

ORIGINAL

IN THE OHIO SUPREME COURT

On Appeal from the Ohio Board of Tax Appeals

OHIO APARTMENT ASSOCIATION, *et al.*, :

Appellants/Cross-Appellees, :

vs. :

RICHARD A. LEVIN, :
TAX COMMISSIONER OF OHIO, :

Appellee/Cross-Appellant. :

CASE NO. 2009-0213

Board of Tax Appeals
Case No. 2006-A-861

REPLY BRIEF OF APPELLEE/CROSS-APPELLANT
RICHARD A. LEVIN,
TAX COMMISSIONER OF OHIO, IN SUPPORT OF CROSS-APPEAL

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I. INTRODUCTION

As argued in the his first Merit Brief, the Tax Commissioner cross-appeals in the instant matter on the basis that the BTA should not have accepted jurisdiction over the Appellants' application for rule review of Ohio Adm. Code 5703-25-10 and 5703-25-18, within the parameters of R.C. 5703.14(C). As a quasi-legislative proceeding, a characteristic that this Court definitively determined in *Zangerle v. Evatt* (1942), 139 Ohio St. 563, a proceeding under R. C. 5703.14(C) is limited to considerations of whether the given rule in question is "reasonable," specifically whether the rule has been properly promulgated and is consistent with the underlying legislative enactments. *Baxla v. Tracy* (July 30, 1993) B.T.A. Case No. 91-M-1242, 1993 Ohio Tax LEXIS 1330, at 11-12, unreported, citing *William J. Stone v. Limbach* (June 30, 1988), B.T.A. Case No. 85-C-931, unreported (Appdx. to Merit Brief at 281 and 305). As with all legislative functions, consideration of constitutional challenges is outside the scope of such a review as constitutional challenges are exclusively the domain of the judiciary. *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 462. Accordingly, since the sole basis for the Appellants' application was two such constitutional challenges, the BTA should have dismissed.

In responding to the Commissioner's brief, the Appellants essentially concede that if the proceeding below was quasi-legislative in nature, the BTA was without jurisdiction to entertain their arguments even with respect to building a factual record for later review by this Court. They thus concede that judicial review is not available over quasi-legislative proceedings as the Court also affirmatively held in *Zangerle*. Instead they attempt to distinguish the holding in *Zangerle* on the basis that it is applicable only to the facts of that case rather than to proceedings

under R.C. 5703.14(C).in general. They then argue that under the facts of the instant case, the proceeding below was quasi-judicial in nature and therefore a proper forum to raise constitutional issues. But even under the facts of this case, the Appellants misconstrue and misapply the holding of *Zangerle* on multiple fronts. The due process mandates of quasi-judicial proceedings mandate notice to and an opportunity to participate by all necessary parties. That was not done in the proceedings below. Quasi-judicial proceedings mandate a concrete justiciable controversy. In the context of real property taxation, a justiciable controversy translates to an adjudication of the tax consequences of a specifically identified property, as *Zangerle* points out. That is not present in the instant case. The only possible outcome of a rule review in question is the rescission or non-rescission of the two rules in question. Neither alternative provides the Appellants with an adjustment to their tax bill or the restoration of the tax rollback they seek. All of these factors demonstrate why a rule review is quasi-legislative and therefore not a proper forum for constitutional issues.

Moreover, even if the Court should conclude that these proceedings are quasi-judicial, many of these same dynamics underscore why the constitutionality of the two rules in question are simply not properly before the BTA and this Court. First, a rule rescission simply doesn't eliminate the binding effect of the underlying statute. This in itself rules out any meaningful remedy. Second, the absence of the county auditors precludes the BTA and this Court from issuing an order binding on the actual officials responsible for making the allegedly unlawful classifications and resulting assessments. Third, the absence of a specific contested assessment from the proceedings makes any ruling by the BTA or this Court purely hypothetical. Fourth, the Appellants have an adequate remedy at law to challenge their classification via a complaint

filed under R.C. 5715.19. Finally, the relief requested by the Appellants – an order restoring the rollback to them – is clearly within the province of the General Assembly and therefore outside the scope of R.C. 5703.14(C), beyond the concomitant jurisdiction of the BTA and beyond the Court’s revisory jurisdiction under R.C. 5717.04. For all of these reasons the BTA did not have jurisdiction to entertain the Amended Application.¹

II. ARGUMENT

A. *R.C. 5703.14(C) is a quasi-legislative proceeding that precludes the consideration of constitutional challenges.*

1. **While an opportunity for an evidentiary hearing is essential to a quasi-judicial proceeding, it is also, as demonstrated in *Zangerle*, not inconsistent with a quasi-legislative proceeding such as that under R.C. 5703.14(C).**

As one attempt to distinguish *Zangerle*, the Appellants suggest that the instant case involved an evidentiary hearing whereas *Zangerle* did not:

For example, [*Zangerle*], establishes that proceedings before an administrative agency involving a hearing and the submission of evidence are quasi-judicial. Because the *Zangerle* proceedings, which were initiated by county auditors via a simple “communication”² requesting rule review, did not involve such procedures, the matter was deemed quasi-legislative. *Id.* at pp. 565, 574-577.

¹ As the Tax Commissioner noted in his original brief, the arguments advanced in support of his Cross-Appeal are defensive in nature to be considered in the event the Court should not grant the Commissioner’s pending motion to dismiss. While that motion also raises jurisdictional issues related to quasi-legislative proceedings and ripeness, it uniquely raises the issue of the Appellants’ failure to adequately specify error in their notice of appeal to this Court.

² If Appellants are emphasizing the word “communication” in an effort to suggest that the initiation of the rule review addressed in *Zangerle* was less formal than the instant case, they are again in error. As the Tax Commissioner pointed out in his first brief, the requirements of the former version of R.C. 5703.14(C), G.C. 1464-4 require the filing of an application just as the current version requires. That such an application was filed was confirmed by the *Zangerle* Court at 575.

