

**REPORT OF THE JUDICIAL COUNCIL ADMINISTRATIVE PROCEDURE ADVISORY COMMITTEE
REGARDING JUDICIAL REVIEW OF BOTA APPEALS**

DECEMBER 4, 2015

In the spring of 2015, the Judicial Council was approached by the Kansas Court of Appeals about the need for clarification of the jurisdictional rules regarding judicial review of appeals from the Board of Tax Appeals (BOTA). The Judicial Council agreed to assign the topic to its Administrative Procedure Advisory Committee for review.

COMMITTEE MEMBERSHIP

The members of the Judicial Council Administrative Procedure Advisory Committee are:

Tracy T. Diel, Chair; Topeka
Athena Andaya; Topeka
Martha Coffman; Lawrence
Bob Corkins; Topeka
James G. Flaherty; Ottawa
Jack Glaves; Wichita
Hon. Steve Leben; Fairway
Prof. Richard E. Levy; Lawrence
Steve Schwarm; Kansas City
Mark W. Stafford; Topeka

BACKGROUND

In 2014, the legislature passed H.Sub. for S.B. 231, a bill that made a number of changes affecting BOTA. See L. 2014, ch. 141. Some of the changes affected the process for obtaining judicial review of a BOTA appeal. For example, under the prior law, BOTA had 120 days to render a written opinion in a property tax appeal. Under the bill, BOTA has 14 days to issue a “summary decision.” Any aggrieved party, within 14 days of receiving the summary decision, may request a full and complete BOTA opinion, which must be issued within 90 days. An aggrieved party may appeal to either the Court of Appeals or the district court, rather than only to the Court of Appeals as under prior law. Any appeal to the district court will be a trial de novo. Also, a petition for reconsideration is no longer required to exhaust administrative remedies.

The bill did not make clear how these new provisions interact with the Kansas Judicial Review Act (KJRA), which governs judicial review of agency actions. For example, the new law does not say whether a summary decision is a final, appealable order under the KJRA. Nor does it state whether a party may seek judicial review of a summary decision by BOTA without first requesting a full and complete opinion in order to exhaust administrative remedies. Finally, the new law was ambiguous as to the extent of de novo review in the district court.

APPROACH

The Administrative Procedure Committee met three times during the late summer and fall of 2015 to review the current BOTA appeals process. The Committee considered input from BOTA including an example of a BOTA summary decision, which contained provisions stating how BOTA interprets the 2014 amendments. The Committee also considered information provided by the Court of Appeals about how that court is handling BOTA appeals.

DISCUSSION

As a preliminary matter, the Committee considered whether there is any need for clarification of the statutory provisions regarding judicial review of BOTA appeals. Although the Committee agreed that both BOTA and the Court of Appeals have adopted logical, consistent interpretations of the new provisions, the Committee also found that the statutes are ambiguous and some clarifying amendments would be helpful.

The Committee drafted the attached amendments with the goal of preserving the original legislative intent and key elements of the new provisions, while clarifying uncertainties and resolving potential conflicts between provisions. The Committee's proposed amendments reflect the following ideas:

- If an appeal is taken to the Court of Appeals, the appealing party should be required to first request a full and complete opinion. Because the Court of Appeals exercises limited review under the KJRA and must review the case on the record, it must have the full and complete opinion, which gives BOTA's findings of fact and conclusions of law.
- The taxpayer should control whether the appeal is to the district court or Court of Appeals; thus, while a taxpayer should be allowed to seek de novo review in the district court, a government entity should be allowed to appeal only to the Court of Appeals. If multiple taxpayers are parties to an appeal, any taxpayer should be able to seek de novo district court review. This approach is consistent with the perceived legislative intent to make the process fairer to, and more protective of, taxpayers.
- A party should be allowed to file a petition for reconsideration of a full and complete BOTA opinion but not a summary decision. If a party disagrees with a summary decision, the appropriate remedy is to request a full and complete opinion, not reconsideration.

