

IN THE SUPREME COURT OF OHIO

BOARD OF EDUCATION OF THE :
COLUMBUS CITY SCHOOLS, :
 : Case No. 2014-0839
Appellee, :
 : Appeal from Board of Tax Appeals
v. : BTA Case Nos. 2012-3902 & 2012-3903
 :
FRANKLIN COUNTY BOARD OF :
REVISION, et al., :
 :
Appellees, :
 :
& :
 :
770 WEST BROAD AGA, LLC, and :
WBS COLUMBUS, LLC, :
 :
Appellants.

APPELLEE COLUMBUS CITY SCHOOLS' MOTION TO DISMISS APPEAL

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Now comes Appellee Columbus City Schools Board of Education (the “Board of Education”) and moves this Honorable Court for dismissal of Appellants’ appeal in the above-captioned matter as Appellants failed to strictly comply with R.C. 5717.04 in filing this appeal.

STATEMENT OF FACTS

Appellants filed their Notice of Appeal with the Court on May 21, 2014. *See* Notice of Appeal, attached hereto as Exhibit A, and incorporated herein. Appellants appealed two decisions of the Ohio Board of Tax Appeals entered on April 21, 2014. *See id.* As appellees in this appeal, Appellants named “Board of Education of the Columbus City Schools” and “Franklin County Board of Revision and Franklin County Auditor.” *See id.* In its Certificate of Service, Appellants certified that the Notice of Appeal was served by certified mail upon counsel for the Board of Education and counsel for the County Appellees. *See id.*

LAW AND ARGUMENT

Appeals from the Board of Tax Appeals are governed by R.C. 5717.04. The Court has long held that “where a statute confers the right of appeal, adherence to the conditions thereby imposed is essential to the enjoyment of the right conferred.” *Am. Restaurant & Lunch Co. v. Glander*, 147 Ohio St. 147, 70 N.E.2d 93, syllabus ¶ 1. Specifically, R.C. 5717.04 “requires an appellant who wishes to challenge the BTA’s decision must serve the Tax Commissioner, who by statute must be made an appellee, with a copy of the notice of appeal by certified mail.” *Olympic Steel, Inc. v. Cuyahoga Cty. Bd. of Revision*, 110 Ohio St. 3d 1242, 2006-Ohio-4091, 852 N.E.2d 178, ¶ 2. Failure to comply with the “statutory obligation to serve the notice of appeal on the Tax Commissioner in the prescribed manner deprives this court of jurisdiction to consider the appeal.” *Id.*

The Court held in *Berea City School District Board of Education v. Cuyahoga County Board of Revision*, 111 Ohio St. 3d 1219, 2006-Ohio-5601, 857 N.E.2d 145, that “the certified-mail service required by R.C. 5717.04 must be initiated within the thirty-day period prescribed by R.C. 5717.04 for the filing of the appeal” and initiation of service constitutes placing the appeal in the mail. *Id.* at ¶ 2. Moreover, it recently declined to overrule *Berea*, finding that “since *Berea* was decided, we have applied it, and there is no indication that its holding is unworkable.” *Columbus City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, Slip Op. 2015-Ohio-150 (Jan. 21, 2015), attached hereto as Exhibit B and incorporated herein.

Here, Appellants failed to strictly comply with R.C. 5717.04 as they failed to name the Tax Commissioner as an appellee and timely him with the Notice of Appeal within the thirty day appeal period. *See* Notice of Appeal. Accordingly, upon the authority of *Olympic Steel, supra*, and *Columbus City Schools, supra*, the Board of Education respectfully requests that the Court dismiss this appeal for lack of jurisdiction.

Respectfully Submitted,

/s Kelley A. Gorry
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CERTIFICATE OF SERVICE

The undersigned certifies that a true and accurate copy of the foregoing was served, by electronic mail transmission, and regular U.S. Mail, postage prepaid, upon: James V. Maniace, Esq., Taft Stetinius & Hollister, LLP, 65 East State Street, Suite 1000, Columbus, OH 43215; William J. Stehle, Esq., Assistant County Prosecutor, 373 South High Street, 20th Floor, Columbus, OH 43215; and Honorable Michael DeWine, Esq., Ohio Attorney General, 30 East Broad Street, 14th Floor, Columbus, OH 43215, this 22nd day of January, 2015.

/s Kelley A. Gorry
Kelley A. Gorry (0079210)

ORIGINAL

IN THE SUPREME COURT OF OHIO

770 West Broad Street AGA, LLC
and
WBS Columbus, LLC,

Appellees,

vs.