Appts' Brief in Opposition at 10. But Appellants misconstrue both the facts and law of the *Zangerle* ruling. The action was brought by three county auditors challenging a rule impacting the classification and corresponding valuation of real and personal property used in the refining of petroleum. Contrary to the Appellants' contention, the BTA conducted an extensive hearing on the merits of the rule challenge. The focus of the hearing was on the rule's impact on the property of three specific petroleum businesses. The passages to which Appellants refer discuss the classic elements of due process – notice and an opportunity to be heard – in the context of pointing out that a necessary party, i.e. the taxpayers, were not present and therefore constituted one major factor precluding the proceedings from rising to a quasi-judicial matter. The Court, however, never opined that once an evidentiary hearing was held, the matter suddenly morphed into a quasi-judicial proceeding. Indeed such a holding would be contrary to the very facts of the case. As the decision quite clearly points out:

A great deal of testimony was taken and many exhibits introduced, involving principally the Cuyahoga county properties of The Standard Oil Company and the Lucas county properties of The Standard Oil Company, The Sun Oil Company and The Gulf Refining Company.

* * * * *

The Board of Tax Appeals, **following the hearing** and personal examination of some of the properties, made a finding that rule No. 2 of the Tax Commissioner is reasonable.

Zangerle at 565. (Emphasis added). See also *Id.* at 575. The holding of an evidentiary hearing was not unusual. It was mandated by the provisions of the statute:

Applications for review of any rule adopted and promulgated by the Tax Commissioner, as herein provided, may be filed by any person with the Board of Tax Appeals. Such applications shall allege that the rule complained of is unreasonable and shall state the grounds upon which such allegation is based. Upon the filing

of such an application the board shall notify the Tax Commissioner thereof, shall fix the time for hearing same, shall notify the Tax Commissioner and the applicant of the time so fixed, and shall afford both an opportunity to be heard. After such hearing the board shall determine whether the rule complained of is reasonable or unreasonable.

G.C. 1464-4.

Appellants' reliance on case law that holds that notice and an opportunity to be heard is a necessary element of a quasi-judicial proceeding cannot be cited for the converse proposition that the presence of an evidentiary hearing is the sole factor to be considered in determining whether a given proceeding is quasi-judicial or quasi-legislative. As explained by the Court in *Union Title Co. v. State Bd. Of Ed.* (1990), 51 Ohio St 3d 189, 191:

In explaining the distinction between quasi-legislative and quasi-judicial proceedings, this court stated in *Rankin-Thoman, Inc. v. Caldwell* (1975), 42 Ohio St. 2d 436, 438..., that "[q]uasi-judicial proceedings require notice, hearing and the opportunity for introduction of evidence. * * * Quasi-legislative proceedings do not. **More frequently, however, courts have examined the nature of the proceedings themselves, to ascertain whether they involve the making or revising of rules, rather than the application of rules in an adjudicatory manner.**

(Emphasis added.) It was the latter consideration, not the issue of whether R.C 5703.14(C) provided for an evidentiary hearing, that factored into the *Zangerle* Court's conclusion that the General Code version of R.C 5703.14(C) constituted a quasi-legislative proceeding. In addition to the absence of a necessary party, the Court spelled out in a series of rhetorical questions, what factors are to be examined in ascertaining the nature of the proceedings: "What rights and whose rights have been affected? What adjudication may be made in respect of this rule? On whom would our decision be binding?" *Id.* at 574. As discussed next, it is the application of all of these factors that sets the instant case apart from a quasi-judicial proceeding.

2. The presence of a taxpayer on an application for rule review does not convert a R.C. 5703.14(C) proceeding into a quasi-judicial proceeding where the statute does not provide for notice and opportunity to participate by all other necessary parties.

The Appellants also argue that *Zangerle* stands for the proposition that a substitution of a taxpayer for that of the auditor as the applicant requesting rule review would convert a R.C. 5703.14(C) rule review into a quasi-judicial proceeding in which constitutional questions could be raised. Appts' Brief in Opposition at 11. Again they misconstrue the decision. Most certainly the Court was concerned about the due process implications of a rule review that principally centered on a rule's impact on the properties of several petroleum companies without the property owners being a party to the proceedings. *Zangerle* at 574-579. But the Court never suggested that the addition of the taxpayers would convert the proceedings into quasi-judicial proceedings. Indeed this Court subsequently found the equivalent Chapter 119 version of R.C. 5703.14(C), R.C. 119.11, to be a quasi-legislative proceeding even though the regulated entity, the holder of a liquor permit, was the actual applicant challenging a regulation of the Ohio Liquor Control Commission. See *Fortner v. Thomas* (1970), 22 Ohio St.2d 13.

The Court also did not rule that the auditors themselves were not equally necessary parties, as the Appellants argue. Instead the Court references "all the necessary parties" being a requisite to a quasi-judicial proceeding. *Id.* at 578. That the county auditors are necessary parties to the adjudication of real property tax issues is evident from the statutory scheme. Real property taxes are a local tax assessed locally by such county auditors. See R.C. Chapter 5713. County auditors are charged with the duty to classify each property under the underlying statute for the rules at issue herein, R.C. 319.302(A)(2). County auditors are charged with the duty of actually reducing the tax liability of taxpayers subject to the partial exemption by the ten percent

rollback amount. See R.C. 319.302(B). Accordingly, as set forth in R.C. 5715.19(A)(1)(f), any challenge to “[a]ny determination made under division (A) of section 319.302 of the Revised Code,” is properly filed as a complaint with the county auditor in whose county the property is located. The auditor is then mandated to present to the county board of revision all complaints filed with him. *State ex rel. Wedgewood 129 Corp. v. Olenick* (1973), 36 Ohio App.2d 111. After a decision is rendered by the board of revision, the county auditor is authorized to appeal any adverse ruling to the Board of Tax Appeals and/or participate as a party if the appeal is filed by another party. R. C. 5717.01.

The Appellants themselves realize the significance of the auditor’s participation as they named the Franklin County Auditor as a defendant in their failed attempt to challenge R.C. 319.302 and the underlying two rules in the Tenth District Court of Appeals. See *State ex rel. Ohio Apt. Assn. v. Wilkins*, 10th Dist. No. 06AP-198, 2006-Ohio-6783, unreported. And the Franklin County Auditor is only a necessary party as to the property located in Franklin County. Where, as here, the relief sought by the Ohio Apartment Association is on behalf of its statewide membership, it naturally involves property in more than one county, making each of the respective auditors a necessary under the provisions of R.C. 5715.19.

