ORIGINAL

IN THE SUPREME COURT OF OHIO

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| 2200 CARNEGIE, LLC,<br><br>Appellee,<br><br>-vs-<br><br>CUYAHOGA COUNTY BOARD OF REVISION, et al.,<br><br>Appellant. | :<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>: | CASE NO.: 2011-2147<br><br><br>On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District<br><br>Court of Appeals Case No. 96646 |

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MERIT BRIEF OF APPELLEE
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## 1. STATEMENT OF THE FACTS

The procedural history of this case began on March 27, 2007 when Appellee Board of Education of the Cleveland Metropolitan School District (hereinafter "BOE") filed a Complaint Against the Valuation of Real Property (hereinafter, "Complaint") against Appellant 2200 Carnegie, LLC (hereinafter, "2200 Carnegie") relative to Parcel Numbers 103-16-029 and 103-16-030. The "requested change in value" was purported to be justified due to "recent sale". The Complaint sought an increase in the valuation of the property in an amount in excess of $17,500.00. This Complaint listed the proper address of 2200 Carnegie as "3912 Prospect Ave., Cleveland, Ohio 44115".

It is uncontested that neither a copy of this Complaint, nor a notice of the filing of this Complaint as mandated by R.C. 5715.19(B) was served upon 2200 Carnegie.

On August 14, 2007, the Board of Revision (hereinafter "BOR" or "Board") sent the notice of hearing mandated by R.C. 5715.19(C) to 2200 Carnegie at its proper address. The notice was dated July 27, 2007 and was erroneously addressed to "2000 E. 9th St. #700, Cleveland, Ohio 44114". This was the first notification to 2200 Carnegie that a Complaint had been filed relative to its property.

On August 30, 2007, 2200 Carnegie challenged the jurisdiction of the BOR for the first time by filing its Motion to Dismiss Complaint. (*See, Appellee's Supplement to the Briefs*). In this motion, 2200 Carnegie asserted that the BOR did not have jurisdiction over 2200 Carnegie due to the fact that the Complaint had not been served upon 2200 Carnegie, as mandated by R.C. 5715.19(B).

On August 30, 2007, a hearing was held before the BOR on the Complaint. 2200 Carnegie's Motion to Dismiss was acknowledged but never addressed by the BOR.

On October 11, 2007, the BOR served notice upon 2200 Carnegie of its decision to increase the value of the property by the amount of $97,800.00 for tax year 2006.

2200 Carnegie appealed this decision to the Cuyahoga County Court of Common Pleas. This appeal was captioned *2200 Carnegie, LLC v. Cuyahoga County Board of Revision, et al., Cuyahoga County Court of Common Pleas Case No. CV-07-641119* (hereinafter, "2200 Carnegie I").

On appeal, 2200 Carnegie again argued, in relevant part, that the BOR failed to acquire jurisdiction over 2200 Carnegie due to the auditor's failure to serve notice to 2200 Carnegie of the filing of the Complaint as mandated by R.C. 5715.19(B).

The Court implicitly agreed with 2200 Carnegie by issuing an order on September 8, 2008 remanding the matter back to the BOR. In its order remanding the case back to the BOR, the Court stated, in relevant part: "The court remands this matter to the Cuyahoga County Board of Revision with instructions to send notice of the Board of Education Complaint to the property owner pursuant to R.C. 5715.19(B) the parties shall then proceed accordingly after notice is properly given and jurisdiction is obtained."

Notwithstanding the fact that the only way to properly give notice and obtain jurisdiction over 2200 Carnegie was for the BOE to re-file its Complaint so that the BOR could comply with R.C. 5715.19(B), on September 25, 2008 the BOR attempted to establish jurisdiction by simply sending a letter to 2200 Carnegie, with a copy of the March 27, 2007 Complaint enclosed, notifying 2200 Carnegie of the filing of the Complaint, almost 18 months after the filing of the Complaint.

On or about April 16, 2009, a hearing was held before the BOR on the BOE's March 27, 2007 Complaint.

Subsequently, on August 6, 2009, the BOR issued its decision for tax year 2006, increasing the property tax.

Thereafter, on August 31, 2009, 2200 Carnegie appealed this decision to the Cuyahoga County Court of Common Pleas. This appeal was captioned *2200 Carnegie, LLC v. Cuyahoga County Board of Revision, et al., Cuyahoga County Court of Common Pleas Case No. CV-09-702890* (hereinafter, "2200 Carnegie II"). Once again, 2200 Carnegie argued that the BOR was without jurisdiction over 2200 Carnegie due to the auditor's failure to comply with the mandates of R.C. 5715.19(B).

On March 9, 2011, the Court affirmed the BOR's revision valuation of the taxable value of 2200 Carnegie's property.

2200 Carnegie appealed this decision to the Eighth District Court of Appeals. The appellate court agreed with 2200 Carnegie, holding, in relevant part, that the BOR was without jurisdiction to consider the Complaint.

For the reasons that follow, the appellate court correctly held that the BOR did not have jurisdiction over 2200 Carnegie and, accordingly, this Honorable Court must affirm the appellate court decision.

## II. LAW AND ARGUMENT

**Response to Appellant's Proposition of Law 1**

*Appellee's Proposition of Law 1:* Boards of revision are creatures of statute and full and complete compliance with the service mandates contained in R.C. 5715.19(B) is necessary for a board of revision to have jurisdiction over a property owner and act on the merits of a claim.

*Appellant's Proposed Proposition of Law 1*: A failure by a board of revision to provide notice of the filing of a valid complaint as required by R.C. 5715.19(B) does not mandate the dismissal of the complaint, but instead requires the board of revision to provide notice prior to conducting a hearing and issuing a decision.