Board of Education of the
Columbus City Schools

Appellant.

and

Franklin County Board of Revision and
Franklin County Auditor, Appellees;

Case No. 14-0839

On Appeal from the
Ohio Board of Tax Appeals

BTA Case Nos. 2012-3902
and 2012-3903

**NOTICE OF APPEAL OF 770 WEST BROAD STREET AGA, LLC
AND WBS COLUMBUS, LLC**

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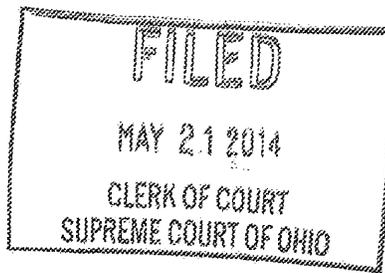
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770 West Broad Street AGA, LLC &
WBS Columbus, LLC*



Appellants before this Court (although Appellees below), 770 West Broad Street AGA, LLC and WBS Columbus, LLC, owners for the relevant years of the property whose tax valuation is at issue in this appeal, hereby give notice of their appeal as of right, pursuant to R.C. 5717.04, from a Decision and Order of the Ohio Board of Tax Appeals, journalized and entered on April 21, 2014, that reversed a value determination by the Franklin County Board of Revision and reinstated the value originally established by the Franklin County Auditor for the property and tax years at issue. A true and accurate copy of this Decision and Order is attached as Exhibit A.

Appellants complain of the following errors:

1. The decision of the Board of Tax Appeals is unreasonable and unlawful.
2. The Board of Tax Appeals erred as a matter of law in not placing upon the party appealing to the Board of Tax Appeals from a decision of the Franklin County Board of Revision the burden of proving by competent and probative evidence that the taxable value established by the said Board of Revision for the tax years at issue was incorrect.
3. The Board of Tax Appeals erred as a matter of law in reversing the value established by the Board of Revision and substituting the value originally established by the County Auditor even though the record contains sufficient evidence for the Board of Tax Appeals to make its own independent judgment of value.
4. The Board of Tax Appeals erred as a matter of law, and rendered a decision that was not supported by competent and probative evidence, when it reversed the value established by the Board of Revision and reinstated the value originally

established by the County Auditor, even though the only evidence on the record supported the value established by the Board of Revision.

Because of the above errors by the Board of Tax Appeals, Appellants ask that the Decision and Order of the Board of Tax Appeals be reversed, and that the values established by the Franklin County Board of Revision be reinstated for the tax years on appeal.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of May, 2014, a true copy of the foregoing

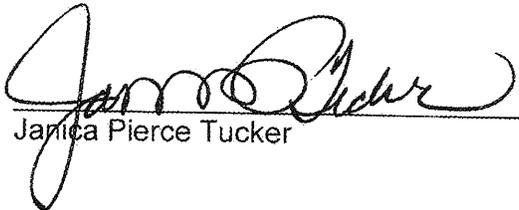
Notice of Appeal was served by certified mail upon the following:

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Franklin County Board of Revision
And Franklin County Auditor*


Janica Pierce Tucker

OHIO BOARD OF TAX APPEALS

Board of Education of the Columbus City Schools,)	CASE NOS. 2012-3902 and 2012-3903
)	
Appellant,)	(REAL PROPERTY TAX)
)	
vs.)	DECISION AND ORDER
)	
Franklin County Board of Revision, Franklin County Auditor, 770 West Broad AGA, LLC, and WBS Columbus, LLC,)	
)	
Appellees.)	

APPEARANCES:

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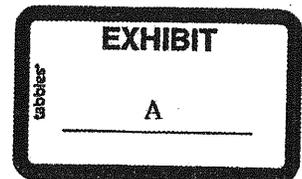
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Entered APR 21 2014

Mr. Williamson, Mr. Johrendt, and Mr. Harbarger concur.

Appellant appeals decisions of the Franklin County Board of Revision ("BOR") which determined the taxable value of the subject property, comprising thirty-two parcels for tax years 2009 and 2010, and eighteen parcels for tax year 2011. These matters are now considered upon the notices of appeal, the statutory transcripts ("S.T.") certified to this board by the BOR, the record of



this board's hearing ("H.R."), and the legal argument of the appellant and property owners.

For tax year 2009, the auditor assessed the subject property, a single-tenant office building, at a total true value of \$6,735,800, at a total true value of \$6,697,600 for tax year 2010, and at a value of \$7,447,000 for tax year 2011. For tax year 2009, 770 West Broad AGA LLC ("770 W. Broad"), the property owner at the time, filed a complaint with the BOR requesting that the property's total true value be decreased to \$4,050,000 because "[c]urrent value is not consistent with fair market value based on current trends and comparable properties." S.T., Ex. 1. The complaint indicated that the property had transferred on February 21, 2008 for \$4,000,000. *Id.* It also noted that between March and June of 2008, \$1,850,000 in improvements were completed, which included "demolition." *Id.* For tax year 2011, WBS Columbus, LLC ("WBS"), the property owner as of that date, filed a complaint requested that the property's total true value be decreased to \$1,475,000 due to "[m]arket conditions, vacancy, purchase of Note in Default is indicative of value." *Id.* The complaint also indicated that the property transferred on November 10, 2011 for \$1,450,000. *Id.* The appellant filed a countercomplaint for each year, advocating for the retention of the auditor's values. S.T., Ex. 2.