The same requirements to join county auditors as necessary parties are present in R.C. Chapter 2723, a provision that allows taxpayers who are not otherwise precluded by Ohio’s Tax Injunction Act, R.C 5703.38, or by the existence of an adequate remedy at law under R.C. 5715.19, to invoke the jurisdiction of the court of common pleas to enjoin or recover illegal taxes and assessments. R.C. 2723.02 states that:

Actions to enjoin the illegal levy of taxes and assessments must be brought against the corporation or person for whose use and benefit the levy is made. If the levy would go upon the county duplicate, **the county auditor must be joined** in the action.

(Emphasis added.) Where the tax has been assessed and the taxpayer seeks to enjoin the collection of the tax based on illegality, or a refund is sought, the county treasurer is added to the mix as a necessary party. See R.C. 2723.03. See also *Scherler v. Maple Heights* (1931), 40 Ohio App. 389, 394-395 (both the county auditor and county treasurer are necessary parties.)

While the absence of the county auditors and/or treasurers alone demonstrates the quasi-legislative nature of the underlying proceedings, they are not the only category of necessary party missing from these proceedings. The Appellants are challenging alleged unconstitutional disparate treatment between property owners of three or fewer residential units who receive the ten percent rollback and those in excess of three who do not. That distinction is codified in the Tax Commissioner's rules which directly track the underlying statute. The Appellants, of course, are precluded from challenging the underlying statute in these proceedings, a point they concede, and one which itself severely limits the relief they can obtain, as more fully discussed below.

Even assuming for purposes of discussion, however, that the Appellants can obtain some relief by just addressing the rules rather than the statute, the real relief they want - to restore the now-repealed rollback provision to themselves - is not the relief they are authorized to achieve under R.C. 5703.14(C). The rule review provisions only authorize the repeal of the unreasonable rule. See R.C. 5703.14(C)(2). The BTA is neither authorized to order the Tax Commissioner to promulgate a new rule incorporating a rollback for the Appellants nor can the Appellants seek to adjust their own tax assessment based on the alleged constitutional infirmity as the adjudication

of real property tax assessments is uniquely within the province of R.C. Chapter 5715 and R.C. 5717.01

Thus, if the only remedy available under the statute is the repeal of a rule, a remedy that would, in turn, eliminate the rollback altogether at least in its rule form, the resulting consequences would be to adversely impact hundreds of thousands of property owners who are currently the beneficiaries of the rollback and neither received notice nor are parties to this proceeding.³ To give such a ruling quasi-judicial force, as the Appellants advocate, without notice and an opportunity to be heard by each of these taxpayers, would create the very due process problems addressed in *Zangerle*. See also *Columbus Apartments Associates v. Franklin Co. Bd. of Revision* (1981), 67 Ohio St.2d 85, holding that where a complaint was filed by a board of education under R. C. 5715.19 seeking an increase in the taxable value of real property owned by a taxpayer, the latter is “an indispensable party to that proceeding” regardless of whether the taxpayer himself/herself filed the complaint.

The Appellants may argue that, unlike R.C. 5715.19 and/or R.C. Chapter 2723, R.C. 5703.14(C) does not mandate notice and/or the participation of these other necessary parties. But that is precisely the point. R.C. 5715.19 was established by the General Assembly as the administrative forum for obtaining adjudications concerning tax classifications. It is a quasi-judicial body, *Swetland v. Evatt* (1941), 139 Ohio St. 6, paragraph nine of syllabus. Consequently the legislative intent of R.C. 5715.19 and the provisions regarding subsequent appeals set forth in R.C. 5717.01 and R.C. 5717.04 is “to provide every procedural safeguard for

³ The Appellants cannot even verify that they have given internal notice of this action to those members in their own organization who currently benefit from the rollback. Testimony of OAA Executive Director Jay Scott. Supp.at 11.

the taxpayer. Indeed, most of these sections are in essence a codification of the fundamental concepts of due process.” *Columbus Apartments Associates*, 67 Ohio St.2d at 89-90. In contrast, because R.C. 5703.14(C) was established simply to conduct a quasi-legislative rule review, the same level of due process safeguards is missing, as the Court observed in *Zangerle*. It is the absence of such safeguards that also makes consideration of the constitutional issues presented by the Appellants inappropriate

3. Proceedings under R.C. 5703.14(C) do not address the tax consequences of specific property and therefore do not present a concrete, justiciable question for the consideration of constitutional issues.

Zangerle also makes it clear that even the presence of “all the necessary parties” would be insufficient to elevate a rule review proceeding to quasi-judicial status where the tax consequences of a specific piece of property are not before the tribunal. The county auditors had argued that even in the absence of the taxpayers, the rule review still constituted a quasi-judicial process because it was binding upon the auditors. The Court disagreed:

Counsel cite authorities to the effect that a declaratory judgment may be had between two administrative officers as to the scope of the powers and duties of each. Suffice it to point out that this court has no jurisdiction to render a declaratory judgment in this case even if all the necessary parties were before it. In this connection, it may be said that some authorities on administrative rule-making have urged the use of the declaratory judgment procedure.

If we were to entertain jurisdiction of this attempted appeal, our judgment would bind no one. Certainly it would not bind the property owner. Neither would it bind any county auditor, including appellants, for whether an auditor's action in valuing a particular property as real or personal property was lawful **would depend upon the facts of the particular case**. The same may be said of the Tax Commissioner and the Board of Tax Appeals. Any rule which this court might declare reasonable in an abstract case could not be considered by us as binding in any future concrete case. The Tax Commissioner might amend or repeal it the next day.

* * * *

When a case reaches this court involving the valuation for taxation of some specific property of a taxpayer and the question of whether rule No. 2 or any other rule is reasonable and lawful is presented, we will, of course, pass upon such concrete question.

Id at 578-579 (Emphasis added.). See also *Fortner v. Thomas*, 22 Ohio St.2d at 14, “it is the duty of every judicial tribunal to decide actual controversies between parties legitimately affected by specific facts.” (Emphasis added.)

As noted in the Commissioner’s initial brief, Appellants, in their Amended Application for Review, (Appellants’ Supplement at 55-59), did not identify a single property or assessment for consideration by the BTA in the proceedings below, including property owned by the named applicants themselves, and therefore failed to present the kind of concrete question to which the *Zangerle* Court refers. Appellants, without citing to any authority, argue that *Zangerle* shouldn’t be read so narrowly and that a generic argument involving the “Rules’ broad application across all real property containing four or more residential rental units owned by Appellants and others similarly situated does not make the challenge to the Rules any more or less concrete.” (Appts’ Brief in Opposition at 11.) But this approach ignores the fundamental fact that real property taxation is dependent on identification of individual property. In fact the same kind of generic request for relief was addressed in *Powell v. Durr* (1917), 9 Ohio App. 237, 240, where the First District Court of Appeals held that a complaint challenging the constitutionality of assessments, brought by a petitioner under the General Code version of R.C. Chapter 2723, “on his own behalf, and on behalf of numerous resident landowners of the village of Cheviot, the value of whose lands has been increased in a manner similar to that of plaintiff,” could not be maintained

as to property holders not named in the petition and property owners whose “properties were not set forth with sufficient certainty in the petition for the court to enter a judgment as to same.”

