:

'It is a fundamental rule that to be entitled to institute appeal or error proceedings a person must have a present interest in the subject-matter of the litigation *and must be aggrieved or prejudiced by the judgment, order or decree.*'

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In Section 152, ibid, it is said:

'In addition to the requirement of a substantial interest in the subject-matter of the litigation, it is essential, in order that a person may appeal or sue out a writ of error, that *he shall be aggrieved or prejudiced by the judgment or decree.* Appeals are not allowed for the purpose of settling

abstract questions, however interesting or important to the public generally, *but only to correct errors injuriously affecting the appellant*.'" Id. at 161.

In the present case, the BOE at no time was aggrieved, prejudiced or injured by the decision of the BTA. The only injury that could possibly have been suffered by the BOE in this case is a loss of real property tax revenue due to a reduction in the *total valuation* of the subject property either through a reduction in the land value, improvement value or both. Since the BTA's decision left the total value of the property unchanged (both the land and improvement values were also left unchanged), the BOE suffered no monetary loss of tax revenue and therefore suffered absolutely no injury whatsoever from the BTA's decision.[1] As such, according to this Court's unanimous decision in *Dayton* and its unanimous decision in *Ohio Contract Carriers*, the BOE was *not a proper party* to assert any issue on cross-appeal since it was *not aggrieved, prejudiced or injured* by any error in the BTA's decision regarding the determination of the allocation of the total value between the land and improvements because such allocation had no effect whatsoever on the property's total valuation and therefore the taxes to be levied, charged and payable would be identical under any such allocation.

The BOE asserts that it in fact could not have filed a cross-appeal in this case simply because it could not under any circumstances meet the requirements of filing a cross-appeal. Supreme Court Rule II Section 3(A)(2) governs the ability of an appellee to file its own appeal from a decision of the board of tax appeals and states: "If a party timely files a notice of appeal in the Supreme Court, any other party may file a notice of appeal pursuant to section 5717.04 of the Revised Code." Therefore, in order to properly file its own notice of appeal, the BOE would have had to include the "errors complaints of" within the notice of appeal in order for it to be

[1] R.C. 323.131(A)(1) requires the Treasurer to include "[t]he taxes levied and the taxes charged and payable against the property." There is no provision requiring a tax bill to be prepared and sent on each individual component of the taxes charged and payable against the property.

jurisdictionally valid. See R.C. 5717.04. However, as discussed previously, the BOE could not have asserted any errors complained of as it was not aggrieved, prejudiced or injured in any way by the decision of the BTA. In other words, had the BOE filed a notice of appeal, this Court could have properly dismissed it as jurisdictionally defective on the authority of *Dayton* and *Ohio Contract Carriers* since the BOE could not have asserted any error of the BTA that could have been corrected by this Court to rectify any injury suffered by the BOE as an appellant.

There are only two ways to rectify this paradoxical dilemma whereby an appellee has the statutory authority to file a cross-appeal but cannot as a matter of law file such a cross-appeal that would be jurisdictionally valid. First, the Court could hold that since the originating statute permitting the filing of the original complaint in the action (R.C. 5715.19) only permits a complaint against the "total valuation" of a parcel, the Court always has the jurisdiction to review the "total valuation" of the parcel and all of the components that make up the total valuation.

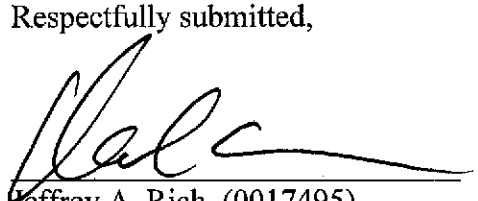
The other way to rectify the situation is to hold that while this Court's appellate review is limited to the errors complained of in the notice of appeal, where the appellees could not have in fact filed a jurisdictionally valid cross-appeal because it was not aggrieved, prejudiced or injured in any way by the decision of the BTA, then on remand, the BTA retains the same jurisdiction over the total valuation including all of its components that it had when the case was appealed the BTA in the first place. By holding otherwise on both points in the present case, this Court has held that Appellee BOE should have taken an action which under the facts of the present case could not have been taken. Had the BOR or the BTA actually reduced the value of the improvements in this case as was done in the *Dayton* case (the land value was changed to the detriment of the appellees in that case), then and only then could the BOE have asserted an error

that demonstrated any prejudice or injury to the BOE as an appellant. Since that did not happen here, this case is clearly distinguishable from *Dayton*.

CONCLUSION

For the reasons set forth herein, this Court is respectfully requested to reconsider its decision that Appellee Board of Education of the Olentangy Local Schools should have filed a cross-appeal in this case and that on remand, the BTA's jurisdiction is limited to determining the value of the land based upon the evidence in the record. The Court is respectfully requested to hold that because Appellee Board of Education could not have filed a jurisdictionally valid cross-appeal that on remand, the BTA's jurisdiction extends over the total valuation of the subject property and all of its components and to permit additional evidence of value if the BTA deems such evidence necessary to carry out its statutory duty to determine the total value of the subject property.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing motion was served upon Todd Sleggs, 820 West Superior Avenue, Suite 400, Cleveland, Ohio 44113; Christopher Betts, Assistant County Prosecuting Attorney, 140 North Sandusky Street, Delaware, Ohio, 43215; and upon Nancy Hardin Rogers, Ohio Attorney General, 30th East Broad Street, 17th Floor, Columbus, Ohio 43215, by regular U.S. mail, postage prepaid, this 5 th day of June, 2008.

Mark H. Gillis