

IN THE SUPREME COURT OF OHIO 09 FEB -5 PM 3: 50

Appeal From the Board of Tax Appeals

OHIO APARTMENT ASSOCIATION *et al.*, :

Appellants/Cross-Appellees, :

v. :

WILLIAM W. WILKINS [RICHARD A. LEVIN], TAX COMMISSIONER OF OHIO, :

Appellee/Cross-Appellant. :

Case No. 2009-0213

Appeal from BTA Case
No. 2006-A-861

FILED
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CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF CROSS-APPEAL OF TAX COMMISSIONER OF OHIO

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IN THE SUPREME COURT OF OHIO

Appeal from Board of Tax Appeals

OHIO APARTMENT ASSOCIATION *et al.*, :
: Case No. 2009-0213
Appellants/Cross-Appellees, :
: :
v. :
: BTA Case No. 2006-A-861
WILLIAM W. WILKINS [RICHARD A. :
LEVIN], TAX COMMISSIONER OF OHIO, :
: :
Appellee/Cross-Appellant. :

NOTICE OF CROSS-APPEAL OF TAX COMMISSIONER OF OHIO

Cross-Appellant, Richard A. Levin, hereby gives notice of his cross-appeal as of right to the Supreme Court of Ohio from the Decision and Order of the Ohio Board of Tax Appeals (“BTA”) dated December 30, 2008, BTA Case No. 2006-A-861, entered on the journal of the proceedings on that same date, and interim Order dated November 9, 2007 entered on the journal that same date in the same matter. This cross-appeal is filed in accordance with R.C. 5717.04, and Section 3(A)(1), S.Ct. Prac. R. II. True copies of the Decision and Order of December 30, 2008, and interim Order of November 9, 2007, from which this appeal is perfected, are attached hereto and incorporated herein by reference. This notice of cross-appeal is being filed within ten (10) days of the Appellant’s notice of appeal having been filed, or within thirty days of the decision of December 30, 2008, whichever is later.

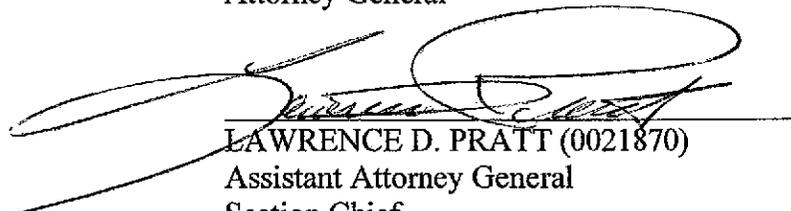
The Cross-Appellant Tax Commissioner asserts that the BTA, in its interim Order of November 9, 2007 and in its December 30, 2008, Decision and Order, made the following errors:

- (1) The BTA erred, as a matter of fact and law, in exercising jurisdiction over the Appellants' application filed pursuant to R.C. 5703.14(C), where the sole stated grounds for the requested review of two administrative rules of the Tax Commissioner, Ohio Admin. Code §§ 5703-25-18 and 5703-25-10, is that the rules are allegedly unconstitutional, rather than an assertion that the administrative rules are in conflict with, or exceed the scope of the enabling statute, R.C. 319.302, or that the Tax Commissioner abused his discretion in the enactment of the administrative rules. Unreasonableness under R.C. 5703.14(C) does not encompass the constitutionality of an administrative rule that does not conflict with the enabling statute, or does not go beyond the statutory provision that it embraces;
- (2) The BTA erred, as a matter of fact and law, in holding that the Appellants have standing to bring this action pursuant to R.C. 5703.14(C) in that the Appellants have not demonstrated any injury caused independently by the two administrative rules for which they seek review rather than injury caused by the underlying enabling statute, R.C. 319.302;
- (3) The BTA erred as a matter of law by not granting the Tax Commissioner's September 17, 2007, "Motion to Dismiss for Ripeness, or in the Alternative for a Summary Ruling in Appellee's Favor."

The Tax Commissioner asserts that with respect to these errors, the BTA's decisions referenced above are both unreasonable and unlawful.

Respectfully submitted,

RICHARD CORDRAY
Attorney General

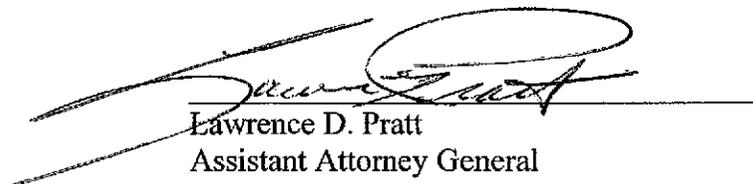


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CERTIFICATE OF FILING

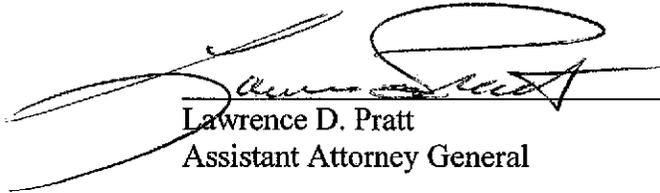
The foregoing Notice of Cross-Appeal of Tax Commissioner of Ohio has been filed with the Board of Tax Appeals in accordance with R.C. § 5717.04, this 5th day of February, 2009.