The requirements of R.C. 5715.19 also require specificity in the complaint. “Each complaint shall state the amount of . . . incorrect classification or determination upon which the complaint is based.” The Court has construed the provisions of the statute as requiring each complainant to fill out a complaint form that contains certain core information on the property at issue and its owner. *Kalmbach Wagner Swine Research Farm v. Bd. of Rev., Wyandot Cty.*, 81 Ohio St.3d 319, 323, 1998 Ohio 475; *Stanjim Co. v. Mahoning Cty. Bd. of Rev.* (1974), 38 Ohio St.2d 233. See also *Cincinnati Gas & Electric Co. v. Clermont Cty. Bd. of Rev.* (May 28, 1999), BTA Nos. 98-K-706, 709, 1999 Ohio Tax LEXIS 710, unreported, attached. Moreover, during the course of the proceedings, the complainant is further instructed to “provide to the board of revision all information or evidence within complainant’s knowledge or possession that affects the real property that is the subject of the complaint.” R.C. 5715.19(G).

With the sole exception of statistical data related to the equal protection claim, introduced defensively by the Commissioner, no information regarding specific property was presented to the BTA for consideration, let alone adjudication of a specific assessment. As the *Zangerle* court rhetorically asked, without a specific identified property and assessment to adjudicate, “[w]hat adjudication may be made in respect of this rule? On whom would our decisions be binding?” *Id.* at 574. Appellants’ arguments certainly do not include any argument that a ruling adverse to them by the BTA or this Court under R.C. 5703.14(C) would preclude any of the property owners whom they purport to represent from raising the very same constitutional arguments in contesting a specific real property assessment before a local county

board of revision.⁴ It is this lack of preclusive effect that is addressed by the *Zangerle* court and is only resolved with the adjudication of a specific property and assessment.

4. A proceeding under R.C. 5703.14(C) is quasi-legislative because it fails to offer any meaningful, judicial remedy.

Still another reason why constitutional issues are outside the purview of R.C. 5703.14(C) is the lack of any meaningful relief. This is true at multiple levels. One, as the *Zangerle* decision notes, any impact on a specific assessment can only be afforded when the facts of that assessment are before the tribunal. R.C. 5703.14(C) simply does not provide for that type of review which is properly brought under R.C. 5715.19. Second, as noted above, the repeal of the two rules does not provide the Appellants with the relief they actually seek. It merely takes the rules off the books. This is all the more problematic when any relief would allow the underlying statute, R.C. 319.302, to remain untouched and therefore controlling.

In their briefing, the Appellants are obviously aware of this problem and consequently suggest that the actual relief should go well beyond the confines of mere repeal of the rules. Thus on page 9 of their Brief in Opposition, they state that “[b]ased on such a determination (that the rules are unreasonable), the Commissioner will be bound to follow the decision and will have to treat property uniformly for purposes of assessment and collection.” In the Conclusion of both their Merit Brief and Reply Brief, the Appellants go a step further to argue that “[t]he Commissioner should be ordered to apply the rollback to all real property in accordance with constitutional mandates and as applied prior to the Rules’ enactment.” Appts’ Merit Brief at 19-20, Brief in Opposition at 14. In neither case do the Appellants offer any authority as to how the Court would acquire jurisdiction to make orders beyond that relief authorized in R.C.

⁴ In fact, the record shows that Appellants even refused to provide specific information about their membership. See Testimony of OAA Executive Director, Jay Scott, Supp. at 13.

5703.14(C), or to grant relief in direct contravention to the dictates of R.C. 319.302 without first finding that provision unconstitutional, or to grant any relief that would be binding on taxpayers or county auditors not party to the proceeding.

That authority simply does not exist where, as here, it is not set forth in R.C. 5703.14(C). The BTA itself is confined to the remedies set forth in the statute. See *Morgan Cty. Budget Commission v. Bd. of Tax App.* (1963), 175 Ohio St. 225, paragraph three of syllabus (“The Board of Tax Appeals, being a creature of statute, is limited to the powers conferred upon it by statute.”): *Stewart v. Evatt* (1944), 143 Ohio St. 547, paragraph one of syllabus. The limitations on remedies are not expanded simply because the matter is on appeal. As noted in *Cleveland Electric Illuminating Co. v. PUCO* (1976), 46 Ohio St.2d 105, 111. fn. 3 “When a judgment or final order is reversed, in whole or part, in the * * * Supreme Court, the reviewing court shall render **such judgment as the court below should have rendered**, or remand the cause to that court for such judgment.” (quoting and applying former R.C. 2505.37 to language similar to that in R.C. 5717.04 in the statute governing appeals from the PUCO.) (Emphasis added.) Moreover, as the Court stated in *Fortner v. Thomas*, 22 Ohio St.2d at 14, “it is the duty of every judicial tribunal to . . . render judgments which can be carried into effect.” As applied to allegedly unlawful rules, “[c]ourts will not aid in making or revising rules of administrative officers, boards or commissions, being confined to deciding whether such rules are reasonable and lawful as applied to the facts of a particular justiciable case,” *Fortner*, second paragraph of syllabus; *Zangerle*, fifth paragraph of syllabus. Again it is the absence of any authority in R.C. 5703.14(C) to provide relief beyond a rule rescission that typifies its status as a quasi-legislative proceeding.

5. Since no one raised the issue therein, *Roosevelt Properties Co. v. Kinney* is not controlling on the issue of whether a proceeding under R.C. 5703.14(C) is a quasi-legislative proceeding.