Where a complaint against valuation in which the stated amount of overvaluation, undervaluation, discriminatory valuation, illegal valuation, or incorrect determination is at least seventeen thousand five hundred dollars is filed with the county auditor, the board of revision can only acquire jurisdiction if notice of the complaint is served upon the property owner subject to the complaint within thirty days after the last date such complaints may be filed.

It is well established that boards of revision are "creatures of statute" and are limited to the powers conferred upon them by statute. *Morgan Cty. Budget Comm. v. Bd. of Tax Appeals* (1963), 175 Ohio St. 225, paragraph three of syllabus. It is also well established that the authority granted to boards of revision is to "hear complaints relating to the valuation or assessment of real property . . ." R.C. 5715.11.

Boards of revision are "quasi-judicial" bodies and "deciding tribunal[s}" comprised of "[t]he county treasurer, county auditor, and a member of the board of county commissioners". *See, Sharon Village Ltd. v. Licking County Board of Revision* (1997), 78 Ohio St. 3d 479; R.C. 5715.02.

R.C. 5715.19 sets forth the procedures which a board of revision must follow with respect to complaints against valuation. Pursuant to this statute, complaints against valuation must be filed, in relevant part, "on or before the thirty-first day of March of the ensuing tax year".

This Court has addressed, and stressed, the importance of strict compliance with the mandates of R.C. 5715.19, and how said compliance is necessary to confer jurisdiction to boards of revision, in *Elkem Metals Company v. Washington County Board of Revision* (1998), 81 Ohio St. 3d 683:

> A review of the applicable statutes set forth above shows that a board of revision has been given jurisdiction to hear and rule on complaints submitted to it. As part

> of its jurisdiction to hear and rule on complaints, a board of revision must undertake a two-step analysis. First, the board of revision must examine the complaint to determine whether it meets the jurisdiction requirements set forth by the statutes. Second, if the complaint meets the jurisdictional requirements, then the board of revision is empowered to proceed to consider the evidence and determine the true value of the property.
>
> The statutory requirements for filing and filling out a complaint are contained in R.C. 5715.13 and 5715.19. In *Stanjim Co. v. Mahoning Cty. Bd. of Revision* (1974), 38 Ohio St. 2d 233, 235 67 O.O. 2d 296, 298, 313 N.E. 2d 14, 16, we stated that "full compliance with R.C. 5715.19 and 5715.13 is necessary before a county board of revision is empowered to act on the merits of a claim." Thus, only after a board of revision determines that the complaint meets the jurisdictional requirements can it proceed to the second step to determine the case on the merits. If the complaint does not meet the jurisdictional requirements, then the board of revision must dismiss it because the complaint has not invoked the power to proceed to a consideration of the merits.
> *Id.*, 81 Ohio St. 3d at 686.

*See also, C.I.A. Properties v. Cuyahoga County Auditor* (2000), 89 Ohio St. 3d 363.

Thus, to invoke the jurisdiction of a board of revision, the complaint must be filed in full compliance with the statutory requirements set forth in R.C. 5715.13 and R.C. 5715.19. *See, Sharon Village Ltd.*, supra; *Stanjim Co. v. Mahoning County Board of Revision* (1974), 38 Ohio St. 2d 233; *Elkem Metals Co. v. Washington County Board of Revision* (1998), 81 Ohio St. 3d 683.

Upon the filing of a complaint against valuation "in which the stated amount of overvaluation, undervaluation, discriminatory valuation, illegal valuation, or incorrect determination is at least seventeen thousand five hundred dollars to each property owner whose property is the subject of the complaint", the auditor is mandated, pursuant to R.C. 5715.19(B) to "give notice" "within thirty days after the last date such complaints may be filed" "to each property owner whose property is the subject of the complaint", if the complaint was not filed by the owner or the spouse of the owner. R.C. 5715.19(B).

In order to be made a party to the action, the property owner must file a "complaint in support of or objecting to the amount of alleged overvaluation" within thirty days after receiving the notice of the filing of the complaint against valuation as mandated by R.C. 5715.19(B). This "complaint in support of or objecting to the amount of alleged overvaluation" is commonly referred to as a "counter-complaint" and is synonymous to an answer to a civil complaint. *See, C.I.A. Properties v. Cuyahoga County Auditor* (2000), 89 Ohio St. 3d 363 at 366: "The sole function of the countercomplaint, therefore, is to address the issues raised in the complaint filed pursuant to R.C. 5715.19(A). Viewed in this manner, the counter-complaint serves as the functional equivalent of an answer to a civil complaint." As such, the counter-complaint does not vest a board of revision with independent jurisdiction where there is none conferred by the complaint against valuation. *Id.*

This Court has recognized that an owner's property rights are at stake upon the filing of a complaint with the board of revision. In *Sharon Village Ltd, supra,* this Court held that the preparation and filing of a complaint with a board of revision on behalf of a taxpayer constitutes the practice of law. In so holding, this Court analyzed and discussed the property rights at stake as a result of the filing of a complaint against valuation:

> . . . the complaint is filed for the purpose of initiating an adversarial proceeding just as any other complaint does. A board of revision is required by R.C. 5715.19 to give proper notice to property owners and boards of education when a complaint is filed by other parties. Under R.C. 5715.11, the board of revision hears and investigates all complaints. A board of revision is also required to give adequate notice of hearing dates and times so that all parties may participate.
>
> . . . At a board of revision hearing, the parties may be given an opportunity to present evidence in the form of documents and testimony, question and cross-examine witnesses, and make legal arguments in support of their positions. A property owner failing to provide known and available evidence is barred by R.C. 5715.19(G) from later presenting that evidence on appeal, absent a showing of good cause or an order by the BTA or common pleas court, pursuant to R.C. 5717.01 or 5717.05. . . .