The BOR held one hearing for both tax years at issue. S.T., Ex. 9. At that hearing, the property owners presented the testimony of Michael Weisz, partner of both 770 West Broad and WBS. *Id.* Weisz testified that the 2008 transfer was a "package transaction" whereby 770 West Broad negotiated the price

of approximately \$20 million for three buildings, \$4 million of which was allocated to the subject property. Id. He then explained that between the purchase and January 1, 2009, \$1,850,000 of improvements were made "to make it ready to lease to the state."¹ Id. The property owners then presented the testimony and report of Thomas D. Sprout, MAI, CPA, who in relying primarily upon the income approach to value, opined a total true value of the subject of \$1,635,000 for tax year 2009 and \$1,620,000 for tax year 2011.² S.T., Exs. 6 and 9. Sprout testified that the subject is "a highly risky investment," that he utilized actual rents for the subject because they were the market rents, and that he did not consider the 2008 sale because he was told that was an allocation. S.T., Ex. 9. The appellant presented the deed and conveyance fee statement, evidencing the transfer of thirty-two parcels for \$4,000,000 in February 2008. S.T., Ex. 6. After consideration of the testimony and evidence, for tax years 2009 and 2010, the BOR issued a decision accepting the "arm's-length sale of the thirty-two parcels as the price" for those years. S.T., Ex. 9. For tax year 2011, the BOR issued a decision decreasing the total true value of the eighteen parcels at issue to "\$1,620,000, as determined by Sprout." Id. The present appeals ensued.

At the hearing before this board, the appellant posited that sale price of \$4,000,000 plus the \$1,850,000 worth of improvements was the value of the

¹ Weisz also testified that although the lease with the state of Ohio did not commence until July, the lease was in place when the property was purchased. He stated that the lease was contingent on the improvements made. S.T., Ex. 9.

² It is important to note that Sprout's report included only eighteen parcels for tax year 2009, despite the fact that thirty-two parcels were at issue.

subject for both tax years while the property owner again presented the testimony of Sprout, whose testimony focused on the effects of the recession in 2008 as well as the consequences of the state contract.

When cases are appealed from a board of revision to this board, an appellant must prove the adjustment in value requested. See, e.g., *Shinkle v. Ashtabula Cty. Bd. of Revision*, 135 Ohio St.3d 227, 2013-Ohio-397. It has long been held by the Supreme Court that “the best evidence of ‘true value in money’ of real property is an actual, recent sale of the property in an arm’s-length transaction.” *Conalco v. Bd. of Revision* (1977), 50 Ohio St.2d 129. Then, typically, “the only rebuttal lies in challenging whether the elements of recency and arm’s-length character between a willing seller and a willing buyer are genuinely present for that particular sale.” *Cummins Property Servs., L.L.C. v. Franklin Cty. Bd. of Revision*, 117 Ohio St.3d 516, 2008-Ohio-1473, at ¶13. As recognized by the Supreme Court, temporal proximity of a sale to a tax lien date is not the only factor affecting its utility in establishing value. Rather, “recency ‘encompasses all factors that would, by changing with the passage of time, affect the value of the property’ *** [and that] recency factors include ‘changes that have occurred in the market.’” *Worthington City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 124 Ohio St.3d 27, 2009-Ohio-5932 at ¶32. (Citations omitted.) One such factor that can include a change can involve a material change to the property itself.

While various arguments are made challenging the utility of the sale, it is undisputed that the property transferred in February 2008 for \$4,000,000 and that between the sale and tax lien date \$1,850,000 in improvements were made. While the record lacks specificity regarding the improvements, the record does indicate that the improvements were made specifically for the tenant, the state of Ohio. Additionally, the face of the complaint indicates that demolition occurred. Based upon this information, we find the \$1,850,000 in improvements materially changed the property, so that the \$4,000,000 sale price is unreliable as of both tax lien dates. See, e.g., *Bailey v. Hamilton Cty. Bd. of Revision* (Feb. 28, 2013), BTA No. 2012-L-2146, unreported (where this board, in finding a sale remote, held a material change occurred between the sale and the tax lien date due to the significant testimony focused on the efforts/cost in making the property habitable).

We likewise find that the sale price plus the value of the improvements is not the value of the property as of either tax lien date. As we stated in *Mason City School District v. Warren Cty. Bd. of Revision* (Apr. 1, 2005), BTA No. 2003-T-1355, unreported, at 9, remanded for settlement, 106 Ohio St. 3d 1517, 2005-Ohio-4857, "Simply adding all of the costs, however, does not necessarily reflect the value of an improvement. In determining the value of property for the purposes of taxation, the assessing body must take into consideration all factors which affect the value of the property." *The B.F. Keith Columbus Co. v. Franklin Cty. Bd. of Revision* (1947), 148 Ohio St. 253, at paragraph one of the syllabus. Factors such as depreciation, deficiencies,

superadequacies, and other forms of obsolescence may be present.” See, e.g., *Gen. Motors Corp. v. Cuyahoga Cty. Bd. of Revision* (1996), 74 Ohio St.3d 513 (dollar for dollar additions are no different than dollar for dollar deductions); *Hotel Statler v. Cuyahoga* (1997), 79 Ohio St.3d 299 (rejecting the presence of a one-to-one relationship between cost and value when there exists no evidence of such a relationship).

