

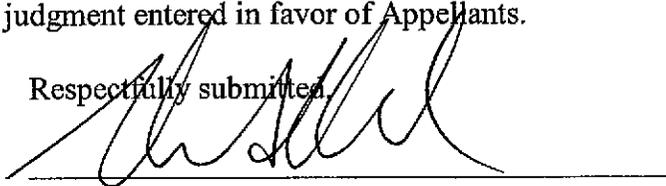
Appellants, Ohio Apartment Association, Greenwich Apartments, Ltd., and D&S Properties (collectively "Appellants"), hereby give notice of their appeal to the Supreme Court of Ohio from the Decision and Order of the Board of Tax Appeals (the "Board"), entered in Case No. 2006-A-816 and issued on December 30, 2008 (the "Order"). A true and accurate copy of the Board's Order is attached hereto as Exhibit A and incorporated herein by reference.

Appellants complain and allege that the Order is unlawful and unreasonable in the following respects:

1. The Board's finding that the Tax Commissioner's Rules 5703-25-18 and 5703-25-10 (collectively the "Rules") are reasonable violates Article XII, Section 2 of the Ohio Constitution, which requires taxation on real property "by uniform rule according to value."
2. The Board's finding that the Rules are reasonable violates Article I, Section 2 of the Ohio Constitution, which provides equal protection to Appellants.

WHEREFORE, Appellants respectfully submit that the Board's Order is unlawful and unreasonable, and should be reversed with judgment entered in favor of Appellants.

Respectfully submitted,



Mark I. Wallach
Counsel of Record for Appellants

CERTIFICATE OF FILING

A copy of the foregoing *Notice of Appeal of Ohio Apartment Association, Greenwich Apartments, Ltd., and D&S Properties* has been filed with the docketing division of the Board of Tax Appeals, in accordance with R.C. § 5717.04, this 28th day of January, 2009.

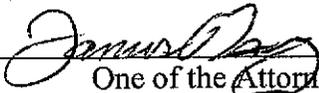


One of the Attorneys for Appellants

CERTIFICATE OF SERVICE

A copy of the foregoing *Notice of Appeal of Ohio Apartment Association, Greenwich Apartments, Ltd., and D&S Properties* was served by **certified mail**, postage prepaid, on the 27th day of January, 2009, on:

Larry D. Pratt, Esq.
Alan Schwepe, Esq.
Office of the Attorney General, Taxation Division
30 East Broad Street, 25th Floor
Columbus, Ohio 43215



One of the Attorneys for Appellants

EXHIBIT A

OHIO BOARD OF TAX APPEALS

Ohio Apartment Association)
)
 and)
)
 Greenwich Apartments, Ltd.)
)
)
 (RULE REVIEW)
)
 DECISION AND ORDER
 and)
)
 D & S Properties,)
)
)
 Appellants,)
)
)
 vs.)
)
 William W. Wilkins, Tax Commissioner)
 of Ohio,)
)
)
 Appellee.)

APPEARANCES:

For the Appellants - Calfee, Halter & Griswold LLP
Laura C. McBride
1400 McDonald Investment Center
800 Superior Avenue
Cleveland, Ohio 44114

For the Appellee - Nancy H. Rogers
Attorney General of Ohio
Lawrence D. Pratt
Alan P. Schwepe
Assistant Attorneys General
30 East Broad Street, 25th Floor
Columbus, Ohio 43215

Entered **DEC 30 2008**

Ms. Margulies, Mr. Eberhart, and Mr. Dunlap concur.

This cause and matter comes on to be considered by the Board of Tax Appeals pursuant to an application for rule review. By such application, this board has

been asked to review Ohio Adm. Code 5703-25-18 and 5703-25-10 (only insofar as and to the extent that it is the mechanism by which the commissioner would effect the changes set forth in Ohio Adm. Code 5703-25-18), pursuant to the powers vested in this board by R.C. 5703.14. Such request for review arises out of what the appellants claim is the disparate treatment of different classes of real property owners resulting from the amendment of R.C. 319.302 in 2005 which precluded certain property owners from continuing to receive a 10% real property tax rollback.

