

ORIGINAL

**IN THE SUPREME COURT OF OHIO**

**Appeal From the Board of Tax Appeals**

OHIO APARTMENT ASSOCIATION <i>et al.</i> ,	:	
	:	Case No. 2009-0213
Appellants/Cross-Appellees,	:	
	:	
v.	:	
	:	Appeal from BTA Case
RICHARD A. LEVIN, TAX	:	No. 2006-A-861
COMMISSIONER OF OHIO,	:	
	:	
Appellee/Cross-Appellant.	:	

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**MOTION FOR STAY OF BRIEFING SCHEDULE  
BY APPELLEE/CROSS-APPELLANT  
RICHARD A. LEVIN  
TAX COMMISSIONER OF OHIO**

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MARK I. WALLACK (0010948)  
Counsel of Record  
JAMES LANG (0059668)  
Counsel of Record  
LAURA C. McBRIDE (00800059)  
Calfee, Halter & Griswold LLP  
1400 McDonald Investment Center  
800 Superior Avenue  
Cleveland, Ohio 44114  
Telephone: (614) 231-8900

RICHARD CORDRAY  
Attorney General of Ohio  
LAWRENCE D. PRATT (00 21870)  
Section Chief  
(Counsel of Record)  
ALAN SCHWEPE (0012676)  
Assistant Section Chief  
30 East Broad Street, 25<sup>th</sup> Floor  
Columbus, Ohio 43215-3428  
Telephone: (614) 466-5967  
Facsimile: (614) 466-8226  
lawrence.pratt@ohioattorneygeneral.gov  
alan.schwepe@ohioattorneygeneral.gov

ATTORNEYS FOR APPELLANT

ATTORNEYS FOR APPELLEE/  
CROSS-APPELLANT

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SUPREME COURT OF OHIO

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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  
RICHARD A. LEVIN, TAX :  
COMMISSIONER OF OHIO, :  
: **MOTION FOR STAY OF BRIEFING**  
Appellee/Cross-Appellant. : **SCHEDULE BY APPELLEE/CROSS-**  
: **APPELLANT**

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The Appellee-Cross-Appellant, Richard A. Levin, hereby moves the Court to stay further briefing in this matter until such time as the Court rules upon the Motion to Dismiss filed by the Appellee-Cross-Appellant on April 1, 2009 asserting that the Court lacks jurisdiction to entertain the Appellants' appeal of a review of an administrative rule pursuant to R.C. 5703.14(C). A memorandum in support is attached and incorporated herein.

Respectfully submitted,

RICHARD CORDARY  
Attorney General

  
LAWRENCE PRATT (00 21870)  
ALAN P. SCHWEPE (0012676)  
Assistant Attorneys General  
30 East Broad Street, 25<sup>th</sup> Floor  
Columbus, Ohio 43215  
Telephone: (614) 466-5967

## MEMORANDUM

On April 1, 2009, Richard A. Levin, Tax Commissioner of Ohio (the “Tax Commissioner”), moved the Court to dismiss this action in its entirety for lack of jurisdiction. The action is brought purportedly as an appeal, pursuant to R.C. 5717.04, from a decision of the Board of Tax Appeals (hereinafter “BTA”) in a rule review proceeding conducted by the BTA pursuant to the special provisions of R.C. 5703.14(C). In its decision the BTA, acting within the parameters of the scope of its authority under the statute, upheld Ohio Adm. Code 5703-25-18 and 5703-25-10 as being reasonable in that they merely replicate the language of the underlying enabling statute, R.C. 319.302, and “do not go beyond such statutory provisions in any manner.” The BTA found that it only had jurisdiction to determine reasonableness, and had no jurisdiction to address constitutional issues upon which Appellants’ entire application for review was based.

The Tax Commissioner filed a Motion to Dismiss asserting that this action should be dismissed for multiple reasons. First, the Court has no revisory jurisdiction over appeals from proceedings conducted under R.C. 5703.14(C). This Court has held that Section 2, Article IV of the Ohio Constitution does not confer jurisdiction over appeals from quasi-legislative actions. The Court has specifically ruled that a Board of Tax Appeals rule review does not present a justiciable case or controversy for review and, as such, is a quasi-legislative action which the Court is without jurisdiction to hear. *Zangerle v. Evatt* (1942), 139 Ohio St. 563. Second, to the extent that, contrary to *Zangerle*, the jurisdiction is quasi-judicial, jurisdiction does not lie for this Court to review matters that exceed the scope of the issues properly considered under R.C. 5703.14(C). R.C. 5703.14(C) does not encompass the two constitutional issues raised by the Appellants in their Notice of Appeal to this Court. Third, the Appellants seek to raise issues not ripe for review as they challenge the constitutionality of rules that merely track the underlying

self executing enabling statute, one for which they do not seek a declaration of unconstitutionality. Thus they pursue an action that cannot result in any meaningful remedy. Finally, the Notice of Appeal is not written with sufficient specificity to satisfy the jurisdictional requirements of R.C. 5717.04.

This Court has stayed briefing when to do so is appropriate. When faced with questions concerning the Court's jurisdiction to entertain an appeal, the Court has stayed briefing to allow sufficient time to determine the jurisdictional question. See *Newman v. Levin* (2007), 114 Ohio St.3d 1493, 2007 Ohio 4057; *Newman v. Levin* (2007), 116 Ohio St.3d 1205, 2007 Ohio 5507; *Cleveland Clinic Found. v. Levin* (2008), 118 Ohio St.3d 1438, 2008 Ohio 2694.

Given the jurisdictional issues raised by the Tax Commissioner, a stay of further briefing by the parties is appropriate. The Appellants, Ohio Apartment Association, Greenwich Apartments, Ltd. and D & S Properties, filed their first merit brief on April 1, 2009. The Tax Commissioner's first merit brief is due on or before May 6, 2009. This brief and the respective reply briefs on the appeal and cross-appeal should be stayed.

A ruling on the jurisdictional issues may resolve this appeal without reaching the merits, i.e. the reasonableness of Ohio Adm. Code 5703-25-18 and 5703-25-10 under R.C. 5703.14(C). The aforementioned merits briefs only go to the reasonableness under 5703.14(C). It is appropriate to resolve the jurisdictional questions prior to further briefing of the merits in this

matter. Accordingly, the Court should stay the filing of further merits briefs while it considers the Tax Commissioner's Motion to Dismiss.

Respectfully submitted,

RICHARD CORDRAY  
Attorney General

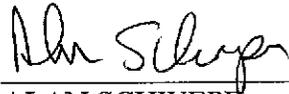


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LAWRENCE PRATT (00 21870)  
ALAN P. SCHWEPE (0012676)  
Assistant Attorneys General  
30 East Broad Street 25<sup>th</sup> Floor  
Columbus, Ohio 43215  
Telephone: (614) 466-5967

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Motion for Stay was sent by regular U.S. Mail this 9<sup>th</sup> day of April, 2009, to: Mark I. Wallach, James F. Lang, Laura C. McBride, Calfee, Halter & Griswold LLP, 1400 McDonald Investment Center, 800 Superior Avenue, Cleveland, Ohio 44114-2688.



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ALAN SCHWEPE  
Assistant Attorney General