*Id.,* at 481-482.

The *Sharon* Court concluded: " . . . the initiating of a board of revision action places the property owner at risk." *Id.*

A property owner possesses a fundamental constitutional right to due process of law in regard to property valuation cases before boards of revision. *See, MB West Chester v. Butler County Board of Revision* (2010), 126 Ohio St. 3d 430.

"The Fourteenth Amendment to the United States Constitution prohibits any state from depriving 'any person of life, liberty, or property, without due process of law.' " *State ex rel. Haylett v. Ohio Bur. of Workers' Comp.* (1999), 87 Ohio St. 3d 325, 331.

Likewise, the Ohio Constitution provides, in relevant part, "Section 16, Article I * * * states that 'every person, for an injury done him in his land, goods, person or reputation, shall have remedy by due course of law.' " *Haylett* at 331.

In cases involving complaints against valuation, a property owner's due process rights are statutorily protected by several provisions within R.C. Chapter 5715.

R.C. 5715.12, entitled, "Duty to give notice before increasing valuation – service", states, in relevant part, that "[t]he county board of revision shall not increase any valuation without giving notice to the person in whose name the property affected thereby is listed and affording him an opportunity to be heard. . . . such notice shall be served . . . by sending the same by registered letter mailed to the address of such person."

As previously discussed, R.C. 5715.12(B) requires the auditor to "give notice" "within thirty days after the last date such complaints may be filed" relative to complaints "in which the stated amount of overvaluation, undervaluation, discriminatory valuation, illegal valuation, or

incorrect determination is at least seventeen thousand five hundred dollars to each property owner whose property is the subject of the complaint".

Finally, when any complaint against valuation is filed "by one other than the property owner", R.C. 5715.19(C) separately requires the board of revision to notify the property owner, "by certified mail", "not less than ten days prior to the hearing, of the time and place the same will be heard".

Reading these statutory provisions *in pari materia,* it is clear that the legislature has distinguished cases in which the requested increase or decrease in property valuation involves at least seventeen thousand five hundred dollars. In such cases, the auditor is mandated to "give notice" to the property owner, in order to protect the property owner's due process rights *and* in order to provide the property owner a timely opportunity to file a counter-complaint, thus making the property owner a party to the action.

This Court has held that strict construction of taxing statutes is "required", "and any doubt must be resolved in favor of the citizen upon whom or the property upon which the burden is sought to be imposed". *Gulf Oil Corp. v. Kosydar* (1975), 44 Ohio St. 2d 208.

This principle has been applied to R.C. 5715.19 by this Court. *See Cincinnati School District Board of Education v. Hamilton County Board of Revision* (1996), 74 Ohio St. 3d 639.

Thus, as mandated by ORC 5715.19(B), which must be strictly construed against the Board, the auditor was mandated to "give notice" of the March 27, 2007 complaint against valuation filed by the BOE to 2200 Carnegie "[w]ithin thirty days after the last date such complaints may be filed", i.e., within thirty days of March 31, 2007. It is undisputed that the auditor failed to send this notice within that time period.

This failure to "give notice" to 2200 Carnegie within thirty days of March 31, 2007 cannot be cured, as the mandates of ORC 5715.19(B) must be strictly construed against the Board. In this case, notice of the filing of the Complaint was not sent until almost 18 months after the March 27, 2007 filing of the Complaint.

Where, as here, a board of revision fails to properly serve a property owner with notice that a complaint against valuation has been filed pursuant to R.C. 5175.19(B), the property owner's ability to file a timely counter-complaint is compromised.

It is axiomatic that a property owner has rights to due process of law relative to complaints against valuation and board of revision hearings. As outlined above, the Ohio legislature has set forth a two-step notice requirement for complaints against valuation "in which the stated amount of overvaluation, undervaluation, discriminatory valuation, illegal valuation, or incorrect determination is at least seventeen thousand five hundred dollars to each property owner whose property is the subject of the complaint". In such cases, in the first step, the owner must be given notice of the complaint by the auditor within thirty days of the March 31 deadline to file. Thereafter, within thirty days of the date of service, the property owner may file a counter-complaint, i.e., an answer to the complaint. In the second step, the board of revision must notify the property owner prior to any hearing being held, not less than ten days prior to the hearing.

As stated by this Court in *Hin, LLC v. Cuyahoga County Board of Revision* (2010), 124 Ohio St. 3d 481:

> In construing a statute, we must ascertain and give effect to the intent of the legislature. . . . Determining this intent requires the court 'to read words and phrases in context and construe them in accordance with rules of grammar and common usage'. . . . When the statutory text is unambiguous, we apply it as written.
> *Id.* (citations omitted).

The statutory notice requirements set forth in R.C. Chapter 5715 are clearly meant to protect property owners' due process rights and are clear and unequivocal. Comparing these requirements to civil rules of procedure, the first step, i.e., notice of the filing of the complaint, is functionally equivalent to service of summons. Upon service of notice to a property owner of the filing of a complaint against valuation, the property owner can then file a counter-complaint, just as a civil defendant can file an answer. The second step, i.e., notice to the property owner of a board of revision hearing not less than ten days prior to the hearing, is the functional equivalent to notice of a hearing or trial in a civil case.

