Division No.
1143

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

TAX DIVISION

JOSEPH M. BURTON
CLERK OF
SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
TAX DIVISION

FEB 25 1977

FILED

TOM AND MARGUERITE KELLY, et al.,	)	
	)	
Petitioners	)	
	)	
v.	)	Docket No. 2225
	)	
DISTRICT OF COLUMBIA, et al.,	)	
	)	
Respondents	)	

MEMORANDUM ORDER

This case comes back before the Court as the result of the "Motion of the Respondents to Revise Order of the Court dated July 25, 1974". The motion is opposed by the petitioners.

Briefly, the underlying facts in this case are as follows: The petitioners filed this case in 1974 seeking to enjoin the respondents from changing the method of selecting real properties for reassessment.[1/] The petitioners contended that the respondents had changed their method of reassessment for Fiscal Year 1975 and that the "new" method was invalid because the respondents had failed to comply with the District of Columbia Administrative Procedure Act (hereinafter referred to as DCAPA) (D.C. Code 1973, §1-1501 et seq.), and that the "new" method of selection utilized by the respondents for Fiscal Year 1975 violated the equal protection and due process provisions of the Constitution.

1/ The term "reassessment" as used in this Memorandum Order refers to the process of appraisal and revaluation of real property. See Kelly v. District of Columbia, No. 2225, 102 Wash. L. Rptr. 2081, Slip Op. 1, n 1 (D.C. Super Ct., July 25, 1974).

After a lengthy hearing, lasting more than two weeks, this Court filed an interim order on June 28, 1974, enjoining the respondents from approving or in any way utilizing any reassessments of real property which were different than those used for Fiscal Year 1974.[2/]

I

On July 25, 1974, this Court entered its Opinion and Order in which it directed the respondents to initiate a two-year cyclical reassessment program beginning with Fiscal Year 1975. Kelly v. District of Columbia, No. 2225, 102 Wash. L. Rptr. 2081 (D.C. Super. Ct., July 25, 1974). That opinion will sometimes be referred to as Kelly I to distinguish it from the instant order which will be sometimes referred to as Kelly II.[3/] The Opinion and Order are attached hereto as Appendix A. It further directed that those real properties which the respondents had reassessed for Fiscal Year 1975 would henceforth constitute Group A and provided that Group A property could be reassessed for Fiscal Year 1975 but not for Fiscal Year 1976.[4/] The Order also directed that all real property not falling within Group A would henceforth constitute Group B. The respondents were

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2/ The purpose of the order of June 28, 1974, was solely to maintain the status quo pending a final order by the Court.

3/ Citations to Kelly I are both to the Washington Law Reporter and the Slip Opinion.

4/ There were approximately 75,000 properties in Group A and approximately 61,000 in Group B.

directed to reassess only Group B properties for Fiscal Year 1976. Based upon the representation of the respondents made to the Court, the Court assumed that the respondents would be able to reassess all real properties for Fiscal Year 1977 and that it would not be necessary to begin a second two-year cycle. However, in the event the respondents were unable to reassess all real properties for Fiscal Year 1977, the Court provided that they were to commence a second two-year cycle to include Fiscal Years 1977 and 1978. Wash. L. Rptr. at 2101-2102, Slip Op. at 50, n 14. The Court also ordered the respondents to send notices to all real property taxpayers advising them of the court order, identifying the group designation of their real property, advising them that the respondents expected to be able to reassess all real properties for Fiscal Year 1977 but further advising them that if the respondents could not do so, they would commence a second two-year cycle. Wash. L. Rptr. at 2102, Slip Op. at 53-55.