Lawrence D. Pratt
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the Notice of Cross- Appeal of Tax Commissioner of Ohio and the Case Information Statement were sent by regular U.S. mail on this 5th day of February, 2009 to: Mark I. Wallach, James F. Lang and Laura C. McBride, Calfee, Halter & Griswold LLP, 1400 Key Bank Center, 800 Superior Avenue, Cleveland, Ohio 44114-2688.



Lawrence D. Pratt
Assistant Attorney General

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.”

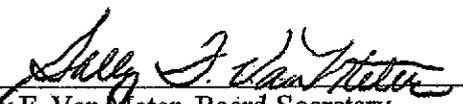
Pursuant to the above-cited grant of authority, the commissioner promulgated Ohio Adm. Code 5703-25-18 and amended 5703-25-10, although not with regard to dwellings.¹ The General Assembly delegated to the Tax Commissioner the power to promulgate rules which would assist in the administration of the partial 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

OHIO BOARD OF TAX APPEALS

Ohio Apartment Association)
)
 and)
)
 Greenwich Apartments, Ltd.)
)
 and)
)
 F & W Properties,)
)
 Appellants,)
)
 v.)
)
 William W. Wilkins, Tax Commissioner)
 of Ohio,)
)
 Appellee.)

CASE NO. 2006-A-861
(RULE REVIEW)
ORDER
(Denying Appellee's Motions)

APPEARANCES:

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For the Appellee - Marc Dann
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Columbus, Ohio 43215

Entered **NOV 9 2007**

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

This cause and matter came on to be considered by the Board of Tax Appeals upon a motion to dismiss the instant appeal for ripeness, or in the alternative,

a motion for a summary ruling in the appellee's favor, filed by the Tax Commissioner. The matter was submitted to the Board of Tax Appeals upon the motion and brief in support of said motion, a response to said motion filed by the appellant taxpayers, and a response thereto filed by the commissioner.

Specifically, the motion provides as follows:

"The Appellee, Richard A. Levin [William W. Wilkins], hereby moves the Board of Tax Appeals to dismiss the Appellants' Application for Review on the basis of ripeness. Appellee submits that, to the extent that any claim of unconstitutionality can fall within the scope of a review for 'reasonableness' under R.C. 5703.14, it is premature to request this Board to review Ohio Adm. Code 5703-25-10¹ and Ohio Adm. Code 5703-25-18² for

¹ That section, entitled "classification of real property and coding of records," provides in pertinent part that:

"(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, hotels, motels, theaters, office buildings, warehouses, retail and wholesale stores,

their alleged unconstitutionality when they are based upon and tract (sic) the language of an underlying statute, R.C. 319.302(A)(1),³ which itself has not been ruled to be

bank buildings, commercial garages, commercial parking lots, and shopping centers.

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

² That section, entitled “partial exemption from real property tax,” provides in pertinent part that:

“(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:

“(1) Farming;

“(2) Leasing property for farming;

“(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.

“***”

³ R.C. 319.302, entitled “partial tax exemption for real property not intended primarily for use in business activity,” provides in pertinent part that:

“(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. For purposes of this partial exemption, ‘farming’ does not include land used for the commercial production of timber that is receiving the tax benefit under section 5713.23 or

unconstitutional. The latter is, of course, an issue over which this tribunal clearly has no jurisdiction, nor has it been raised in the instant action. In fact, the Appellants have failed to follow the directive of the Franklin County Court of Appeals in *State ex. rel. Ohio Apt. Assn. v. Wilkins*, 2006 Ohio 6783, to have the constitutionality of R.C. 319.302(A)(1), Ohio Adm. Code 5703-25-10 and Ohio Adm. Code 5703-25-18 determined in a declaratory judgment action in the court of common pleas. Alternatively, until R.C. 319.302(A)(1) has been declared unconstitutional, Ohio Adm. Code 5703-25-10 and 5703-25-18 are as a matter of law reasonable under R.C. 5703.14(C) as they incorporate the same standards set forth in R.C. 319.302(A)(1). Thus, the Board of Tax Appeals should dismiss this matter for ripeness, or must issue a summary decision affirming the reasonableness of the rules. ***”