Here, the first step, notice of the filing of the complaint against valuation, was not perfected in a timely fashion. Just as the rules of civil procedure require that service of summons be perfected by a date certain (one year from the filing of the complaint per Civ. R. 3(A)), R.C. 5715.19(B) also requires that service be perfected by a date certain, i.e., within thirty days of the last date to file such complaints, March 31 of the ensuing tax year.

Relative to a property owner's due process rights in the context of a board of revision proceeding, this Court has previously compared cases in which boards of revision lacked jurisdiction due to failure of notice to property owners to civil cases involving similar lack of notice. In *Cincinnati School District Board of Education v. Hamilton County Board of Revision* (2000), 87 Ohio St. 3d 363, this Court held, in relevant part, that proper notice to a property owner must be given for a board of revision to acquire jurisdiction.

In *Cincinnati School District*, supra, the Cincinnati School District timely filed a complaint against valuation of property, seeking an increase in property tax valuation relative to property owned by Candlewood, Ltd. Due to a clerical error, a mortgagee of the property was listed as the property owner in the auditor's office. The complaint erroneously listed the

mortgagee as the owner of the property due to the error. Notice of the filing of the complaint was sent to the mortgagee. Notice of the hearing was sent to the mortgagee. No notices were sent to the owner of the property, Candlewood.

No one appeared at the hearing representing either the mortgagee or the owner. The requested valuation increase was approved by the board of revision. Notice of the increase was sent to the mortgagee. A representative of the auditor's office became aware of the ownership problem and faxed information to the owner, Candlewood. Shortly thereafter, a notice of the complaint against valuation that had been filed was sent to the owner. Candlewood then filed a countercomplaint, requesting that the complaint be dismissed. The owner, Candlewood, also filed a motion with the board of revision requesting that the complaint be dismissed and that the board vacate its prior order increasing the property valuation.

A hearing was held wherein Candlewood presented a witness who testified concerning valuation of the property. The board of revision subsequently overturned its prior decision and reinstated the initial valuation of the property. The board of education filed an appeal from this decision to the Board of Tax Appeals. The Board of Tax Appeals dismissed the appeal, finding that the board of revision did not have jurisdiction to render its initial order increasing the property value. The board of education appealed that decision to this Court.

Although this Court ultimately held that the Board of Tax Appeals did not have authority to set aside the board of revision's initial order increasing the property valuation, this Court did hold that the board of revision's initial decision increasing the valuation of the property was void:

> The giving of notice to a person who is incorrectly listed on the auditor's tax list as the owner does not meet the notice requirements of R.C. 5815. In *Columbus Apartments Assoc. v. Franklin Cty. Bd. of Revision* (1981), 67 Ohio St. 2d 85, 89-90, 21 O.O. 3d 54, 57, 423 N.E. 2d 147, 150, we stated, 'In that it is the

> owner's, not the school board's, property which is the subject of the complaint and evaluation proceeding before a board of revision, the owner is an indispensable party to that proceeding."
>
> The consequences of not giving notice to an indispensible party, like the actual owner, were set forth in *Lincoln Tavern, Inc. v. Snader* (1956), 165 Ohio St. 61, 64, 59 O.O. 74, 75-76, 133 N.E. 2d 606, 610, where we stated, "It is axiomatic that for a court to acquire jurisdiction there must be a proper service of summons or an entry of appearance, and a judgment rendered without proper service or entry of appearance is a nullity and void." Without the required notices being given to Candlewood, the BOR acquired no jurisdiction.
> *Id.* at 366-367.

In *Knickerbocker Properties, Inc., XLII v. Delaware County Board of Revision* (2008), 119 Ohio St.3d 233, this Court held that the board of revision's use of the wrong address in attempting to notify the property owner of a hearing resulted in both a failure to afford due process rights in conducting the hearing and a lack of authority to order an increase in property value. Significantly, the property owner, Knickerbocker, did receive notice of the filing of the complaint against valuation. This notice also included a date for the board of revision hearing. Knickerbocker, after having received notice of the filing of the complaint against valuation and notice of the hearing, sent a letter to the board of revision requesting a continuance of the hearing. The notice of the second hearing was sent to the wrong address. The hearing was held resulting in an increase in property valuation.

In holding that the board of revision's use of the wrong address in its attempt to notify Knickerbocker of the second hearing violated the property owner's due process rights, this Court stated:

> While R.C. 5715.12 and 5715.19(C) expressly create the obligation to notify the owner and authorize the use of "registered" mail, neither section specifies what address ought to be used. Under such circumstances, we have held that the constitutional due process principle supplies the rule: the owner may be served at an address that is reasonably calculated to give notice to the owner. See *Regional Airport Auth. v. Swinehart* (1980), 62 Ohio St. 2d 403, 406, 16 O.O. 3d 436, 406 N.E. 2d 811. Thus, the issue in this case consists of whether using the

> Eproperty address was reasonably calculated to give actual notice to Knickerbocker that the hearing would be held on September 29, 2004.
>
> We hold that given the present record, the BOR failed to comply with R.C. 5715.12 and 5715.19(C). . . .
> *Id.*, at 237.

This Court then concluded that "[t]he BOR's order increasing the value of the property was invalid."

In *MB West Chester, LLC v. Butler County Board of Revision* (2010), 126 Ohio St 3d 430, this Court addressed the failure of the board of revision (and property owner) to notify the school board of appellate proceedings before the Board of Tax Appeals. This Court cited *Knickerbocker*, supra, for the proposition of law that the failure of a board of revision to give proper notice of a hearing rendered the resulting decision a nullity. This Court then noted that in such cases "[o]f import are cases that address the lack of service in civil cases". *Id.*, at 436-437. Specifically, this Court cited *State, ex rel. Ballard v. O'Donnell* (1990), 50 Ohio St. 3d 182, paragraph one of the syllabus: "a 'trial court is without jurisdiction to render judgment or to make findings against a person who was not served summons, did not appear, and was not a party in the court proceedings."