After this Court entered its Opinion and Order in Kelly I the respondents filed a number of motions, however, before the Court ruled on those motions the respondents advised the Court that it intended to follow the Kelly I guidelines thereby mooting the motions.[5/] Respondents have advised the Court that

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5/ The only issue still active in Kelly I is petitioners' request for counsel fees. Petitioners and respondents are expected to file additional briefs on that issue.

they have followed the Kelly I guidelines since July 25, 1974. See Motion Exhibit A.[6/]

The respondents reassessed all Group A property for Fiscal Year 1975 and all Group B property for Fiscal Year 1976. They did not institute a single year reassessment program for Fiscal Year 1977 but instead reassessed all Group A properties for that fiscal year, thereby beginning a second two-year cycle. That two-year cycle would properly include the reassessment for Group B properties for Fiscal Year 1978. It appears that the completion of the second cycle had been the plan of the respondents until September 1976 when respondents concluded that they could reassess all real properties for Fiscal Year 1978. Respondents now seek to revise the Kelly I order to allow them to make a single year assessment of all properties for Fiscal Year 1978. They argue that they are required by statute to reassess all properties for Fiscal Year 1978 and all fiscal years thereafter. See D. C. Code 1973, §47-641(b) (Supp. III 1976).

The petitioners oppose the motion on the grounds that the reassessment of all properties for Fiscal Year 1978 would result in unfair and unequal treatment to Group A taxpayers since they would have been reassessed three times

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6/ Motion Exhibit A is a Memorandum from the Director of the Department of Finance and Revenue to the Corporation Counsel dated January 14, 1977.

within a five-year period while Group B taxpayers would have been reassessed only twice during the same period. They contend that such a result would violate the equal protection and due process clauses of the Constitution. Last, they argue that the Kelly I order is final and cannot now be revised by the Court.

The motion was filed on January 18, 1977, and counsel appeared before the Court that same day and briefly argued the merits of the motion. At the close of the arguments the Court posed a number of questions to counsel and requested them to reply in writing as soon as possible; the respondents were to answer first and then the petitioners were to reply.[7/] The respondents filed their reply on February 4, 1977 but the petitioners did not receive a copy until February 8, 1977. Thereafter, the petitioners filed their response on February 14. The Court posed an additional question to the respondents on February 18 and received a written reply the same day.[8/] The Court concludes further oral arguments would not be helpful.

7/ A prompt decision was required because D. C. Code 1973, §47-645 (Supp. III 1976) requires that the annual notices of reassessments be sent: "Beginning as soon as possible after January 1, but no later than March 1 of each year".

8/ The Court sought to determine (1) whether the respondents anticipated any change in the assessed values for Group A properties between Fiscal Years 1977 and 1978 since had there been no change the issue would have been effectively rendered moot, (2) which properties were actually reassessed for Fiscal Year 1977, (3) what would be involved if the Court should set aside Group A Fiscal Year 1977 reassessments which was one of the suggestions made by the petitioners, (4) whether Group A properties were generally decreasing or increasing in value

II

The Findings of Fact in Kelly I

It is unnecessary to set forth in detail the findings and the conclusions reached in Kelly I since that 55 page Opinion and Order is attached hereto as a part of this Memorandum Order. See Appendix A.

In Kelly I, the petitioners originally contended that the respondents had used a cyclical reassessment program prior to Fiscal Year 1975 but complained that, without completing the last cycle, the respondents had reassessed petitioners a second time. Strangely enough, the respondents denied that they had used a cyclical reassessment program for at least several years but asserted that their method of reassessment was not in violation of the Constitution. The Court found that the respondents had not utilized a cyclical reassessment program although they had represented to Congress, the City Council and the taxpayers that they had been using a cyclical reassessment program for the years preceding Fiscal Year 1975. Wash. L. Rptr. at 2096-2097, Slip Op. at 21-25. The Court found that the method used by the respondents, for selecting properties for reassessment, was arbitrary and discriminatory.

8/ Cont'd.
or remaining the same and (5) what would be involved if the Court concluded that the values assigned to Group A properties in Fiscal Year 1978 remained the same as those for Fiscal Year 1977. The Court also posed a number of legal questions and requested counsel to suggest any alternatives which may be available.

There were cycles within cycles. Some properties were reassessed every year while others were reassessed every two, three, four or more years and apparently some were never reassessed. Wash. L. Rptr at 2088, 2097, Slip. Op. at 13, 25. The respondents were unable to identify neighborhoods which had been reassessed in prior years because they kept poor records. Furthermore, the Court found that the "program" being utilized did not achieve equalization. Wash. L. Rptr. at 2098, 2099, Slip Op. at 31-32.