Having no sale upon which to rely,³ we must now turn to the appraisal evidence submitted by the property owners. We are unpersuaded by Sprout’s opinion of value for both tax years at issue.⁴ Through both his testimony and statements in his report, Sprout emphasized the detrimental effects of the recession and the alleged lack of desirability of the state of Ohio as the tenant. Without providing supporting evidence, Sprout concluded that not only did these factors exist, but they had a negative effect on the value of the subject. See, generally, *Lakota Local School Dist. Bd. of Edn. v. Butler Cty. Bd. of Revision*, 108 Ohio St.3d 310, 2006-Ohio-1059, at ¶26, (“Mere speculation is not evidence.”). We find that Sprout improperly relied on these contentions and that,

³ We also recognized that the property transferred in November 2011 to WBS via deed in lieu of foreclosure. However, we cannot utilize this transfer to value the subject as of the tax lien dates at issue as the Supreme Court has clearly stated that foreclosure sales are not voluntary. See *Cincinnati School Dist. Bd. of Edn. v. Hamilton Cty. Bd. of Revision, et al.*, 127 Ohio St.3d 63, 2010-Ohio-4907.

⁴ For tax year 2009, Sprout specifically noted in his testimony and report that his report addressed only eighteen parcels while the 2009 complaint encompassed the thirty-two parcels transferred for \$4,000,000 in 2008. For the reasons discussed herein, we decline to accept his value determination for even that portion of the parcels at issue for that year. When parties rely on an appraiser’s opinion of value, this board may accept all, part, or none of that appraiser’s opinion. *Witt Co. v. Hamilton Cty. Bd. of Revision* (1991), 61 Ohio St.3d 155.

in turn, they improperly affected his ultimate value conclusions. For example, Sprout relied upon those unsupported assertions in determining a 12% capitalization rate for his income approach, despite this being at the very top of the range for the subject. Additionally, this board has stated “[r]eal property values, even within a small geographic area, may vary greatly due to a number of factors and we are unwilling to conclude that a general economic situation must necessarily impact the values of all real property equally.” *Myles v. Cuyahoga Cty. Bd. of Revision* (Jan. 29, 2013), BTA No. 2012-L-2358, unreported at 6. See, also, *Bell v. Hamilton Cty. Bd. of Revision* (Aug. 27, 2004), BTA No. 2003-T-1087, unreported (rejecting claim that the terrorist events of September 11, 2001 had an obvious negative economic impact on the value of real property).

Therefore, there is no evidence upon which this board may determine value. Additionally, and for the reasons discussed, we find the BOR’s decisions to reduce the total true value of the subject for each tax year improper. See, *Vandalia-Butler City Schools Bd. of Edn. v. Montgomery Cty. Bd. of Revision* (2011), 130 Ohio St.3d 291, 2011-Ohio-5078, at ¶21, which held:

“It is true that the *absence* of sufficient evidence requires the BTA to reverse a reduction or increase ordered by a board of revision. See *Columbus City School Dist. Bd. of Edn. v. Franklin Cty. Bd. of Revision* (2001), 90 Ohio St.3d 564, 566-567 ***.” (Emphasis sic.)

Accordingly, based upon the record and discussion herein, we determine that the value of the subject property as of the effective tax lien dates, were as originally determined by the auditor as follows:

As of January 1, 2009:

TRUE VALUE ⁵	TAXABLE VALUE
\$6,735,800	\$2,357,530

As of January 1, 2010:

TRUE VALUE ⁶	TAXABLE VALUE
\$6,697,600	\$2,344,160

As of January 1, 2011:

TRUE VALUE ⁷	TAXABLE VALUE
\$7,447,000	\$2,606,450

It is therefore the order of this board that the Franklin County Auditor list and to assess the same in accordance therewith as provided by law.

⁵ This value is the total value of the following thirty-two parcels combined: 010-010337-00, 010-002600-00, 010-006547-00, 010-010336-00, 010-010959-00, 010-016817-00, 010-046802-00, 010-047441-00, 010-047998-00, 010-049738-00, 010-054947-00, 010-000446-00, 010-043012-00, 010-043013-00, 010-044421-00, 010-045265-00, 010-045587-00, 010-025009-00, 010-027813-00, 010-032888-00, 010-043011-00, 010-017534-00, 010-019504-00, 010-020110-00, 010-022257-00, 010-025008-00, 010-055952-00, 010-066587-00, 010-066602-00, 010-094926-00, 010-232286-00, 010-027205-00

⁶ See fn. 5, *infra*.

⁷ This value is the total value of the following eighteen parcels combined: 010-016817-00, 010-025009-00, 010-000446-00, 010-010336-00, 010-010959-00, 010-020110-00, 010-002600-00, 010-017534-00, 010-022257-00, 010-025008-00, 010-027813-00, 010-047441-00, 010-047998-00, 010-049738-00, 010-055952-00, 010-066587-00, 010-066602-00, 010-094926-00

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.