In *State, ex rel. Ballard*, supra, this Court stated that "[d]ue process requires, at a minimum, that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case". *Id.*, at 183. The *Ballard* Court further cited *Lincoln Tavern, Inc.*, supra, for the proposition that "judgment rendered without proper service or entry of appearance is a nullity and void" and concluded that "[i]t is thus well-settled that a decision rendered by a court without jurisdiction is unauthorized by law and amounts to usurpation of judicial power". Id., at 183-184, (citing *State, ex rel. Osborn v. Jackson* (1976), 46 Ohio St. 2d 41, at 52).

Here, it is uncontested that the auditor failed to comply with R.C. 5715.19(B) by not serving notice upon 2200 Carnegie of the filing of the complaint against valuation within the statutorily required thirty days. Prior to entering any appearance, 2200 Carnegie objected to the BOR's jurisdiction by filing a Motion to Dismiss. The service of the notice of filing of the complaint against valuation some eighteen months later cannot cure the failure of the auditor to comply with R.C. 5715.19(B).

As set forth above, 2200 Carnegie raised the jurisdictional defect in this matter in its initial Motion to Dismiss. However, even if 2200 Carnegie had not immediately objected to the BOR's jurisdiction, subject matter jurisdictional defects can be raised for the first time on appeal. See *Colonial Village v. Board of Review* (2007), 114 Ohio St. 3d 493: ". . . there are times when jurisdiction can be raised late in the proceedings, including for the first time on appeal" (citing *Cleveland Electric Illum. Co. v. Lake County Board of Revision* (2002), 96 Ohio St. 3d 165). "[A] party cannot waive subject-matter jurisdiction, regardless of procedural deficiencies". *H.R. Options, Inc. v. Zaino*, 100 Ohio St. 3d 373.

Accordingly, based on the foregoing, the BOR failed to acquire jurisdiction over 2200 Carnegie by failing to serve timely notice upon 2200 Carnegie, in violation of R.C. 5715.19(B) and, accordingly, the decision of the Eighth District Court of Appeals must be affirmed.

In its Merit Brief, the BOE admits that R.C. 5715.19(B) was violated and submits that "although the failure of the board of revision to provide timely notice may have deprived the board of jurisdiction to hold a hearing, this failure did not divest the board of jurisdiction over the complaint itself". *Merit Brief of Appellant*, pg. 6. The BOE, however, fails to provide any case law to support this proposition. The BOE thus urges this Court to carve out an exception to the thirty day notice requirement set forth in R.C. 5715.19(B) by permitting a board of revision

to acquire jurisdiction over complaint against valuation without timely notifying property owners of the filing of a complaint against valuation relative to their property. In so arguing, the BOE asserts that a board of revision cannot, by its own actions or inactions, divest itself of jurisdiction. However, the BOE ignores a board of revision's statutory directives in so arguing. As stated by this Court in *Cincinnati School District Board of Education*, supra, "[w]ithout the required notices being given to [a property owner], the BOR acquired no jurisdiction." (Bracket added).

The BOE also erroneously cites *Knickerbocker*, supra, for the proposition that "failure to give notice did not divest the board of revision of jurisdiction to hear and consider the complaint", however, the BOE ignores the crucial distinction between the within matter and *Knickerbocker*, supra: in *Knickerbocker*, supra, the property owner did receive notice of the filing of the complaint against valuation, whereas in the within matter there was absolutely no timely service of the complaint against valuation upon 2200 Carnegie. This failure of timely service of the complaint itself constitutes the jurisdictional defect at issue herein.

In the Eighth District Court of Appeals' decision in the within matter, the appellate court correctly held that because the auditor failed to timely serve notice upon 2200 Carnegie of the complaint against valuation in compliance with R.C. 5715.19(B) and because complaints against valuation must be filed by March 31 of the ensuing year, the auditor could not remedy noncompliance with the thirty day service requirement by serving notice of the complaint eighteen months later. Accordingly, the only recourse was dismissal of the complaint.

As set forth above, boards of revision are "creatures of statute", limited to the powers that are conferred upon them by statute. Due to the noncompliance by the auditor in this case, the

Board had no power to proceed to hearing on the complaint against valuation in the within matter. Thus, the appellate court decision must be affirmed.

**Response to Appellant's Proposition of Law No. 2:**

*Appellant's Proposition of Law No. 2:* The doctrine of the law of the case applies to proceedings that originate with the board of revision and a decision by a reviewing court is the law of that case for all subsequent proceedings.

*Appellee's Proposition of Law No. 2:* Compliance with the notice provision set forth in R.C. 5715.19(B) is a jurisdictional pre-requisite. Lack of subject matter jurisdiction cannot be cured.

The failure of the auditor to comply with the service of notice provision of R.C. 5715.19(B) resulted in the failure of the Board to have jurisdiction over 2200 Carnegie and the complaint against valuation. This lack of jurisdiction could not be "cured" by service of notice of the complaint some eighteen months later, as the service of notice must be made within thirty days of the last day on which such complaints could be filed. Here, the complaint at issue related to tax year 2006. As such, the last day on which such complaints could be field was March 31, 2007. Therefore, the mandatory notice requirement set forth in R.C. 5715.19(B) mandated that notice of the filing of the complaint was to be made upon the property owner, 2200 Carnegie, within thirty days following March 31, 2007.

