



Summary of H.B. 294 Litigation

Presented By: Stephen W. Funk, Esq., Roetzel & Andress, LPA

State ex rel. Feltner v.
Cuyahoga Cty. Bd. of Revision,
2020-3080 (May 28, 2020)

RESULT: The Ohio Supreme Court **denied** a writ of prohibition and writ of mandamus filed by the former owner of a tax-foreclosed property under R.C. 323.78 that alleged constitutional challenge to H.B. 329 on separation of powers, due process, and takings grounds.

HOLDING: The Board of Revision did not clearly and unambiguously lack jurisdiction over tax foreclosure proceedings under R.C. 323.65-.79

Feltner's Claims

Writ of Prohibition: Board of Revision lacked jurisdiction over administrative tax foreclosure proceedings because the enabling statute (H.B. 329) is unconstitutional.

Response: The statute does not violate separation of powers, due process, and takings clauses and the Board was granted the jurisdiction to order a direct transfer by the General Assembly by R.C. 323.78.

Writ of Mandamus: Cuyahoga County had a mandatory duty to commence appropriation proceedings to compensate Feltner for the alleged taking of his property.

Response: A tax foreclosure proceeding cannot give rise to a takings claim as a matter of law.

Feltner's Constitutional Arguments (Separation of Powers)

Feltner's Claim: Delegation of “judicial power” to Board of Revision violates separation of powers because only tax foreclosures involve the exercise of “equitable” powers that only a court can grant.

Response:

1. Tax foreclosure proceedings involve the exercise of the statutory powers granted by the General Assembly. Equity does not apply to tax foreclosure actions.
2. Separation of powers does not bar the General Assembly from delegating tax foreclosure powers to administrative agencies, particularly where, as here, the property owner can transfer the case to court or obtain de novo judicial review.

Separation of Powers (cont'd)

The separation of power doctrine traditionally has been applied only to prevent “two dangers”:

- (1) where the judicial branch has been assigned tasks that are more properly accomplished by other branches; and
- (2) where the executive branch has authority to review judicial decisions or reopen final judgments.

-- *State v. Boydke*, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753 (citing *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19 (1985))

Separation of Powers (Cont'd)

Except for criminal matters, the Supreme Court has held that “matters usually classed as of judicial cognizance may be submitted for determination to administrative boards and commissions, and other public officials, . . . if a provision is made for judicial review.”

-- *Stanton v. State Tax Commission*, 114 Ohio St. 658, 151 N.E. 760 (1926).

Thus, the Supreme Court has held that the civil enforcement of state statutes may be delegated to administrative agencies so long the statutory scheme does not grant exclusive jurisdiction to the courts.

-- *Walker v. Toledo*, 143 Ohio St.3d 420, 2014-Ohio-5461, 39 N.E.3d 474.

Polling Question No. 1

Who is the current President of the United States of America?

1. George Washington
2. Donald J. Trump
3. Abraham Lincoln



Supreme Court's Holding in *Feltner*

- **Majority:** “When a relator in a prohibition action seeks to undo a final judgment by challenging the constitutionality of the statutory authority under which a lower tribunal acted, a court may consider only whether the authorizing statute was clearly unconstitutional under precedent existing at the time of the lower tribunal’s judgment.” *Feltner*, 2020-Ohio-3080, ¶ 13. All seven justices agreed that the statutes were not “clearly unconstitutional.”
- **Concurring Opinion by Justice Fischer/O’Connor:** The power to tax is exclusively for the legislative branch, and the statutory scheme creates an unique intersection of “judicial and legislative power.” *Id.* at ¶ 24. Thus, the BOR’s enforcement of the statutory scheme is not “strictly and conclusively an exercise of judicial power.”

Justice DeWine's Concurring Opinion

Separation of Powers Argument Fails for Two Reasons:

- (1) Statutory scheme allows for independent judicial assessment by transferring the case to a court under R.C. 323.70 or by de novo appeal to the court under R.C. 323.79.
- (2) Tax levy and tax foreclosure matters have historically been handled by executive branch, including in 1851 when the Ohio Constitution was adopted.

Feltner's Arguments (Due Process)

Feltner's Argument: Delegation of powers to Board of Revision violated due process because Cuyahoga County Executive appointed the County Treasurer and appointed the members of the Board of Revision.

Response:

(1) Ohio Supreme Court has rejected similar due process arguments that challenge Board of Revision's handling of tax valuation appeals. *Jakobovitch v. Cuyahoga Cty. Bd. of Rev.*, 152 Ohio St.3d 187, 2017-Ohio-8818, 94 N.E.2d 519.

(2) Ohio Supreme Court has held that it does not violate due process for administrative board or officer to hear a dispute so long as the "prosecutor" and "hearing officer" are not the same person. *Woods v. Teib*, 89 Ohio St.3d 504 (2000).

Supreme Court's Holding (Due Process)

Majority: Statutory scheme was not “clearly unconstitutional” under existing precedent.

Justice Fischer/O'Connor: Feltner’s due process claim presents a “troubling scenario,” but Feltner could have should have presented his claim to a court by transferring the action under R.C. 323.69 and R.C. 323.70. Recommends that further review by the “General Assembly or Cuyahoga County.”

Justice DeWine: Handling of tax foreclosure proceedings by executive branch does not violate due process because the executive branch historically been granted the right to control all tax matters without judicial involvement.

Feltner's Arguments (Takings)

Feltner's Argument: Takings arises from a direct transfer if fair market value of foreclosed property exceeds the total amount of tax imposes owed.

Response:

- (1) Takings claim cannot arise as a matter of law because the sale or transfer of property under tax foreclosure statutes involves the taxing power, not the power of eminent domain. *Leasor v. Kapszukiewicz*, 6th Dist. Lucas No. L-08-1004, 2008-Ohio-6176.
- (2) Takings claim should be dismissed because Feltner has an adequate remedy at law (R.C. 323.79).