A handwritten signature in cursive script, appearing to read "A.J. Groeber".

A.J. Groeber, Board Secretary

EXHIBIT B

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Columbus City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, Slip Opinion No. 2015-Ohio-150.]

NOTICE

This slip opinion is subject to formal revision before it is published in an advance sheet of the Ohio Official Reports. Readers are requested to promptly notify the Reporter of Decisions, Supreme Court of Ohio, 65 South Front Street, Columbus, Ohio 43215, of any typographical or other formal errors in the opinion, in order that corrections may be made before the opinion is published.

SLIP OPINION NO. 2015-OHIO-150

COLUMBUS CITY SCHOOLS BOARD OF EDUCATION, APPELLEE, v. FRANKLIN COUNTY BOARD OF REVISION ET AL., APPELLEES; MIKE FERRIS PROPERTIES, INC., APPELLANT.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Columbus City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, Slip Opinion No. 2015-Ohio-150.]

Taxation—R.C. 5717.04—Appeal—Service of notice of appeal on tax commissioner must be initiated within the 30-day appeal period.

(No. 2013-1544—Submitted August 19, 2014—Decided January 21, 2015.)

APPEAL from the Board of Tax Appeals, No. 2010-Y-3507.

Per Curiam.

{¶ 1} This real-property-valuation case comes before us on a motion to dismiss and on the briefing of the merits by the parties. The motion to dismiss presents a threshold jurisdictional issue: whether the property owner, who appealed from the Board of Tax Appeals (“BTA”) to this court, fully perfected the appeal in light of its having failed to initiate service of the notice of appeal on the tax commissioner, a necessary party, within the 30-day appeal period.

SUPREME COURT OF OHIO

{¶ 2} The jurisdictional facts are clear and undisputed. Ferris Properties, Inc., filed the notice of appeal in this case on September 30, 2013. The certificate of service on the notice of appeal indicates certified-mail service on the property owner and the county appellees, but not on the tax commissioner. The appeal was referred to mediation on October 3, 2013, but returned to the regular docket on November 4, 2013. The order returning the case to the regular docket specified that the appellant's brief was due 40 days from the date of the order. Apparently during mediation the school board made its intention to seek dismissal apparent, and Ferris responded by serving the tax commissioner. On November 12, 2013, the school board filed its motion to dismiss. Ferris filed a response on November 15, 2013. Both the motion and the response agree that Ferris did serve the tax commissioner with the appeal on October 24, 2013, before the case had been returned to the regular docket. Thus, the tax commissioner was served well in advance of the briefing of this case.

{¶ 3} The case law is equally clear. We have held that the requirement of service on appellees pursuant to paragraph six of former R.C. 5717.04, 2009 Sub.H.B. No. 1, is a jurisdictional prerequisite to pursuing the appeal, with the tax commissioner being one of the persons statutorily required to be served. *See Mason City School Dist. Bd. of Edn. v. Warren Cty. Bd. of Revision*, 138 Ohio St.3d 153, 2014-Ohio-104, 4 N.E.3d 1027, ¶ 13-17. We have also held that the service required by that paragraph must be initiated within the 30-day appeal period. *Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 111 Ohio St.3d 1219, 2006-Ohio-5601, 857 N.E.2d 145, ¶ 2. Because the appellant in *Berea City School Dist.* had initiated the service after expiration of the appeal period, the appeal was dismissed for lack of jurisdiction.

{¶ 4} The facts of the present case call for dismissal under *Berea City School Dist.*, unless we revisit and overrule the holding of that case. It is true that R.C. 5717.04 by its own terms does not require service to be initiated or

completed within any prescribed time frame, and in our recent cases we have declined to recognize a requirement as jurisdictional when the statute does not expressly impose it. See *Groveport Madison Local Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 137 Ohio St.3d 266, 2013-Ohio-4627, 998 N.E.2d 1132, ¶ 23. But to overrule *Berea City School Dist.* would require us to find that the test set forth in *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, paragraph one of the syllabus, had been satisfied:

A prior decision of the Supreme Court may be overruled where (1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it.

{¶ 5} Since *Berea City School Dist.* was decided, we have applied it, and there is no indication that its holding is unworkable. Accordingly, we adhere to the holding in *Berea City School Dist.* and dismiss this appeal for lack of jurisdiction. Because we lack jurisdiction, we do not reach the merits of the appeal.

Appeal dismissed.

O'DONNELL, LANZINGER, KENNEDY, FRENCH, and O'NEILL, JJ., concur.

O'CONNOR, C.J., and PFEIFER, J., dissent.

O'CONNOR, C.J., dissenting.

{¶ 6} In this appeal, we confront two issues that are sharply contested by the property owner, Mike Ferris Properties, Inc., and the Columbus City Schools

SUPREME COURT OF OHIO

Board of Education (“BOE”). One of the issues is jurisdictional, and the other is substantive—the legally proper valuation of the property.