In its Merit Brief, the BOE erroneously argues that the journal entry following 2200 Carnegie I, remanding the matter back to the BOR with instructions to send notice of the complaint and proceed after jurisdiction was obtained constitutes the "law of the case".

Initially it should be noted that even if this was the "law of the case", the BOR never obtained jurisdiction, as the complaint was not served until almost eighteen months after March 31, 2007. Under the BOE's theory of "law of the case", the journal entry at issue instructed the BOR to "proceed after jurisdiction was obtained", however, jurisdiction was never obtained, as

jurisdiction could only be acquired by serving the notice of the complaint upon 2200 Carnegie within thirty days of March 31, 2007.

More significantly, subject matter jurisdiction cannot be "waived". See, *State ex rel. Jones v. Suster* (1998), 84 Ohio St. 3d 70. "[J]urisdiction is a condition precedent to the court's ability to hear the case. If a court acts without jurisdiction, then any proclamation by that court is void." *Id.*, at 75. "Subject matter jurisdiction is never waived, and neither a court nor the parties may confer jurisdiction where none existed originally." *Hirt's Greenhouse, Inc., v. City of Strongsville* (Sept. 7, 1995), Cuyahoga App. No. 68374. Thus, "the lack of jurisdiction can be raised at any time, even for the first time on appeal." *State ex rel. Tubbs Jones, supra, at 75.*

This Court has held "a party cannot waive subject matter jurisdiction regardless of procedural sins." *See Columbus City School Dist. Bd. of Edn. v. Wilkins* (2004), 101 Ohio St. 3d 112 (quoting *Shawnee Twp. v. Allen Cty. Budget Comm.* (1991), 58 Ohio St. 3d 14). Parties to a case may not waive subject matter jurisdiction upon a court. *See State ex rel. White v. Cuyahoga Metro. Hous. Auth.* (1997), 79 Ohio St. 3d 543, 1997 Ohio 366, 684 N.E. 2d 72.

Simply stated, the journal entry following 2200 Carnegie I did not, and cannot, confer jurisdiction upon the BOR where there was none. Due to the failure of the auditor to comply with R.C. 5715.19(B), jurisdiction was never acquired and, accordingly, cannot be later acquired by "the law of the case".

**Response to Amicus Curiae's Proposition of Law No. 1:**

*Amicus Curiae State of Ohio's Proposition of Law No. 1*: Notice of filing of a complaint under R.C. 5715.19(B) is merely directory and therefore has no jurisdictional consequences when notice and opportunity to be heard are given.

*Appellee's Proposition of Law No. 3:* The notice provision set forth in R.C. 5715.19(B) is mandatory and must be strictly construed in favor of property owners. Noncompliance with the notice requirements set forth in R.C. 5715.19(B) will render proceedings to which it relates null and void.

In its Merit Brief, Amicus Curiae State of Ohio argues: (a) that the thirty day notice requirement set forth in R.C. 5715.19(B) is "merely directory" and violation of said statute has no jurisdictional consequences; and (b) the failure of the board of revision to perfect service of the filing of a complaint against valuation on the property owner affects personal jurisdiction and not subject matter jurisdiction.

In support of its first argument, that the thirty day notice requirement set forth in R.C. 5715.19(B) is "merely directory", the State of Ohio cites *Hardy v. Delaware County Board of Revision* (2005), 106 Ohio St. 3d 359, for the proposition that the R.C. 5715.19(B) thirty day notice requirement is "directory" rather than "mandatory". In so arguing, the State of Ohio asserts that this notice requirement is directory "because it functions only to set certain timing requirements"; "is merely a timing rule for the efficient handling of Board of Revision revaluation cases"; and "also provides that the property owner is a party to the case, which further suggests that notice failure does not create a jurisdictional defect". The State of Ohio then reasons that "the Auditor's failure to give notice is little more than the failure to carry out a statutory ministerial act".

The State of Ohio's arguments are directly contradicted by the statute itself and ignore a property owner's right to due process of law. As previously set forth, the plain language of the statute reveals its purpose: to protect a property owner's right to due process of law in cases where the valuation differential is in excess of seventeen thousand five hundred dollars. In such cases, the auditor "shall" give notice of each such complaint to, among others, the property owner. The mandatory service of such complaints then triggers the property owner's right to file a counter-complaint. The filing of a counter-complaint then makes the property owner "a party to

the action": "[u]pon the filing of a complaint *under this division*, the board of education or the property owner shall be made a party to the action" R.C. 5715.19(B) (emphasis added).

Accordingly, this statutory requirement is not "merely a timing rule", it is a statutory mandate to effectuate service to protect a property owner's constitutional right to due process of law. Without service of the filing of the complaint against valuation, a property owner's right and ability to challenge the valuation complaint is violated and prejudiced.