First, the commissioner claims that “[u]ntil R.C. 319.302(A)(1) is ruled unconstitutional, this action pursuant to R.C. 5703.14(C) is not ripe for adjudication.” Motion at 3. However, we find such contention is not supported by the provisions of R.C. 5703.14(C). The Tax Commissioner, either through a general power provided in R.C. 5703.05(M), or more specific legislative grants, has the power to promulgate rules for the administration of the tax laws. The Board of Tax Appeals, through R.C. 5703.14, has the power to review rules promulgated by the Tax Commissioner. Specifically, that section provides in pertinent part that:

“Applications for review of any rule adopted and promulgated by the commissioner may be filed with the board [of Tax Appeals] by any person who has been or

5713.31 of the Revised Code and all improvements connected with such commercial production of timber.

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

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.”

As this board stated in *Baxla v. Tracy* (July 30, 1993), BTA No. 1991-M-1242, “[t]he General Assembly has given wide latitude to a taxpayer who wishes to challenge a rule promulgated by the Tax Commissioner. R.C. 5703.14(C) permits any taxpayer who has been or may be affected by such a rule the ability to challenge the reasonableness of that rule. The legislature allows a taxpayer to challenge a rule as a separate appeal, or within an appeal of an underlying assessment if the rule appears to be in issue.” *Id.* at 6. Thus, based upon the foregoing, we do not agree that there must be a prerequisite finding that an underlying statute is unconstitutional before an appeal to this board for review of rules related to that underlying statute can be considered “ripe.”

Further, the commissioner claims that “as a matter of law, Ohio Adm. Code 5703-25-10 and 57-25-18 [sic] must be determined to be ‘reasonable’ under R.C. *** 5703.14(C).” Motion at 4. The conclusion sought by the commissioner is premature, as the appellants are entitled to provide evidence and testimony to this board in support of their position that the rules in question are “unreasonable.” In this regard, we find our prior decision in *Roosevelt Properties Co. v. Kinney* (Jan. 11, 1983), BTA Nos. 1981-F-666, 1981-A-667, unreported, affirmed (1984), 12 Ohio St.3d 7 to be instructive. Contrary to the commissioner’s suggestion, we believe that

our holding in *Roosevelt* demonstrates this board's ability to review the reasonableness of a rule, without determining its constitutionality or that of the statute which it purports to amplify. The Supreme Court, on appeal in *Roosevelt*, confirmed that: "[a] regularly enacted statute of Ohio is presumed to be constitutional and is therefore entitled to the benefit of every presumption in favor of its constitutionality. This court has held enactments of the General Assembly to be constitutional unless such enactments are clearly unconstitutional beyond a reasonable doubt." *State, ex rel. Dickman, v. Defenbacher* (1955), 164 Ohio St. 142, 147 [57 O.O. 134]. Accord *Bd. of Edn. v. Walter* (1979), 58 Ohio St. 2d 368, 376 [12 O.O.3d 327]. This principle applies equally to administrative regulations. *Pacific States Box & Basket Co. v. White* (1935), 296 U.S. 176. Cf. *State, ex rel. Shafer v. Ohio Turnpike Comm.* (1953), 159 Ohio St. 581, 590 [50 O.O. 465], wherein it was recognized that administrative regulations are presumed reasonable, both factually and legally, and the burden rests on the party challenging the rule to introduce evidence to the contrary." *Id.* at 13. Appellants are attempting to exercise their statutory right to challenge the rules in question herein, and we believe the statute requires that they be afforded the opportunity to do so.

Finally, the commissioner argues that appellants have failed "to follow the directive of the Franklin County Court of Appeals to file a declaratory judgment action seeking a declaration that R.C. 319.302(A)(1), Ohio Adm. Code 5703-25-10 and Ohio Adm. Code 5703-25-18 are unconstitutional." Motion at 7. Regardless of any "directive" set forth in the court of appeals' decision in *State ex rel. Ohio Apt. Assn. v.*

Wilkins, 2006-Ohio-6783, we note that the ability of the appellants to file a rule review appeal with this board was never addressed therein. Further, we find nothing in the court's discussion that could be construed to preclude a rule review appeal with this board.

Thus, based upon the foregoing, the commissioner's motions must be and hereby are, denied. During the pendency of the instant motions, the parties informally requested, and were granted, a stay of the scheduling order previously issued herein on July 27, 2007 (see *Ohio Apartment Association, et al. v. Wilkins* (Int. Order, July 27, 2007), BTA No. 2006-A-861, unreported). Therefore, the parties are hereby directed to provide this board with a new scheduling agreement within fourteen days of the issuance of the instant order.

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