{¶ 7} On the jurisdictional issue, the majority applies a previous decision of this court that required that the service of the notice of appeal under R.C. 5717.04 be initiated within the appeal period, despite the fact that the statute itself is silent on when service must be performed. *Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 111 Ohio St.3d 1219, 2006-Ohio-5601, 857 N.E.2d 145, ¶ 2. Because Ferris served the tax commissioner after the appeal period closed, the majority dismisses the appeal on the authority of *Berea City School Dist.* I disagree.

{¶ 8} I would reverse the decision of the BTA and reinstate the decision of the Franklin County Board of Revision (“BOR”) to carry over the 2008 value to 2009. I therefore dissent.

RELEVANT BACKGROUND

{¶ 9} Ferris filed the notice of appeal in this case on September 30, 2013. The certificate of service on the notice of appeal indicates certified-mail service on the property owner and the county appellees, but not on the tax commissioner. The appeal was referred to mediation on October 3, 2013, but returned to the regular docket on November 4, 2013. The order returning the case to the regular docket specified that the appellant’s brief was due 40 days from the date of the order.

{¶ 10} On November 12, 2013, the school board moved to dismiss. Ferris filed a response on November 15, 2013. The parties agree that Ferris served the tax commissioner with a notice of appeal on October 24, 2013, before the case had been returned to the regular docket.

{¶ 11} The period for appealing from the August 29, 2013 BTA decision expired on September 30, 2013. Thus, service of the notice of appeal on the tax

commissioner was, as the school board emphasizes, not initiated during the appeal period.

{¶ 12} But it remains undisputed that the appellant served the notice of appeal on the tax commissioner and that there can have been no prejudice to the commissioner because that official was served before briefing in this matter began. Thus, the issue is whether the timing of the service constituted a jurisdictional defect.

THE APPEAL SHOULD NOT BE DISMISSED

{¶ 13} The jurisdiction of this court depends upon the statute, and the appellant complied with the statute. In plain terms, the statute requires service upon those persons, including the tax commissioner, to whom the BTA is required to send a copy of its decision. *See Mason City School Dist. Bd. of Edn. v. Warren Cty. Bd. of Revision*, 138 Ohio St.3d 153, 2014-Ohio-104, 4 N.E.3d 1027, ¶ 14-16. Ferris did in fact serve the tax commissioner and did so well before the briefing of this appeal on the merits.

{¶ 14} But *Berea City School Dist.* imposes the additional requirement that the service occur within a prescribed timeframe: “We now hold that the certified-mail service required by R.C. 5717.04 must be initiated within the thirty-day period prescribed by R.C. 5717.04 for the filing of an appeal.” 111 Ohio St.3d 1219, 2006-Ohio-5601, 857 N.E.2d 145, ¶ 2. That holding is not, however, based on the wording of the statute.

{¶ 15} The 30-day deadline for filing the appeal is set forth in the fifth paragraph of former R.C. 5717.04, 2009 Sub.H.B. No. 1: “Such appeals shall be taken within thirty days after the date of the entry of the decision of the board on the journal of its proceedings.” That paragraph then completes the discussion of the notice of appeal, its content, and where it must be filed. Service, by contrast, is a new subject initiated by the sixth paragraph of the section, and there is no reference to a time limit in relation to service.

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{¶ 16} Since *Berea City School Dist.* was decided, the court has clarified that a procedural requirement does not constitute a jurisdictional prerequisite unless the requirement is set forth in the statute itself. *Groveport Madison Local Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 137 Ohio St.3d 266, 2013-Ohio-4627, 998 N.E.2d 1132 (although complaint form called for setting forth the property owner, failure to properly identify the owner was not a jurisdictional defect because the statute itself did not require the information); *Knickerbocker Properties, Inc. XLII v. Delaware Cty. Bd. of Revision*, 119 Ohio St.3d 233, 2008-Ohio-3192, 893 N.E.2d 457, ¶ 10-14 (although complaint form called for setting forth the property owner’s address, failure to set forth a proper address was not a jurisdictional defect because the statute itself did not require the information). Here, not only is there no time limit for service in R.C. 5717.04, but the sole basis for a time limit lies in court rules that contemplate service at the time the notice of appeal is filed. See S.Ct.Prac.R. 3.11(A)(1) (“when a party * * * files any document with the Clerk of the Supreme Court, that party * * * shall also serve a copy of the document on all parties to the case”); App.R. 13(B) (“Copies of all documents filed by any party and not required by these rules to be served by the clerk shall, *on or before the day of filing*, be served by a party or person acting for the party on all other parties to the appeal * * *” [emphasis added]). But a violation of those rules would typically not be deemed a jurisdictional defect. See App.R. 3(A) (“Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal”); *State ex rel. Arcadia Acres v. Ohio Dept. of Job & Family Servs.*, 123 Ohio St.3d 54, 2009-Ohio-4176, 914 N.E.2d 170, ¶ 12 (applying App.R. 3(A) principles to the Supreme Court rules).