Not surprisingly, Appellants continue to rely on *Roosevelt v. Kinney* (1984), 12 Ohio St. 3d 7, as supportive of their position that proceedings under R.C. 5703.14(C) are quasi-judicial since the Court accepted jurisdiction over the appeal that followed. Appts' Brief in Opposition at 10. However, as the Commissioner pointed out in his original brief as well as his Motion to Dismiss, the issue was simply never raised in that matter. While the Court, just as it did in *Zangerle*, could have *sua sponte* dismissed *Roosevelt* as beyond its jurisdiction, the Court has also indicated that with respect to the specific question of its inability to review quasi-legislative determinations, it is the duty of the parties themselves to raise the issue. Otherwise it will presume that the proceeding below was quasi-judicial.

Thus, in *Morgan Cty. Budget Commission v. Bd. of Tax App.*, *supra*, a power company filed a petition with the BTA asking it to exercise its supervisory and investigatory powers under R.C. Chapters 5703 and 5715 relative to the 1963 budget for and proposed tax levies of Morgan County. The BTA issued an order finding the budget to have been erroneously determined and ordering a specific correction. The budget commission appealed to this Court arguing that the scope of the order exceeded the BTA's jurisdiction. In agreeing and vacating the BTA order, the Court first noted that, under *Zangerle*, it may not have jurisdiction to do so as the proceedings below appeared to be quasi-legislative in nature. Nevertheless, in light of the fact that no party had raised the issue, the Court, over the strong objections of two of its members, *Id.* at 230-232, elected to treat the proceedings as if they were quasi-judicial since the relief requested could not otherwise be afforded. *Id.* at 226-227. The *Morgan Cty.* decision therefore

established precedent for the subsequent disposition of *Roosevelt* but is distinguishable from a case such as the instant case where jurisdiction has been raised by a party.

6. Appellants are not denied meaningful relief since they have available quasi-judicial proceedings which they have not exercised.

Appellants argue that a construction of R.C. 5703.14(C) precluding them from raising constitutional questions would be an “absurd limitation on the Court’s authority to remedy Appellants’ injury.” Appts’ Brief in Opposition at 13. But Appellants simply ignore the fact that the “absurdity” they ponder is addressed by an alternative administrative procedure in which they can ultimately seek redress of constitutional issues before this Court. See R.C. 5715.19.

One need not look any further than the related litigation surrounding *Zangerle* to see that none of the persons affected by the rules at issue were prevented from ultimately having their issues addressed by this Court. The rule at issue in *Zangerle*, like the rules in the present case, was merely enacted in conformity with constitutional and legislative changes in 1931 that excluded personal property from the uniformity provisions of Article XII, Section 2 of the Ohio Constitution. The changes permitted personal property to be taxed at different percentages of value while real property valuation remained uniform. Further, the changes provided for machinery and equipment used in manufacturing or refining, and not a part of the improvements to the land, to be taxed at 50% of its true value in money rather than 100% as realty. See G.C. Section 5323 *et seq.*(114 Ohio Laws 714); G.C. Sections 5385, 5386 and 5388; *Standard Oil Co. v. Zangerle* (1943), 141 Ohio St. 505, 508-510. The Cuyahoga County Auditor and other county auditors took exception to the machinery and equipment owned by certain petroleum and steel companies being classified as personalty rather than as realty.

Thus began a series of challenges in the local board of revision that both predated and followed the *Zangerle* ruling. Unlike *Zangerle* and the present case, all necessary parties were present and the tax consequences of specific property and property owners were at issue. Consequently, most of the cases ended either at the Eighth District Court of Appeals or at this Court with rulings on the merits. See *Standard Oil Co. v. Zangerle* (1937), 133 Ohio St. 33; *Standard Oil Co. v. Zangerle* (1939), 136 Ohio St. 212; *State ex rel. O'Connor v. Austin* (1942), 140 Ohio St. 7; *Standard Oil Co. v. Zangerle* (1943), *supra*; *Zangerle v. Standard Oil Co.* (1945), 144 Ohio St. 506; *Standard Oil Co. v. Zangerle* (1945), 144 Ohio St. 523; and *Zangerle v. Republic Steel Corp* (1945), 144 Ohio St. 529. Just as the adverse jurisdictional ruling in *Zangerle* did not deter the county auditor or the taxpayer from pursuing a merit ruling by initiating it in the board of revision, neither does the inability of the Appellants to pursue a merit ruling on constitutional questions via R.C. 5703.14(C) prevent them from raising those constitutional issues by filing a complaint under R.C. 5715.19 and pursuing an adjudication through the board of revision and ultimately to this Court.⁵

B. Even within the context of a quasi-judicial proceeding, Appellants seek relief that is barred by issues of ripeness, standing and scope of review.

As pointed out in the Commissioner's initial brief, the Appellants seek relief that would be barred even if R.C. 5703.14(C) were considered to be a quasi-judicial proceeding. At the core of the issue is the fact that any constitutional review of R.C. 319.302 is outside the scope of a rule review. Appellants do not deny this but instead attempt to end-run this jurisdictional defect by seeking relief that would be premised on the equivalent of a determination that the statute is

⁵ To the extent not otherwise precluded, other available remedies could include actions under R.C. Chapters 2723 and 2721.

unconstitutional. Specifically, as noted above, they ask the Court to order the Commissioner “to apply the rollback to all real property in accordance with constitutional mandates and as applied prior to the Rules’ enactment.” Appts’ Brief in Opposition at 14. But the only relief the Court has the jurisdiction to order is the relief specified in R.C. 5703.14(C), the rescission of the two rules. The same is equally true of the BTA.

This Court can not order application of the rollback to all property because rescission of the rules does not accomplish that. It is R.C. 319.302 that creates the two classifications for administration of the rollback, R.C. 319.302(A), and it is the county auditors, not the Commissioner, who are directed by the General Assembly to determine what property is eligible for the partial exemption, R.C. 319.302(A)(2), and to apply it accordingly, R.C. 319.302(B). Until such time as the statute itself is declared unconstitutional⁶ the county auditors would be obligated to comply with its dictates regardless of whether or not the underlying ministerial rules had been rescinded.⁷ The Appellants simply are requesting relief that neither the BTA nor this Court can grant at this time.⁸

⁶ There is an open question as to whether the Appellants could obtain the relief they want even if the question of the statute’s constitutionality was before the Court. If the statute were found unconstitutional, the remedy is not the grant of a rollback to the Appellants, as that would constitute a legislative act to do so. Instead, the remedy might be to strike down the partial exemption altogether with the General Assembly left with the discretion of determining whether it wanted to restore the rollback in a constitutional manner. See for example *DeRolph v. State*, 78 Ohio St.3d 193, 212-213, 1997 Ohio 84 (“Although we have found the school financing system to be unconstitutional, we do not instruct the General Assembly as to the specifics of the legislation it should enact.”)