The matter is considered by the Board of Tax Appeals upon the application for review, the evidence and testimony presented at a hearing before the board, and the briefs submitted by counsel.

At the outset, we will review the pertinent rules and statutes under consideration in this matter. First, R.C. 5703.14 (C) sets forth the rule review process, including this board's role, as follows:

“Applications for review of any rule adopted and promulgated by the commissioner may be filed with the board by any person who has been or may be injured by the operation of the rule. The appeal may be taken at any time after the rule is filed with the secretary of state, the director of the legislative service commission, and, if applicable, the joint committee on agency rule review. Failure to file an appeal does not preclude any person from seeking any other remedy against the application of the rule to the person. The applications shall set forth, or have attached thereto and incorporated by reference, a true copy of the rule, and shall allege that the rule complained of is unreasonable and shall state the grounds upon which the allegation is based. Upon the filing of the application, the board shall notify the commissioner of the filing of the application, fix a time for hearing the application, notify the commissioner and the applicant of the time for the hearing, and afford both the opportunity to be heard. The

appellant, the tax commissioner, and any other interested persons that the board permits, may introduce evidence. The burden of proof to show that the rule is unreasonable shall be upon the appellant. After the hearing, the board shall determine whether the rule complained of is reasonable or unreasonable. A determination that the rule complained of is unreasonable shall require a majority vote of the three members of the board, and the reasons for the determination shall be entered on the journal of the board.”

Appellants have requested our review of two rules. The relevant portions of the first, Ohio Adm. Code 5703-25-18, provide in pertinent part, as follows:

“(A) Real property that is not intended primarily for use in a business activity shall qualify for a partial exemption from real property taxation pursuant to section 319.302 of the Revised Code. For purposes of this partial exemption, ‘business activity’ includes all uses of real property, except:

“ ***

“(3) occupying or holding property improved with single-family, two-family, or three-family dwellings;

“(4) leasing property improved with single-family, two-family, or three-family dwellings; and

“(5) holding vacant land that the county auditor determines will be used for farming or to develop single-family, two-family, or three-family dwellings.

“ ***

“(C) In determining whether real property is qualified for the partial exemption, each separate parcel of real property shall be classified according to its principal and current use, and each vacant parcel of land shall be classified in accordance with its location and its highest and best probable legal use. In the case where a single parcel has

multiple uses the principal use shall be the use to which the greatest percentage of the value of the parcel is devoted.

“(D) In determining whether real property is qualified for the partial exemption, the county auditor shall be guided by the property record of taxable real property coded in accordance with the code groups provided for in paragraph (C) of rule 5703-25-10 of the Administrative Code.”

The relevant portions of the second rule, Ohio Adm. Code 5703-25-10, provide in pertinent part, as follows:

“(A) As required by section 5713.041 of the Revised Code, the county auditor shall classify each parcel of taxable real property in the county into one of the two following classifications, which are:

“(1) Residential and agricultural land and improvements;

“(2) All other taxable land and improvements, including commercial, industrial, mineral and public utility land and improvements.

“(B) Each separate parcel of real property with improvements shall be classified according to its principal and current use, and each vacant parcel of land shall be classified in accordance with its location and its highest and best probable legal use. In the case where a single parcel has multiple uses the principal use shall be the use to which the greatest percentage of the value of the parcel is devoted. The following definitions shall be used by the county auditor to determine the proper classification of each such parcel of real property:

“ ***

“(4) ‘Commercial land and improvements’ – The land and improvements to land which are owned or occupied for general commercial and income producing purposes and where production of income is a factor to be considered in

arriving at true value, including but not limited to, apartment houses ***.

“(5) ‘Residential land and improvements’ – The land and improvements to the land used and occupied by one, two, or three families.”

The foregoing rule also requires that each property record be coded according to the code groups listed within the rule, which include Code 401, Apartments, 4-19 rental units; Code 402, Apartments, 20-39 rental units; Code 403, Apartments, 40 or more rental units; Code 510, Single family dwelling; Code 520, Two family dwelling; and Code 530, Three family dwelling.