{¶ 17} The majority adheres to *Berea City School Dist.* apparently because of its inability to satisfy the standard for overruling precedent articulated

in *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256:

A prior decision of the Supreme Court may be overruled where (1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it.

Id., paragraph one of the syllabus. But *Galatis* does not apply in a case, like this one, in which a procedural rule is at issue.

{¶ 18} As we have explained, “*Galatis* must be applied in matters of substantive law,” *State v. Silverman*, 121 Ohio St.3d 581, 2009-Ohio-1576, 906 N.E.2d 427, ¶ 31, but not when evidentiary or procedural rules that “ ‘do[] not alter primary conduct’ ” are at issue (brackets sic), *id.* at ¶ 33, quoting *Hohn v. United States*, 524 U.S. 236, 252, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998). Granted, *Silverman* involved a rule of evidence, but its reasoning extends to a procedural rule like that at issue here because it implicates no principle of “substantive law” or any type of “primary conduct” that substantive law might regulate. Thus, *Galatis* is not applicable here.

ON THE MERITS, THE BTA’S DECISION SHOULD BE REVERSED

{¶ 19} Although Ferris advances four propositions of law in its brief, the main point of this case remains the carryover, pursuant to R.C. 5715.19(D), of the 2008 valuation to tax year 2009. Ferris reiterates the basic point, which it had previously advanced before the BTA:

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In 2008, the first year of the triennium,^[1] the BOR confirmed the value of [the property at issue], as substantially constructed, to be \$350,000. Values determined for the first year of a triennial period should be carried forward to the next two years. Unless some event triggers a need to change the valuation, the Auditor carries over the value from the first year of a triennium to the next year.

{¶ 20} The argument that the value determined for tax year 2008 should have been carried over to 2009 rests on R.C. 5715.19(D), which states that “[l]iability for taxes * * * for such year [i.e., the tax year for which valuation was contested in the original complaint] and each succeeding year until the complaint is finally determined * * * shall be based upon the determination, valuation, or assessment as finally determined.”

{¶ 21} Ferris is correct. Because R.C. 5715.19(D) imposed a carryover under the circumstances of this case, the BOR acted appropriately in finding that the 2008 value carried over to 2009. And, by the same token, the BTA erred by failing to recognize that the carryover value was the presumptively correct value for 2009.

*The BOR correctly recognized that Ferris was entitled to a carryover
of the 2008 valuation to tax year 2009*

{¶ 22} Ferris filed its complaint against valuation for tax year 2009, which is at issue here, on February 23, 2010. An attachment to the complaint explains the history of the auditor’s valuations and the BOR determinations for the property. Ferris also stated that in 2007, the auditor had valued the property at issue—then two parcels—at \$235,200. In 2008, the auditor had valued the property (now a single parcel) at \$529,000. Ferris filed a complaint, and after a

¹ In Franklin County, 2008 was an update year, and 2009 was the second year of that interim period lasting until the 2011 reappraisal.

hearing, the BOR determined the value to be \$350,000 for 2008, based on construction-cost evidence presented by Ferris. Next, Ferris received a notice from the auditor in December 2009 stating that the auditor's appraisers had reviewed the property for tax year 2009 and determined that a value change was necessary to reflect the parcel's value as of the January 1, 2009 tax lien date. The notice also noted: "Tax year 2008 valuation: \$529,000; Tax year 2009 valuation: \$970,000."

{¶ 23} The primary point made by Ferris's complaint was that the auditor's 2009 increase relied on "new construction," but "the 'new construction' had already been discussed, considered, and evaluated by the BOR at the hearing for the 2008 tax year resulting in the valuation of \$350,000." When Ferris's counsel reiterated the point at the BOR hearing, the auditor's delegate appeared to corroborate that assertion.

{¶ 24} In the past, this court has enforced the carryover provision in R.C. 5715.19(D) *both within and beyond* the three-year periods that separate each reappraisal (which is performed every six years) from the update of value that is performed in the third year after the reappraisal. (The three-year periods from reappraisal to update, and from update to reappraisal, are referred to as either as "trienniums," or as "interim periods.")

{¶ 25} This case presents a straightforward application of the carryover from the first to the second year *within the same triennium*. *Oberlin Manor, Ltd. v. Lorain Cty. Bd. of Revision*, 69 Ohio St.3d 1, 629 N.E.2d 1361 (1994) ("The final determination of Oberlin Manor's complaint as to the assessment of real property taxes for 1982 applies to the subsequent tax years in the same triennium," there being "no evidence of record that the property was changed in 1983 or 1984, or that it was in any way different from tax year 1982").

{¶ 26} The auditor's delegate and the treasurer's delegate sat as the BOR, and they adopted \$350,000—the same amount as the tax year 2008 valuation—as

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the value of the property for tax year 2009. Thus, although the BOR did not explicitly predicate its decision on R.C. 5715.19(D), the circumstances raise the inference that the members—particularly the auditor’s delegate—applied the carryover provision. It acted correctly in doing so.