⁷ Appellants are not even accurate with respect to chronology. They suggest that the rollback was applied uniformly to all property immediately preceding the enactment/amendment of the two rules. However, R.C. 319.302 was amended effective June 30, 2005. Ohio Adm. 5703-25-18 and Ohio Adm. 5703-25-10 were not either promulgated or amended until December 15, 2005, nearly six months later.

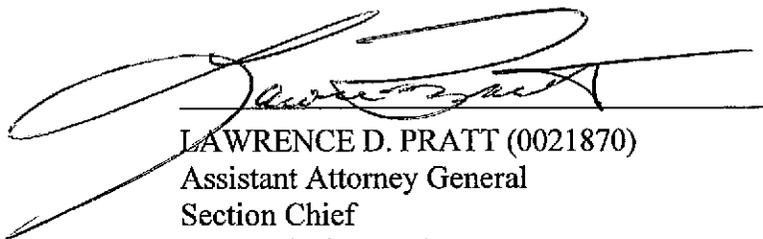
⁸ As noted in the Commissioner’s original brief, these facts materially distinguish the rules under review in the instant case from the rule under review in *Roosevelt Properties Co. v. Kinney*, *supra*. There the General Assembly delegated to the Commissioner the task of creating by rule the tax classifications to which the tax reduction factor was applied, and therefore repeal of the rule would have had material impact. Here that role was performed by the General Assembly itself.

III. CONCLUSION

For all the above reasons and those set forth in the Commissioner's original brief, the Commissioner respectfully requests this Court, should it not already have granted the Commissioner's Motion to Dismiss because of a lack of the Court's own jurisdiction, to find the Commissioner's Cross-Appeal to be well taken and either dismiss this appeal or vacate the BTA decision and order the Amended Application to be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the forgoing *Reply Brief of the Appellee/Cross Appellant Richard A. Levin, Tax Commissioner of Ohio, in Support of Cross-Appeal* was served by regular U.S. mail, postage prepaid, this 19th day of June, 2009 upon the following:

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APPENDIX



LEXSEE 1999 OHIO TAX LEXIS 710

Cincinnati Gas & Electric Co., Appellant, vs. Clermont County Board of Revision, Clermont County Auditor, Board of Trustees of Pierce Township, New Richmond Exempted Village Board of Education, U.S. Grant Vocational School District Board of Education, Appellees.

CASE NOS. 98-K-706; 98-K-709 (REAL PROPERTY TAX)

STATE OF OHIO -- BOARD OF TAX APPEALS

1999 Ohio Tax LEXIS 710

May 28, 1999, Entered

[*1]

APPEARANCES:

For the Appellant - Raymond D. Anderson, Carol Mahaffey, Vorys, Sater, Seymour and Pease LLP, 52 East Gay Street, P.O. Box 1008, Columbus, Ohio 43216-1008. John J. Finnigan, Jr., Senior Counsel, Cinergy Corp. Legal Dept., 2500 Atrium II, P.O. Box 960, Cincinnati, Ohio 45201-0960.

For the County Appellees - Donald A. White, Clermont County Prosecuting Attorney, By: Alan Lee Edwards, Assistant Prosecuting Attorney, Courthouse, Batavia, Ohio 45103.

For the Appellee Board of Trustees of Pierce Township - Paul D. Rice, Esq., 600 Shepherd Avenue, Cincinnati, Ohio 45215.

For the Appellees New Richmond Exempted Village Board of Education and U.S. Grant Vocational School District Board of Education - David C. DiMuzio, Wood & Lamping LLP, 2500 Cincinnati Commerce Center, 600 Vine Street, Cincinnati, Ohio 45202-2409.

OPINION:

ORDER (Overruling Motion to Dismiss)

Mr. Johnson, Ms. Jackson and Mr. Manoranjan concur.

This matter is now considered by the Board of Tax Appeals upon a motion to dismiss these appeals which has been filed on behalf of the above-named appellee boards of education (collectively referred to as "BOE"). Through this motion, the BOE asserts that the Clermont County Board [*2] of Revision ("BOR") was, and in turn this Board is, without jurisdiction to consider the value of the subject property, *i.e.*, The Beckjord Electric Generating Plant, because the complaint failed to identify all of the subject's owners. n1 We now proceed to address the jurisdictional issue which has been raised by the BOE by giving consideration to its motion, the parties' respective written arguments, the statutory transcripts certified by the Clermont County Auditor ("Auditor"), the evidence presented at the hearing n2 conducted by this Board and the written stipulations of fact which have been jointly submitted by the parties. n3

n1 In a subsequent filing with this Board, the BOE indicates that its motion to dismiss *may* not be applicable to B.T.A. No. 98-K-706. Given the decision which we reach today, we need not further address the BOE's uncertainty in this regard.

n2 At this Board's hearing, appellant presented evidence regarding its role as the operator of the subject property and its ability to make day-to-day decisions on behalf of the other owners by virtue of certain operating

agreements. While this information tends to support our conclusion, we do not have to look beyond the face of appellant's complaint and our prior decisions to find support for our decision announced herein.

[*3]

n3 We note that a second jurisdictional issue was raised by this Board. In the statutory transcript certified to this Board by the Auditor, it appeared that appellant's notices of appeal were filed with the BOR beyond the period prescribed by R.C. 5717.01. If accurate, this Board would have been without jurisdiction to consider these appeals. See *Hope v. Highland Cty. Bd. of Revision* (1990), 56 Ohio St.3d 68. However, the parties have stipulated that appellant's notices of appeal were mailed to the BOR by certified mail within thirty days of the mailing of the BOR's decisions. Accordingly, this Board will proceed to address the jurisdictional issue now raised by the BOE.

On line 1 of Division of Tax Equalization Form 1, entitled "Complaint Against the Valuation of Real Property" ("complaint"), appellant's former counsel identified the "owner of the property" as "Cincinnati Gas & Electric Co." In support of its motion, the BOE has directed this Board's attention to certified warranty deeds attached to its motion n4 which indicate that the subject property is jointly owned by appellant, *i.e.*, Cincinnati Gas & Electric Company, Dayton Power & Light Company ("DP&L"), and Columbus [*4] Southern Power Company ("Columbus Southern"). Relying upon several decisions of this Board, the BOE asserts that appellant's failure to identify DP&L and Columbus Southern as owners on its initial complaint form renders the complaint jurisdictionally deficient. For the reasons which follow, we disagree.

n4 The parties stipulated that the certified deeds which were attached to the BOE's motion are true and accurate copies of the deeds of the two power plants that are the subject of these hearings.