De Novo District Court Review

In discussing the concept of de novo district court review, the Committee considered the Supreme Court's opinion in *Frick v. City of Salina*, 289 Kan. 1, 208 P.3d 739 (2009), which held that statutes allowing de novo review on appeal of an administrative action must be construed in light of the KJRA, which contemplates review on the basis of the agency record. According to *Frick*, in the context of appellate review of an administrative action, de novo review does not mean an entirely new trial with new evidence being introduced unless the statute explicitly says so. Rather, a district court's review must be based on the administrative record, upon which the court is to make independent findings of fact and conclusions of law. See *Frick*, 289 Kan. at 18-23.

This issue of the extent of de novo review has been raised in several BOTA appeals pending in Johnson County. The Committee agreed that the legislature, in providing the option of a de novo trial upon appeal of a BOTA decision to the district court, most likely intended that the taxpayer receive an entirely new trial with the ability to introduce new evidence. The Committee believes that K.S.A. 74-2426 should be amended to clarify this intent, based upon *Frick*. The Committee also agreed that a cross-reference should be added in K.S.A. 77-618 of the KJRA to make clear that BOTA orders appealed to the district court are not subject to KJRA restrictions on the ability of the court to review disputed evidence on appeal.

Petitions for Reconsideration

The Committee also discussed whether a petition for reconsideration should extend the time for appeal or otherwise affect the finality of a BOTA order. The Committee reviewed the Kansas Court of Appeals opinion, *State Bank Comm'r v. Emery*, 19 Kan. App. 2d 1063, 880 P.2d 783 (1994), which held that the filing of a permissive motion to reconsider temporarily tolls the running of the time to file a petition for judicial review. Because petitions for reconsideration of BOTA orders are permissive under the 2014 amendments, the rule announced in *Emery* would apply. The Committee found this to be the appropriate outcome and recommended no change in this area.

RECOMMENDATION

The Committee recommends the attached proposed legislation to clarify the jurisdictional rules relating to judicial review of BOTA appeals.

PROPOSED LEGISLATION

1 **74-2426. Orders of board rendered in accordance with Kansas administrative procedure**
2 **act; petition for reconsideration; costs; bond, when required; judicial review.**
3

4 (a) Orders of the state board of tax appeals on any appeal, in any proceeding under the tax
5 protest, tax grievance or tax exemption statutes or in any other original proceeding before
6 the board shall be rendered and served in accordance with the provisions of the Kansas
7 administrative procedure act. Notwithstanding the provisions of subsection (g) of K.S.A.
8 77-526, and amendments thereto, a written summary decision shall be rendered by the
9 board and served within 14 days after the matter was fully submitted to the board unless
10 this period is waived or extended with the written consent of all parties or for good cause
11 shown. Any aggrieved party, within 14 days of receiving the board's decision, may request
12 a full and complete opinion be issued by the board in which the board explains its decision.
13 *Except as provided in paragraph (c)(4) of this section, this full and complete* opinion shall
14 be served by the board within 90 days of being requested. If the board has not rendered a
15 summary decision or a full and complete opinion within the time periods described in this
16 subsection, and such period has not been waived by the parties nor can the board show
17 good cause for the delay, then the board shall refund any filing fees paid by the taxpayer.
18

19 (b) Final orders of the board shall be subject to review pursuant to subsection (c) except that
20 the aggrieved party may first file a petition for reconsideration of ~~that order~~ *a full and*
21 *complete opinion* with the board in accordance with the provisions of K.S.A. 77-529, and
22 amendments thereto.
23

24 (c) Any action of the board pursuant to this section is subject to review in accordance with the
25 Kansas judicial review act, except that:
26

27 (1) The parties to the action for judicial review shall be the same parties as appeared
28 before the board in the administrative proceedings before the board. The board shall
29 not be a party to any action for judicial review of an action of the board.
30

31 (2) There is no right to review of any order issued by the board in a no-fund warrant
32 proceeding pursuant to K.S.A. 12-110a, 12-1662 et seq., 19-2752a, 79-2938, 79-2939
33 and 79-2951, and amendments thereto, and statutes of a similar character.
34

