

Ohio Senate
Finance -
General Government and Agency Review
Subcommittee Hearing

Am. Sub HB 49 / Property Tax Budget Provisions

Sec. 5717.07. If the county auditor, tax commissioner, or any board, legislative authority, or public official appeals a decision of a county board of revision to the board of tax appeals, or appeals a decision of the board of tax appeals, a court of common pleas, or a court of appeals pursuant to this chapter regarding a decision by a county board of revision, and if the owner of the property that is the subject of the appeal is a party to the appeal and prevails in the proceeding, the county auditor, tax commissioner, board, legislative authority, or public official that appealed the decision shall pay the reasonable attorney's fees and court costs incurred by the property owner with respect to that appeal proceeding. If more than one such party appealed the determination, the attorney's fees and court costs shall be divided equally among those political subdivisions.

Date: May 18, 2017
Time: 10:00AM
North Hearing Room

Written Testimony of Jeffrey A. Rich

Introduction:

Thank you Chairman Jordan and Committee Members for allowing me the opportunity to testify regarding the property tax budget provisions of Am. Sub. House Bill 49. My name is Jeff Rich and I am here on behalf of the Coalition for Fair Taxation. The purpose of my testimony is to make sure the Committee is aware of the ramifications of the effects of the provision contained within Am. Sub. House Bill 49 which would create a lop-sided one-way loser pays system whereby the county auditor, tax commissioner, board, legislative authority, or public official would have to pay the attorney's fees and court costs of an individual property owner if that body appeals a decision of a county board of revision and the property owner "prevails in the proceeding."

One-Way Loser Pays System:

Essentially, this provision creates a lop-sided one-way "loser pays" system since if a property owner files an appeal and loses, the property owner does not have to pay the attorney fees or court costs of any other party.

One of the stated reasons for the inclusion of this provision is that governmental agencies have some sort of "home court advantage" at the County BOR level. This is simply not true.

Since 2008, more than 50,000 complaints have been filed by property owners seeking reductions in value in Franklin County alone. Over that same time period less than 10% of that number have been filed by Boards of Education seeking increases in value in Franklin County. There have been hundreds of millions of dollars more in reductions granted over this time period than the amount of increases granted. Therefore, it is quite clear that it is the property owner that has the "home court advantage" at the BOR and the BOEs are simply trying to stem the bleeding.

Another justification that has been put forth is that because BOE's tend to file increase complaints that somehow, they are not being "fair." This too is not the case. It is quite clear that with 10 times as many reduction complaints being filed by property owners that the filings by BOEs seeking increases in value only tends to *partially offset* the massive amounts of reductions granted every year. It is also clear that the property owner representatives are very active in making sure that property owners who are entitled to reductions file complaints to receive them. If they weren't there wouldn't be such a large discrepancy between the numbers on increase and decrease complaints being filed.

What Does “Prevail” Mean?

The provision in Am. Sub. H.B 49 permits the lop-sided one-way loser pays system if the property owner “prevails in the proceeding,” however there is no definition of the word “prevail” in the statute.

If a property owner files a complaint seeking a reduction in value of their property and the BOR grants the reduction, but on an appeal to the BTA or beyond, the value is determined to be higher than the BOR’s value, but still lower than the Auditor’s original value; which party “prevailed”? Did the official/government body who appealed the initial reduction prevail because the original reduction was lessened or did the property owner prevail because they still got some reduction?

Boards of Education are Currently Prevented from Investigating Property Values at County Level:

There is no discovery power at the County Board of Revision level. As a result, a Board of Education is at a distinct disadvantage before boards of revision because they cannot require a property owner to permit the BOE’s appraiser to enter and inspect the subject property or require the property owner to produce any relevant documents. The property owner holds all of the cards.

This fact is well known by attorneys practicing on behalf of property owners and the majority of them consistently refuse to permit a BOE appraiser to enter and inspect the property and fail to even respond to informal document requests.

It is on appeal to the BTA where *for the first time a board of education can require the production of relevant documents and obtain an inspection of the property involved*. The current provision would severely hamper a BOE’s ability to determine the true value of real property and therefore hinder the BOE’s ability to protect its current tax duplicate. This provision would also create further incentive for property owners and their contingent fee attorneys to refuse to cooperate at the county level.