This Court addressed "directory" statutory time requirements in *In re Davis* (1999), 84 Ohio St. 3d 520. In this case, this Court acknowledged the importance of "the nature of the act to be performed" and the "phraseology of the statute" in determining whether a time requirement is directory or mandatory:

> It is true that where a statute contains the word "shall," the provision will generally be construed as mandatory. *Dorrian v. Scioto Conservancy Dist.* (1971), 27 Ohio St. 2d 102, 56 O.O. 2d 58, 271 N.E. 2d 834, paragraph one of the syllabus. "A mandatory statute may be defined as one where noncompliance * * * will render the proceedings to which it relates illegal and void." See *State ex rel. Jones v. Farrar* (1946), 146 Ohio St. 467, 471-472, 32 O.O. 542, 544, 66 N.E. 2d 531, 534.
>
> But, even with "shall" as the operative verb, a statutory time provision may be directory. "As a general rule, a statute which provides a time for the performance of an official duty will be construed as directory so far as time for performance is concerned, especially where the statute fixes the time simply for convenience or orderly procedure." Id. at 472, 32 O.O. at 544, 66 N.E. 2d at 534. This is so "unless the nature of the act to be performed or the phraseology of the statute or of other statutes relating to the same subject-matter is such that the designation of time must be considered a limitation upon the power of the officer." *State ex rel. Smith v. Barnell* (1924)109 Ohio St. 246, 255, 142 N.E. 611, 613.
> *Id.*, at 522.

Here, R.C. 5715.19(B) contains mandatory language requiring the auditor to effectuate service of notice of the filing of a complaint against valuation in order to protect a property owner's due process rights. Thus, the nature of the act to be performed is not "merely a timing

rule", nor is it "little more than . . . a statutory ministerial act" as the State of Ohio argues. As previously asserted, this mandatory act is the functional equivalent of service of summons and complaint in a civil lawsuit. It is the primary due process notice requirement set forth in R.C. Chapter 5715.

Amicus Curiae State of Ohio asserts that "R.C. 5715.12 and 5715.19(C) serve to protect parties' core due process rights to notice and an opportunity to be heard". In support of this contention, the State argues that "[t]hese were the statutes the Court considered jurisdictionally significant in *Knickerbocker*". Again, *Knickerbocker,* supra, focused primarily on the failure of notice of the hearing itself, as the property owner therein received notice of the complaint against valuation. All of the notice requirements set forth in R.C. Chapter 5715 are required to protect property owners' due process rights. Following the State's argument would lead to the clearly erroneous conclusion that a property owner's due process rights are protected so long as the property owner receives notice of the board of revision hearing at least ten days prior to the hearing, even if the property owner never received notice of the filing of the complaint against valuation. This is what occurred initially in the within matter. In such a scenario, the property owner will be denied the opportunity to file a counter-complaint, will be deprived of notice of the allegations and contents of the complaint against valuation, and will be deprived of the opportunity to prepare evidence to challenge the complaint against valuation. Simple receipt of a letter notifying a property owner that a hearing will be conducted by the board of revision on a date ten days in the future, without pre-existing notice of the filing of the complaint against valuation and a copy of the complaint, does not satisfy due process of law, despite the State of Ohio's assertions to the contrary.

In *Ohio Civil Rights Commission v. Countrywide Home Loans, Inc.* (2003), 99 Ohio St. 3d 522, this Court held that R.C. 4112.05(B)(7) was a mandatory statute of limitations for the filing of complaints by the Ohio Civil Rights Commission and was not a "directory" provision to "encourage the orderly processing of discrimination claims". In so holding, this Court stated:

> In *Dorrian v. Scioto Conservancy Dist.* (1971), 27 Ohio St. 2d 102, 56 O.O. 2d 58, 271 N.E. 2d 834, paragraph one of the syllabus, this court stated that "the word 'shall' shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that [it] receive a construction other than [its] ordinary usage." Accord *State v. Golphin* (1998), 81 Ohio St. 3d 543, 545-546, 692 N.E. 2d 608. We consider the use of the word "shall" in R.C. 4112.05(B)(7) to indicate unambiguously that the provision is mandatory. See *State ex rel. Gen. Motors Corp. v. Ohio Civ. Rights Comm.* (1977), 50 Ohio St. 2d 111, 114, 4 O.O. 3d 241, 362 N.E. 2d 1221 (holding similar language in predecessor statute mandatory).
>
> Interpreting R.C. 4112.05(B)(7) to be anything other than a mandatory statute of limitations would disserve defendants and claimants. . . .
> *Id.*, at Paragraphs 4-5.

Here, interpreting R.C. 5715.19(B) to be anything other than mandatory will lead to the violation of property owners' due process rights to notice and a meaningful opportunity to be heard. Further, this Court has previously held that strict construction of taxing statutes is "required" "and any doubt must be resolved in favor of the citizen upon whom or the property upon which the burden is sought to be imposed." *Gulf Oil Corp. v. Kosydar,* supra.

Accordingly, based on the foregoing, the service provision set forth in R.C. 5715.19(B) is mandatory, and noncompliance with this provision renders the proceedings which it relates to null and void.

**Response to Amicus Curiae's Proposition of Law No. 2:**

*Amicus Curiae State of Ohio's Proposition of Law No. 2:* A Board of Revision must give notice and an opportunity to be heard to a necessary party of real property valuation proceedings in order to obtain personal jurisdiction. If it does not, the resulting lack of jurisdiction over the person may be corrected by vacating the offending order and permitting the party's participation in a new hearing.

*Appellee's Proposition of Law No. 4:* A board of revision can only acquire jurisdiction over a complaint against valuation when all of the service and notice requirements set forth in R.C. Chapter 5715 are satisfied. A failure of the auditor and/or the board of revision to serve notice of the filing of a complaint against valuation and/or notice of a board of revision hearing renders any resulting finding null and void.

In its Merit Brief, Amicus Curiae erroneously relies on *Knickerbocker*, supra, a case in which the property owner received notice of the filing of the complaint against valuation but failed to receive proper notice of the hearing before the board of revision, for the proposition that "[t]he Board of Revision's error was not chargeable against the Board of Education". The State of Ohio then argues that all that is necessary to confer subject matter jurisdiction upon a board of revision is a "properly filed complaint" and that any noncompliance with due process requirements thereafter result in personal jurisdiction problems which may be cured thereafter.