The BTA erred by failing to apply the carryover value for tax year 2009

{¶ 27} The BOE appealed to the BTA, where the parties waived a hearing and submitted the case on the existing record.² The BTA declined to carry over the valuation from 2008 to 2009 or to accord the carryover provision any significance in the case. That decision was a reversible legal error on the part of the BTA under *Oberlin Manor*.³

{¶ 28} At the BOR hearing, the auditor’s delegate indicated that Ferris was correct in asserting that the auditor had erroneously not taken the 2008 BOR redetermination of value into account because of the timing of the BOR decision in relation to the 2009 assessment. But then the delegate went on to state that “by that time [Ferris had] already filed the ’09 [complaint], and that stops any continuation of the \$350,000 decision of the ’08 case.”

{¶ 29} The BTA’s decision is predicated on the fact that Ferris filed a fresh complaint for tax year 2009. Because a new complaint was filed, the carryover provision at R.C. 5715.19(D) was ignored, and the burden was placed on Ferris to prove the validity of using the 2008 value, as determined by the BOR, for 2009. But the BTA erred by ignoring the carryover.

² The BTA first denied Ferris’s motion to dismiss the BOE’s appeal, holding that the BTA had jurisdiction over the appeal. BTA No. 2010-M-3507, 2011 WL 489418 (Feb. 8, 2011).

³ In the earlier interlocutory order denying the motion to dismiss, the BTA disagreed with the owner’s assertion that the 2009 valuation “was a carryover of the 2008 values,” finding instead that “the BOR made an independent finding of value, based upon the evidence before it.” *Id.* at *3. Because applying the carryover was the legally proper thing to do, however, it should be presumed that the BOR did it. *See State ex rel. Shafer v. Ohio Turnpike Comm.*, 159 Ohio St. 581, 590, 113 N.E.2d 14 (1953) (“in the absence of evidence to the contrary, public officers * * *, within the limits of the jurisdiction conferred by law, will be presumed to have properly performed their duties and not to have acted illegally but regularly and in a lawful manner”).

{¶ 30} The record is clear that Ferris only filed a new complaint because the auditor's personnel would not correct the 2009 valuation based merely on Ferris's petition to do so. Although we have held that "the filing of a valid new complaint *in the second triennium* stops, for the tax year at issue and succeeding years, the automatic carryover of the value determined under a prior complaint" (emphasis added), *Cincinnati School Dist. Bd. of Edn. v. Hamilton Cty. Bd. of Revision*, 74 Ohio St.3d 639, 642-643, 660 N.E.2d 1179 (1996), we have never held that a new complaint filed within the first triennium does so.

{¶ 31} Moreover, a serious question can be raised whether the second complaint should be viewed as jurisdictionally valid, given R.C. 5715.19(A)(2)'s general prohibition of a second filing within the same triennium. If it was not valid, the BOR lacked jurisdiction over it, but the auditor still had a duty to determine value based on the carryover. Not surprisingly, the BOE declines to contest jurisdiction based on R.C. 5715.19(B), preferring to argue that the new complaint for 2009 cut off the carryover, which would otherwise have been granted by the auditor as a correction of his 2009 assessment.

{¶ 32} Finally, whatever other legal principles apply here,⁴ it ought to be decisive that Ferris was forced to file the complaint by the bureaucratic insistence of the auditor's personnel that the filing was necessary to obtain the benefit of the carryover. I would hold under these circumstances that a complaint filed with the express purpose of enforcing the carryover does not cut off the carryover.

⁴ One principle that does not apply is that of *Olmsted Falls Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 122 Ohio St.3d 134, 2009-Ohio-2461, 909 N.E.2d 597, ¶ 20, to the effect that "each tax year should be determined based on the evidence presented to the assessor that pertains to that year." *Olmsted* did explicitly hold that no "legal constraint of consistency" applies to the determination of value for successive tax years as a general proposition. *Id.* at ¶ 19-21. But there is a crucial difference in *Olmsted*: the successive years at issue in *Olmsted* were *not in the same triennium*, and *no argument of carryover was advanced in the case*. The same is true of the cases on which *Olmsted* relies. Where, as in this case, the carryover provision does apply, the *Olmsted* rule does not.

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In light of the carryover, the completion of construction for 2009 would not justify the auditor's original 2009 valuation of \$970,000

{¶ 33} Ferris contends that the property was “substantially constructed” as of January 1, 2008. The BOE counters by citing testimony at the BOR indicating that the building was completed during 2008 and the property record card indicating that the construction was 60 percent complete as of the 2008 lien date. But the evidence the BOE points to does not support a valuation of \$970,000 for 2009, given the valuation of \$350,000 for 2008 when construction had at least been partially completed. Indeed, if the 60 percent completion figure were correct, the adjusted valuation for 2009 would be \$583,333, not \$970,000. Thus, nothing in the record justified the BTA’s adoption of \$970,000 as the property value.

CONCLUSION

{¶ 34} I would deny the motion to dismiss, reverse the decision of the BTA, and reinstate the BOR’s carryover valuation. I therefore dissent from the majority’s decision to dismiss the appeal.

PFEIFER, J., concurs in the foregoing opinion.

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