35 (3) In addition to the cost of the preparation of the transcript, the appellant shall pay to
36 the state board of tax appeals the other costs of certifying the record to the reviewing
37 court. Such payment shall be made prior to the transmission of the agency record to
38 the reviewing court.
39

40 (4) ~~(A) Any aggrieved person has the right to appeal any final order of the board issued~~
41 ~~after June 30, 2014, by filing a petition with the court of appeals or the district court.~~
42 ~~Any appeal to the district court shall be a trial de novo.~~

1 ~~(B) Review of orders issued by the board of tax appeals relating to the valuation or~~
2 ~~assessment of property for ad valorem tax purposes or relating to the tax protest for~~
3 ~~which the appellant chooses to be reviewed in district court, shall be conducted by the~~
4 ~~district court of the county in which the property is located or, if located in more than~~
5 ~~one county, the district court of any county in which any portion of the property is~~
6 ~~located.~~

7
8 **(4) Appeal of an order of the board shall be to the court of appeals as provided in**
9 **subparagraph (A) unless a taxpayer who is party to the order requests review in**
10 **district court pursuant to subparagraph (B).**

11
12 **(A) Any aggrieved party may file a petition for review of the board's order in the**
13 **court of appeals. For purposes of such an appeal, the board's order shall**
14 **become final only after the issuance of a full and complete opinion pursuant**
15 **to subsection (a) of this section.**

16
17 **(B) At the election of a taxpayer, any summary decision or full and complete**
18 **opinion of the board of tax appeals issued after June 30, 2014, may be**
19 **appealed by filing a petition for review in the district court. Any appeal to the**
20 **district court shall be a trial de novo. Notwithstanding K.S.A. 77-619, the trial**
21 **de novo shall include an evidentiary hearing at which issues of law and fact**
22 **shall be determined anew. District court review of orders issued by the board**
23 **relating to the valuation or assessment of property for ad valorem tax**
24 **purposes or relating to the tax protest shall be conducted by the court of the**
25 **county in which the property is located or, if located in more than one county,**
26 **the court of any county in which any portion of the property is located.**

27
28 **(C) If a taxpayer requests review of a summary decision or full and complete**
29 **opinion in district court pursuant to paragraph (4)(B) of this subsection, the**
30 **taxpayer shall provide notice to the board as well as the parties. Upon receipt**
31 **of the notice, the board's jurisdiction shall terminate, notwithstanding any**
32 **prior request for a full and complete opinion under subsection (a) of this**
33 **section, and the board shall not issue such opinion.**

34
35 **(d) If review of an order of the state board of tax appeals to the court of appeals relating to**
36 **excise, income or estate taxes, is sought by a person other than the director of taxation,**
37 **such person shall give bond for costs at the time the petition is filed. The bond shall be in**
38 **the amount of 125% of the amount of taxes assessed or a lesser amount approved by the**
39 **court of appeals and shall be conditioned on the petitioner's prosecution of the review**
40 **without delay and payment of all costs assessed against the petitioner.**

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77-618. Review of disputed facts, extent.

Judicial review of disputed issues of fact shall be confined to the agency record for judicial review as supplemented by additional evidence taken pursuant to this act, except that review of:

- (a) Orders of the director of workers' compensation under the workmen's compensation act shall be in accordance with K.S.A. 44-556, and amendments thereto;
- (b) orders of the Kansas human rights commission under the Kansas act against discrimination or the Kansas age discrimination in employment act shall be in accordance with K.S.A. 44-1011 and 44-1021, and amendments thereto;
- (c) orders of the division of vehicles, other than orders under K.S.A. 8-254, and amendments thereto, which deny, cancel, suspend or revoke a driver's license shall be in accordance with K.S.A. 8-259, and amendments thereto;
- (d) orders of the secretary of labor under K.S.A. 72-5413 through 72-5431, and amendments thereto, shall be in accordance with K.S.A. 72-5430a, and amendments thereto; ~~and~~
- (e) orders of the state fire marshal under K.S.A. 31-144, and amendments thereto, shall be in accordance with that section; *and*
- (f) *orders of the board of tax appeals under K.S.A. 74-2426, and amendments thereto, shall be in accordance with that section.*