The State of Ohio fails to address this Court's holding in *Cincinnati School District Board of Education v. Hamilton County Board of Revision* (2000), 87 Ohio St. 3d 363, wherein this Court unequivocally held that "[w]ithout the required notices being given to Candlewood [the owner], the BOR acquired no jurisdiction". *Id.*

The facts and holding of *Cincinnati School District Board of Education,* supra, have been discussed at length above. In its decision, this Court reiterated that boards of revision are "creatures of statute" and their powers are limited by statute. The notice requirements are discussed at some length:

> . . . R.C. 5715.19(B) provides that when a complaint is filed by someone other than the owner and the amount of the stated undervaluation is at least $17,500 the auditor is to give notice of the complaint to the property owner. R.C. 5715.19(B) further provides that within thirty days after receiving the notice the property owner may file a complaint objecting to the claim of undervaluation and be made a party to the action. R.C. 5715.19(C) also provides that the board of revision shall notify the property owner at least ten days prior to a hearing of its time and place. In addition to the notice requirements of R.C. 5715.19, R.C. 5715.12 provides that the board of revision shall not increase any valuation without given

> notice to the person in whose name the property affected is listed and affording him or her the opportunity to be heard.
> *Id.,* at 365.

In *Cincinnati School District Board of Education,* the Board of Education argued, as the BOE and State of Ohio does here, that mistakes or errors of an official should not prejudice a complainant, yet this Court acknowledged in *Cincinnati School District Board of Education,* supra, that officials' errors can, and do, affect complainants in such cases. However, it is the property owner's property, not the complainant's, that is the subject of the complaint, and as such, the property owners' due process rights are paramount:

> . . . It is presumed that the auditor does his or her job correctly and that the tax list contains the correct names of the owners of the property. However, as demonstrated by the facts in this case, when a complainant filing a complaint for valuation of real property relies upon the auditor's tax list he or she does so at his or her peril. If the auditor's tax list is not correct and a complainant files a complaint listing an incorrect name, then the notices given by the board of revision will be given to the wrong persons, the notice requirement of R.C. Chapter 5715 will not be met, and the actual owner will not receive any of the required notices.
>
> The giving of notice to a person who is incorrectly listed on the auditor's tax list as the owner does not meet the notice requirements of R.C. Chapter 5715. In *Columbus Apartments Assoc. v. Franklin Cty. Bd. of Revision* (1981), 67 Ohio St. 2d 85, 89-90, 21 O.O. 3d 54, 57, 423 N.E. 2d 147, 150, we stated, "In that it is the owner's, not the school board's, property which is the subject of the complaint and evaluation proceeding before a board of revision, the owner is the indispensable party to the that proceeding."
> *Id.,* at 366.

Here, as in *Cincinnati School District Board of Education,* the failure of the auditor to comply with the notice requirements of R.C. 5715.19(B) resulted in the Board failing to acquire jurisdiction. Such failure is not a mere "personal jurisdiction" failure that can be remedied by remand. The timeliness of the service requirements affects property owners. It is significant to note that a board of revision's determination of any complaint against valuation "shall relate back to the date when the lien for taxes or recoupment charges for the current year attached or the date

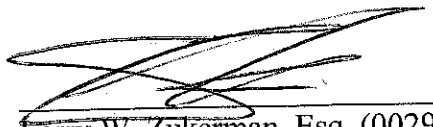
as of which liability for such year was determined" and that "[l]iability for taxes and recoupment charges for such year and each succeeding year until the complaint is finally determined and for any penalty and interest for nonpayment thereof within the time required by law shall be based upon the determination, valuation, or assessment as finally determined." See, R.C. 5715.19(D). Thus, the remedy suggested by Amicus Curiae State of Ohio, that remand and obtaining "personal jurisdiction" is the appropriate remedy for due process violations, will result in further damage to a property owner in the form of potential past due taxes, interest, and penalties.

Simply stated, although it is clear that the board of revision failed to obtain personal jurisdiction over 2200 Carnegie, and that 2200 Carnegie did not enter a "voluntary" appearance in this matter, by virtue of its Motion to Dismiss, the noncompliance with the service and notice requirements of R.C. Chapter 5715 by the auditor resulted in the Board failing to acquire jurisdiction over 2200 Carnegie. The notice requirements set forth in R.C. Chapter 5715 are not mere "timing rules" or "ministerial acts", they are constitutionally significant mandatory notice requirements, the purpose of which are to protect property owners' state and federal rights to due process of law. They cannot be partially complied with, they are the functional equivalent of the rules of Civil Procedure requirements of service of summons and complaint and service of notice of hearings and/or trial. As boards of revision are "creatures of statute", limited to the powers conferred upon them by statute, the service and notice requirements, which are mandatory, must be complied with in order for boards of revision to acquire jurisdiction over property owners and the property which is the subject of a complaint against valuation. Failure to comply with these mandatory notice requirements results in null and void judgments. Such judgments, as pointed out by this Court in *Cincinnati School District Board of Education*, supra, are "good nowhere and bad everywhere." (Citing *Dews v. Floyd* (Tex. Civ. App. 1967), 413 S.W. 2d 800, 804).

## CONCLUSION

For the foregoing reasons, this Honorable Court must affirm the decision of the Eighth District Court of Appeals below.

Respectfully Submitted,



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I hereby certify that a true copy of the forgoing was mailed, postage prepaid, by regular U. S. Mail, on this 11h day of June, 2012 to the following:

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