Also relevant to this discussion is R.C. 319.302, which, upon its amendment in 2005, provided the following:

“(A)(1) Real property that is not intended primarily for use in a business activity shall qualify for a partial exemption from real property taxation. For purposes of this partial exemption, ‘business activity’ includes all uses of real property, except farming; leasing property for farming; occupying or holding property improved with single-family, two-family, or three-family dwellings; leasing property improved with single-family, two-family, or three-family dwellings; or holding vacant land that the county auditor determines will be used for farming or to develop single-family, two-family, or three-family dwellings. ***”

At the hearing before the board, Jay Scott, executive director for both the Columbus and Ohio Apartment Associations, as well as David Fisher, general partner of D&S Properties, owners of residential rental properties, testified on behalf of appellants. Mr. Scott indicated that the Ohio Apartment Association, which is made

up of local apartment associations from around the state, decided to be a party to the instant rule review request because:

“[i]t’s the loss of the 10 percent rollback that is - that was taken away from properties that have more than four residential rental apartments or units on a property. Again, we are looking at that, that there is no differentiation between a residential rental property – the scope may be different based on the size of the business entity that owns the residential rental property, but it is still residential rental property, and so the loss of that, that 10 percent, it basically equated to a 10 percent tax increase. Those larger rental property owners are not able to pass along that tax increase to residential rental residents. The market will not bear that. And *** this is an argument or this is a fact that the members wanted to fight.” H.R. at 22.

Mr. Fisher testified about his business, which includes about 500 units ranging from single family homes to multiple unit buildings. H.R. at 51-56. He indicated that his taxes are higher on the properties with four or more units, and, as a result, his profit margins got tighter, with rent levels decreasing and vacancy increasing. H.R. at 58-59.

At the outset, the appellee has raised a procedural issue which must be addressed prior to beginning our rule review. Counsel for the appellee argues that “[t]he appellants lack standing to challenge Ohio Adm. Code 5703-25-18 as any injury is caused by the enabling statute, R.C. 319.302, and not by the rule itself.” Brief at 12. We acknowledge that “[a] preliminary inquiry in all legal claims is the issue of standing.’ *Cuyahoga Cty. Bd. of Commrs. v. State*, 112 Ohio St.3d 59, 2006-Ohio-6499, ***, ¶22. ‘It has been long and well established that it is the duty of every judicial tribunal to decide actual controversies between parties legitimately affected by

specific facts and to render judgments which can be carried into effect.” *Fortner v. Thomas* (1970), 22 Ohio St.2d 13, 14 ***.” *State ex rel. Ohio Gen. Assembly v. Brunner*, 114 Ohio St.3d 386, 2007-Ohio-3780, at ¶15. However, we find that appellee’s position that the appellants lack standing because any injury that may have occurred was caused by operation of statute, and not by the rules, is merely an argument in semantics. The amendment of the statute in question and the enactment of the rules thereafter in accordance therewith, as well as the overall implementation of all of them, have caused the “injury,” if any. The statute and rules, in effect, contain the same provisions and operate concurrently, and as such, both have caused the “injury” of which appellants complain. Accordingly, we find that appellants have standing to bring their requested rule review.

As we begin the review of the rules in question, we acknowledge that our duty in this matter is straightforward; if the appellants have carried their burden of proof, then we must find the rule(s) unreasonable. Contrary to appellants’ statement in their post-hearing brief, this board cannot declare the subject rules “unconstitutional.” Brief at 2. While the Ohio Supreme Court has authorized this board to accept evidence on constitutional points, it has clearly stated that we have no jurisdiction to decide constitutional claims. *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St.3d 229; *MCI Telecommunications Corp. v. Limbach* (1994), 68 Ohio St.3d 195, 198. Thus, the only issue before this board is one of the reasonableness of the rules.

R.C. 5705.14 requires the taxpayer to list the reasons the rules in question are unreasonable. In their application for review, the taxpayers state that “the

Rules are unreasonable and unconstitutional for two independent reasons. They argue that “the Commissioner has a clear constitutional duty to apply the Rollback to all rental properties, regardless of the number of units contained, because Article XII, Section 2 [sic] explicitly requires a uniform application of property tax to the full range of real properties, including rental properties, and because Article I, Section 2 [sic] requires that the Rules’ classification of rental properties be eliminated.” Application at 4.