In *Trotwood-Madison City School Dist. v. Montgomery Cty. Bd. of Revision* (June 30, 1997), B.T.A. No. 95-S-1282, unreported, this Board considered the sufficiency of a complaint to vest jurisdiction in a county board of revision wherein the complainant, *i.e.*, the affected board of education, identified the wrong corporate entity as the owner of the property. After reviewing several decisions of the Supreme Court, as well as our own, we held that the information sought on line 1 of the complaint form, *i.e.*, the identification of the property's owner, runs to the core jurisdiction of a county board of revision and that the affected board of education's failure to identify the [*5] correct owner deprived that tribunal of jurisdiction to consider the property's value. In reaching this conclusion, we stated as follows:

"In order to determine whether a specific instruction on DTE Form 1 is designed to elicit information required by statute, we must first examine the statutes relating to the filing of complaints seeking to increase the valuation of real property. R.C. 5715.19 sets forth the procedure for filing a complaint to increase land valuation. * * * That section reads, in pertinent part:

"Any person owning property within the county, * * *, the board of education of any school district with any territory within the county, * * * may file such a complaint.

"(B) Within thirty days after the last date such complaint may be filed, the auditor shall give notice of each complaint * * * to each property owner whose property is the subject of the complaint, if the complaint was not filed by such owner.'

"Further, R.C. 5715.12 provides:

"The county board of revision shall not increase any valuation without giving notice to the person in whose name the property affected thereby is listed and affording him an opportunity to be heard.'

"A review of R.C. [*6] 5715.19 and R.C. 5715.12 indicates that the instruction on DTE Form 1 requiring the complaint to list the owner of the property is intended to elicit statutorily required information. The name of the property owner is necessary to enable the auditor to notify the property owner that a

complaint has been filed against the property and to enable the BOR to notify the property owner of the time and place of any hearings relating to such complaint." *Id.* at 6-8. (Footnote omitted.)

We subsequently applied the foregoing reasoning in *Cincinnati School Dist. Bd. of Edn. v. Bd. of Revision of Hamilton Cty.* (Dec. 18, 1998), B.T.A. No. 98-J-481, unreported, and *City of Cincinnati School Dist. Bd. of Edn. v. Hamilton Cty. Bd. of Revision* (Jan. 22, 1999), B.T.A. No. 98-L-138, unreported. In the first of these cases, the complainant identified a former owner of the property on line 1 of the complaint form. The then current owner was unaware of the proceedings before the county board of revision until it received notice of the increase which resulted in its next tax bill. In ultimately finding the board of education's complaint to have been defective, we pointed out:

"The March [*7] 26, 1997 complaint filed by the BOE failed to name the owner of the property. Because the complaint failed to name the owner, the BOR did not have jurisdiction to render its decision, making any action taken void. * * *

"The BOE had the correct date of sale of the property, March 26, 1996. The BOE chose to rely upon erroneous summary records maintained by the auditor. The auditor's records if appropriately researched would have revealed Candlewood, Ltd. as the owner. The county recorder's records, if researched, would have identified the owner." *Id.* at 6.

In *City of Cincinnati School Dist. Bd. of Edn., supra*, this Board considered the propriety of a county board of revision's dismissal of complaint on several grounds, including the failure of the complainant, *i.e.*, the affected board of education, to correctly name the owner of the property whose valuation was being challenged. In its complaint, the board of education identified "The Kroger Co." ("Kroger") as the owner of three distinct parcels. The record revealed, however, that Kroger acquired only a portion of two of these parcels, with the remaining land being retained by an unrelated entity, *i.e.*, "Anchor [*8] Associates, Inc., Tr." ("Anchor Associates"), which was nowhere identified on the complaint. The two parcels which were the subject of Kroger's acquisition were later renumbered to comport with the earlier sale.

Reaffirming our decisions in *Trotwood-Madison City School Dist., supra*, and *Cincinnati School Dist. Bd. of Edn., supra*, we stated:

"Clearly identifying the owner of the subject property on the property valuation complaint form is an essential requirement. A complaint that fails to identify the property owner is jurisdictionally defective because the omission of the name of the owner of the subject property runs to the core of procedural efficiency. The Auditor and the BOR require the name of the owner of the contested property in order to give the required notice pursuant to R.C. 5715.19. A complaint that is filed without naming the owner of the subject property must be dismissed for failure to comply with the core jurisdictional requirements. *Id.* at 19.

We therefore concluded that the complainant had adequately identified the owner, *i.e.*, Kroger, and the land which it had acquired, as being the subject of its complaint. However, with respect to that portion [*9] of the three parcels that continued to be retained by Anchor Associates, we concluded that neither the property nor the owner had been adequately identified on the board of education's complaint so as to vest jurisdiction in the county board of revision to consider its value.

Most recently, in *Bd. of Edn. of the Delaware City Schools v. Delaware Cty. Bd. of Revision* (Feb. 5, 1999), B.T.A. No. 97-L-871, unreported, we considered the sufficiency of a complaint to vest jurisdiction in a county board of revision wherein the complainant, *i.e.*, the board of education, named only one of the property's coowners. In that case, the stipulated facts indicated that Donald E. Rankey, Jr. and Pamela H. Rankey acquired a one hundred percent interest in the property through general warranty deed on August 22, 1996 and, through quit-claim deed dated that same date, transferred a one-half interest in the property to Delaware Realty & Properties, Ltd. ("Delaware Realty"). The board of education's complaint, however, identified only the Rankeys as the property's owner and, consequently, notice of the complaint was only sent to them.

We rejected the claim of Delaware Realty that because it was [*10] not identified as an owner on the initial complaint, the complaint must be considered defective:

"Based upon the record before this Board, we conclude that the BOE's complaint was sufficient to establish jurisdiction with the BOR pursuant to R.C. 5715.19. The BOE's complaint correctly named one of the owners, the parcel number and property location, and the basis for the value sought. The BOE's complaint substantially complied with the core jurisdictional requirements set forth in R.C. 5715.19. The BOE's omission of one of the owners of an undivided one-half interest in the property from the complaint form does not run to the core of procedural efficiency, and therefore, would not be an appropriate basis for the BOR to dismiss the BOE" complaint. *Cleveland Elec. Illum. Co. [v. Lake Cty. Bd. of Revision (1998), 80 Ohio St.3d 591]*." *Id.* at 14.