Supreme Court's Holding (Takings)

- **Majority**: Dismissed takings claim for failure to state a claim. No opinion.
- **Dissent (Justice Fischer)**: Would have permitted full briefing on takings claim. Jointed by Chief Justice O'Connor, but none of the other five justices joined in his dissenting opinion.

Feltner's Other Dismissed Claims

- Complaint did not allege that the tax-foreclosed property was “abandoned.” (Count II) (DISMISSED)
- Cuyahoga County Charter did not grant the Board of Revision with the authority to hear foreclosure cases (Count IV) (DISMISSED)

Feltner: Net Result

Although Feltner does not foreclose future separation of powers or due process challenges, it will be very difficult for a party to prevail on such arguments.

- (1) All seven justices found that the statute was not “clearly unconstitutional,” which should foreclose future cases.
- (2) Justice DeWine’s reasoning forecloses any separation of powers or due process arguments.
- (3) Five out of the seven justices found that the takings claim failed to state a claim on the merits.

Tarrify Properties v. Cuyahoga Cty., 1:19-cv-2293 (N.D. Ohio) and Harrison v. Montgomery Cty., 3:19-cv-0288 (S.D. Ohio)

- Same attorneys in *Feltner* who have alleged class action takings claims in federal court.
 - *Note: Knick v. Twp. of Scott*, 139 S.Ct. 2162 (2019) overruled prior precedent to permit the filing of takings claims in federal court without exhausting state judicial remedies.
- Does not challenge the constitutionality of entire statutory scheme; alleging only that a direct transfer under R.C. 323.78 is unconstitutional because the statute does not provide for the payment of just compensation to the property owner if the fair market value of the property exceeds the total amount of tax impositions owed at the time of the transfer.

County's Motions to Dismiss

- **Tax Injunction Act and Comity:** Federal courts lack jurisdiction over claims arising from enforcement of tax foreclosure statutes. *Wayside Church v. Van Buren Cty.*, 847 F.3d 812 (6th Cir. 2017).
- **Res Judicata:** All claims should have been raised via timely administrative appeal under R.C. 323.79. *Carroll v. City of Cleveland*, 522 Fed. Appx. 299, 305-307 (6th Cir. 2013).
- **No Taking:** Exercise of taxing power, not power of eminent domain (same argument raised in *Feltner*)

County's Motion to Dismiss (cont'd)

- **No Valid State Law Claim:** Remedy for alleged taking under Ohio Constitution is a writ of mandamus, not money damages. *Cleveland v. Martin*, 8th Dist. Cuyahoga No. 85374, 2005-Ohio-6482.
- **Statute of Limitations:** Section 1983 claims are barred by two-year statute of limitations.

Judge Gwin's Ruling on Motion to Dismiss (July 2020)

Jurisdiction: Complaint alleged that direct transfer does not result in “collection” of tax revenue, so TIA and comity does not apply.

- ***Response:*** U.S. Supreme Court has defined “collection” broadly to include all tax foreclosure methods (including forfeiture)
- Conflicts with *Wayside Church*

Res Judicata: *Res judicata* fully applies, but decline to apply on equitable grounds because taxpayers cannot raise takings claims in tax foreclosure proceedings themselves.

- *Conflicts with Carroll*
- *Taxpayers can raise takings claims*

Polling Question No. 2

What is your favorite candy bar?

1. Zagnut
2. Mallo Cup
3. Pay Day



Judge Gwin's Ruling (cont'd)

Merits: Complaint stated a claim because it alleged that the taking involved exercise of “eminent domain” power, not taxing power.

- *R.C. Chapter 323 involves exercise of taxing power. It is entitled “Collection of Taxes.”*
- *Boards of Revisions lack eminent domain power.*

Agreed with County on State Law/SOL: Agreed that Complaint failed to state a valid claim under Ohio Constitution and agreed that takings claims were subject to a two-year statute of limitations.

Judge Rose's Ruling on Motion to Dismiss

Res Judicata: *Res judicata* fully applies. Distinguished Judge Gwin's ruling on the ground that the taxpayer in *Harrison* filed an Answer in the BOR proceedings, and could have transferred the case to state court or filed an administrative appeal to allege takings claim.

State Law Claim: Agreed that state law claim did not state a valid claim under Ohio Constitution.

Result: Case Dismissed; Appeal Deadline is September 28, 2020.

Status of Tarrify Litigation

- **Motion for Class Certification filed (7/8/2020)**
 - *Response:* No class should be certified because determination of fair market value involves an individualized factual determination that cannot be made without individualized appraisals.

- **Motion for Summary Judgment (7/23/2020)**
 - *Raises Additional Arguments:*
 - Taxable values are inadmissible to demonstrate FMV for takings claims.
 - FMV is less than taxes owed
 - BOR's enforcement of R.C. 323.78 is based upon state law, not county policy.

Speaker Contact Information

Stephen Funk, Esq.

Roetzel & Andress, LPA

**222 South Main St. 1375 E. Ninth Street
Akron, OH 44308 Cleveland, OH 44114**

Phone: 330.849.6602

sfunk@ralaw.com

www.ralaw.com

**Akron • Cincinnati • Cleveland • Columbus
Fort Lauderdale • Fort Myers • Naples • Orlando •
Tallahassee • Toledo • Washington, D.C.**

LEGISLATION UPDATE

SB 356 & HB 755

Presented by:

Douglas Sawyer, Esq. and
Gus Frangos, Esq.



Polling Question No. 3

Who is the Governor of the State of Ohio?

1. Mike DeWine
2. Frank Jackson
3. Bill Clinton