Incentive to withhold information:

A perfect example of the incentive to withhold information was revealed in the BTA’s decision in *Columbus City Sch. Dist. Bd. of Edn. v. Franklin Cty. Bd. of Revision* (Aug. 9, 2011), BTA No. 2008-A-947 (attached hereto).

In *SNH*, the property owner filed a complaint seeking a reduction in value from \$16,050,000 to \$3,593,500 based upon a purported sale of the property for that amount. At the BOR hearing, the property owner did not appear, but was represented by its counsel who presented a conveyance fee statement and deed in support of its claim that the entire property sold for \$3,593,500. Having no witnesses to ask questions of regarding the sale, the BOR accepted the reported sale price and lowered the value by \$12,456,500 or 77%.

Without any method by which to gather information regarding this sale, the BOE's only recourse was to appeal the BOR decision to the BTA and obtain relevant documents in discovery at the BTA. It was solely due to the appeal to the BTA that it was discovered that the sale upon which the owner was relying was actually a sale of only the underlying land and did not include the recently constructed building.

The BTA found that "based upon the terms of the purchase and sale agreement, as amplified by the amended and restated ground lease, this board concludes that the sale of the subject property on or about June 7, 2004, ***included only the subject land***. The BTA proceeded to apply the sale price to the land value and reinstate the Auditor's original building value which resulted in the total value being set at \$18,272,480, an increase of \$2.2 million over the Auditor's original value.

Under the current provision, it is quite likely that the appeal to the BTA in *SNH* would never have been filed and the property owner would have received a massive and *unjustified* value reduction resulting in a ***tax increase for all other property owners***.

Contingent Fee Arrangements: The Vast Majority of Property Owner Attorneys are Paid on a Contingent Fee Basis.

Under the language in Am. Sub. H.B. 49, it is likely that the appeal in *SNH* would never have been filed because the property owner's attorney in that case was paid on a contingent fee basis. These contingent fee arrangements typically call for the attorney's "fee" to be a portion of the "tax savings" for one or more tax years (typically 50%). Therefore, the potential "attorney's fees" in the *SNH* could have exceeded \$200,000. Of course, the property owner wasn't paying this potential fee out of its own pocket, but rather only if the large reduction was granted. In *SNH*, the property owner's attorney had every incentive to withhold the true nature of the sale in that case to maximize the potential fee.

There has been some discussion that there are BOE attorneys who are also paid on a contingent fee. While I cannot speak for all BOE attorneys out there, I am unaware of any that work on a contingent fee arrangement and our rates have been hourly for nearly 40 years.

Prohibit Contingent Fee Arrangements:

One alternative to creating a lop-sided one-way loser pays system would be to simply prohibit all contingent fee arrangements before county Boards of Revision and the Ohio Board of Tax Appeals. This would likely have caused the original reduction complaint in *SNH* to not be filed in the first place because the property owner's attorney would have more incentive to properly vet the facts of the case before proceeding.

Other Alternatives:

1. **Eliminate Private Citizen Complaints:** Occasionally, a private property owner will initiate a property tax complaint against a fellow private property owner. This has been cited as a reason to limit who can file BOR complaints against property they do not own. One alternative would be to simply prohibit such individuals from filing valuation appeals against property they do not own, but still permit governmental agencies to file complaints since their budgets are dependent upon receiving the revenue under current levies.

2. **Establish Public Notice Requirements:** In order to increase public accountability and transparency for decisions regarding valuation challenges, the state could require BOEs to pass a resolution outlining the specific parameters under which they intend to file property tax complaints. Parameters could include: 1) the type and class of property, (i.e. commercial/industrial/residential/agricultural, etc); and 2) minimum thresholds, such as a sales price threshold or a value difference threshold. For example, a BOE could resolve to challenge only sales above a certain price, or only those cases where the sale price exceeds the Auditor's value by a certain amount. Each BOE would be free to select whatever thresholds they wish, but would be required to vote on a resolution confirming the parameters.

This would eliminate the potential of favoritism among filing complaints as the complaint would be filed regardless of who owns the property, thereby keeping the blindfold on justice.

Thank you for your time and I urge you to remove this provision from Am. Sub. H.B. 49.