We continued, rejecting the alternate claim asserted by Delaware Realty that because it did not receive notice of the proceedings, the jurisdiction of the county board of revision had not been invoked. This Board pointed out that, pursuant to R.C. 5715.12 and 5715.19(B) and (C), the obligation to provide notice of the filing [*11] of a complaint to appropriate entities is a duty imposed upon the county auditor and county board of revision. *Id.* at 17-18. When these county officials become aware that such notice has not been given, the appropriate response is not to dismiss the complaint, but is instead to either continue the matter until such notice could be given or obtain written waivers from the entities to whom such notice must be given.

Although the BOE asserts that our decision in *Bd. of Edn. of the Delaware City Schools, supra*, is distinguishable from the instant matter due to the somewhat confusing transfer of ownership interests which were involved, we find it to be dispositive of the BOE's motion. Although we acknowledged the difficulties that existed in ascertaining the ownership interest of Delaware Realty, our conclusion was not nearly so restrictive as the BOE suggests. Instead, we held that where a complainant identifies at least one of the owners of the property whose valuation is at issue, the property itself, *i.e.*, by parcel number and location, and the basis for the value claimed, the core jurisdictional requirements of R.C. 5715.19 have been satisfied.

The complaints which were [*12] filed with the BOR in these appeals, correctly identified one of the property's owners, the parcel numbers and locations of the property involved, the values claimed and the general grounds for such claims. Accordingly, based upon our decision in *Bd. of Edn. of the Delaware City Schools, supra*, and the Supreme Court's decision in *Cleveland Elec. Illum. Co. v. Lake Cty. Bd. of Revision (1998), 80 Ohio St.3d 591*, we find the decisions relied upon by the BOE in its motion to be distinguishable. Therefore, the BOE's motion to dismiss is not well-taken and is hereby overruled.

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawState & Local TaxesAdministration & ProceedingsJudicial ReviewTax LawState & Local TaxesReal Property
TaxAssessment & ValuationGeneral Overview



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*** ANNOTATIONS CURRENT THROUGH APRIL 1, 2009 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JUNE 1, 2009 ***

TITLE 27. COURTS -- GENERAL PROVISIONS -- SPECIAL REMEDIES
CHAPTER 2723. ENJOINING AND RECOVERING ILLEGAL TAXES AND ASSESSMENTS

Go to the Ohio Code Archive Directory

ORC Ann. 2723.01 (2009)

§ 2723.01. Jurisdiction of courts of common pleas

Courts of common pleas may enjoin the illegal levy or collection of taxes and assessments and entertain actions to recover them when collected, without regard to the amount thereof, but no recovery shall be had unless the action is brought within one year after the taxes or assessments are collected.

HISTORY:

RS § 5848; S&C 1151, 1152; 53 v 178, §§ 1, 2; GC § 12075; Bureau of Code Revision. Eff 10-1-53.

NOTES:

Related Statutes & Rules

Cross-References to Related Statutes

Action by owner to recover or enjoin county ditch assessment, *RC §§ 6131.55, 6131.56.*

Assessing real estate, *RC § 5713.01 et seq.*

Assessments by municipal corporations, *RC § 727.01 et seq.*

Municipal income tax, *RC § 718.01 et seq.*

Proceedings to enjoin road assessment, *RC § 5537.15.*

State income tax, *RC § 5747.01 et seq.*

Ohio Rules

Injunction, *CivR 65.*

Comparative Legislation



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TITLE 27. COURTS -- GENERAL PROVISIONS -- SPECIAL REMEDIES
CHAPTER 2723. ENJOINING AND RECOVERING ILLEGAL TAXES AND ASSESSMENTS

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ORC Ann. 2723.02 (2009)

§ 2723.02. Parties to actions to enjoin levy

Actions to enjoin the illegal levy of taxes and assessments must be brought against the corporation or person for whose use and benefit the levy is made. If the levy would go upon the county duplicate, the county auditor must be joined in the action.

HISTORY:

RS § 5849; S&C 1152; 53 v 178, § 2; GC § 12076; Bureau of Code Revision. Eff 10-1-53.



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TITLE 27. COURTS -- GENERAL PROVISIONS -- SPECIAL REMEDIES
 CHAPTER 2723. ENJOINING AND RECOVERING ILLEGAL TAXES AND ASSESSMENTS

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ORC Ann. 2723.03 (2009)

§ 2723.03. Parties to actions to enjoin collection of taxes or to recover taxes

Action to enjoin the collection of taxes and assessments must be brought against the officer whose duty it is to collect them. Actions to recover taxes and assessments must be brought against the officer who made the collection, or if he is dead, against his personal representative. When they were not collected on the county duplicate, each corporation or board which is entitled to share in the revenue so collected must be joined in the action. If a plaintiff in an action to recover taxes or assessments, or both, alleges and proves that he or the corporation or deceased person whose estate he represents, at the time of paying such taxes or assessments, filed a written protest as to the portion sought to be recovered, specifying the nature of his claim as to the illegality thereof, together with notice of his intention to sue under sections 2723.01 to 2723.05, inclusive, of the Revised Code, such action shall not be dismissed on the ground that the taxes or assessments, sought to be recovered, were voluntarily paid.

HISTORY:

RS § 5850; S&C 1152; 53 v 178, § 2; GC § 12077; 115 v 598; Bureau of Code Revision. Eff 10-1-53.

Case Notes & OAGs

ANALYSIS Class actions History Necessary parties Under protest

CLASS ACTIONS.

In an action challenging the constitutionality of municipal certificate of occupancy fees, the court erred by granting class action certification, with all landlords required to pay the fees certified as the plaintiff class: *Gottlieb v. City of S. Euclid*, 157 Ohio App. 3d 250, 810 N.E.2d 970, 2004 Ohio App. LEXIS 2409, 2004 Ohio 2705, (2004), appeal denied by 103 Ohio St. 3d 1493, 2004 Ohio 5605, 816 N.E.2d 1080, 2004 Ohio LEXIS 2531 (2004).

HISTORY.