As we consider the rules under challenge, we will review prior case law dealing with rules promulgated by the Tax Commissioner. As we stated in *Baxla v. Tracy* (July 30, 1993), BTA No. 1991-M-1242, unreported, at 8-10:

“In *The Kroger Grocery & Baking Co. v. Glander* (1948), 149 Ohio St. 121, the Ohio Supreme Court considered a rule promulgated by the Tax Commissioner under a direct grant of statutory authority. Therein the Court stated:

“Sections 1464-3, 5546-5 and 5546-31, General Code, authorize and direct the Tax Commissioner to adopt for the administration of the Sales Tax Act such rules and regulations as he may deem necessary to carry out the provisions of the act. Such rules and regulations are necessary because of the infinite detail essential in the consideration of an application and the interpretation of the law to concrete and specific circumstances and situations, the incorporation of which in the statute itself would be impracticable or impossible.’

“The Court cited the specific Tax Commissioner’s rule in issue in that case, and, thereafter, set a standard for review of similar rules:

“This rule, like those of other administrative agencies, issued pursuant to statutory authority, has the force and effect of law unless it is unreasonable or is in clear

conflict with statutory enactment governing in the same subject matter.’

“We have also reviewed prior decisions of this Board wherein rules promulgated by the Tax Commissioner have been considered under R.C. 5705.14(C). Rules have been found reasonable when they carry out the intent of the legislature, *Atlas Crankshaft Corp. v. Lindley* (August 15, 1978), B.T.A. Case No. 3-1816, affirmed on other grounds, 58 Ohio St.2d 299; *Roosevelt Properties, et al. v. Kinney* (January 11, 1983), B.T.A. Case No. 81-F-666, 667, unreported, affirmed, 12 Ohio St.3d 7. Rules have been found to be unreasonable when they have not been properly promulgated, or are in conflict with legislative enactments. *William J. Stone, et al. v. Limbach* (June 30, 1988), B.T.A. Case No. 85-C-931, unreported.”

Having reviewed the prior law, we now turn to the rules in issue. In order to determine whether the commissioner acted within his authority we must look to the commissioner’s enabling statute. R.C. 319.302 sets forth the commissioner’s power to promulgate rules dealing with the partial exemption granted in the statute:

“(C) The tax commissioner may adopt rules governing the administration of the partial exemption provided for by this section.”

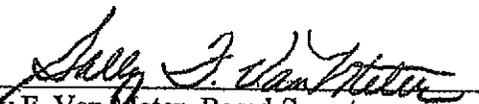
Pursuant to the above-cited grant of authority, the commissioner promulgated Ohio Adm. Code 5703-25-18 and amended 5703-25-10, although not with regard to dwellings.¹ The General Assembly delegated to the Tax Commissioner the power to promulgate rules which would assist in the administration of the partial exemption set forth in R.C. 319.302. “Bearing in mind that ‘administrative agency

¹ The appellants have acknowledged that their only reason for including Ohio Adm. Code 5703-25-10 was insofar as and to the extent that it is the mechanism by which the commissioner would effect the changes made to Ohio Adm. Code 5703-25-18.

rules are an administrative means for the accomplishment of a legislative end,' *Carroll v. Dept. of Admin. Services* (1983), 10 Ohio App.3d 108," *Baxla*, supra, at 14, this board finds the rules in issue to be reasonable – they are administrative regulations, "promulgated to implement legislative policy, not to create it." *Baxla*, supra, at 14. In this regard, we find Ohio Adm. Code 5703-25-18 and 5703-25-10 do not conflict with the legislative directive to the Tax Commissioner to promulgate rules relating to the administration of the partial exemption as the rules specifically replicate the language of R.C. 319.302 and do not go beyond such statutory provisions in any manner.

Based on the foregoing, it is the decision of the Board of Tax Appeals that Ohio Adm. Code 5703-25-18 and 5703-25-10 are reasonable on the basis that each simply provides administrative means by which the Tax Commissioner can implement statutory provisions relating to the partial exemption provided for in R.C. 319.302.

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.


Sally F. Van Meter, Board Secretary