The Conclusions of Law in Kelly I

D. C. Code 1973, §47-702 [9/] required the respondents to make annual reassessments of all real property, however, the petitioners conceded and the Court found that, due to fiscal and manpower shortages it was impossible for the respondents to reassess all real properties in one year. The fact that the respondents could not reassess all real properties once every year, did not of itself result in a violation of the equal protection and due process clauses of the Constitution. Indeed, our Court of Appeals had already recognized that: "[A] cyclical assessment program might be permissible provided any inequities resulting therefrom are of an accidental and temporary character". District of Columbia v. Green, 310 A.2d 848, 855 (D.C. App. 1973). Accord, Johnson v. County of Ramsey, 187 NW 2d 675 (Minn. 1971);

9/ Since repealed, now D. C. Code 1973, §47-641(b) (Supp III 1976).

Carkonen v. Williams, 458 P 2d 280 (Wash. 1969); Best v. County of Los Angeles, 39 Cal. Rptr. 665 (1964); Albert v. Board of Supervisors of San Mateo, 14 Cal. Rptr. 72 (1961), Skinner v. New Mexico State Tax Commission, 345 P 2d 750 (N. Mex. 1959).[10/]

Here the Court found that the respondents had failed to comply with the DCAPA and, more important, that their actions were arbitrary and in violation of the equal protection clause as that clause is read into the Fifth Amendment. Kelly I, Part VIII.

The Order in Kelly I

The final order in Kelly I has already been briefly discussed and need not be repeated here. Part I, supra. It is important to note however that the relief given petitioners was not the relief requested. At the time the suit was filed, the petitioners were under the mistaken belief that the respondents had been operating under a cyclical reassessment program when in fact they had not done so for years. Petitioners requested the Court to require the respondents to return the properties to the reassessment valuations made for Fiscal Year 1974 when it became clear that the respondents had not been using a cyclical reassessment program.

10/ All of the above cases were fully discussed in Kelly I, Part VIII.

This Court rejected that solution since it would have caused other inequities. For example, of the 75,000 properties which were reassessed for Fiscal Year 1975, approximately 61,000 had increased in value and the remaining 15,000 had decreased in value. To return to the reassessment values for Fiscal Year 1974 would have set aside all of the work of the District Assessors for Fiscal Year 1975, which work had hopefully brought the estimated market values more in line with the actual market values. Moreover, the Court's order appeared to be the most practical method of achieving a fair method for selection of properties for reassessment since it utilized the work already completed by the District Assessors and directed that all properties which had already been reassessed for Fiscal Year 1975 be designated as Group A. The petitioners' proposal raised other issues which need not be discussed at this time. See Kelly I, Part IX - A. Equally important was the representation made by the respondents that they expected to be able to reassess all properties for Fiscal Year 1977. The Kelly I order contemplated Group A reassessments for Fiscal Year 1975, Group B reassessments for Fiscal Year 1976 and that all properties would be reassessed for Fiscal Year 1977.

As was previously noted, the respondents accepted the Court's decision and followed the Court's guidelines in Fiscal

Year 1975, 1976 and 1977.[11/] The second cycle began in Fiscal Year 1977 with the reassessment of Group A properties and will end in Fiscal Year 1978 with the reassessment of Group B properties.

III

The respondents now move to revise the Kelly I order so as to allow them to reassess all properties for Fiscal Year 1978. They represent that they have already completed the actual valuation process on all properties and now seek to have the Court approve their sending the reassessment notices for all properties to the taxpayers. They base their request on two grounds: First, that the Kelly I order has been supplanted by D. C. Code 1973, §47-641(b) (Supp. III 1976), which requires the respondents to reassess all real property for Fiscal Year 1978. They suggest that the Kelly I order should be revised to conform with the above statute. Second, they contend that the proposed revision does not violate the Constitution.

The respondents cite District of Columbia v. Linda Pollin Memorial Housing Corp., 313 A.2d 579 (D.C. App. 1973) as support

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11/ The respondents acceptance of the Kelly I guidelines has mooted any appeal from that order since respondents immediately complied with the ruling including sending the required notification to taxpayers. Such action amounts to voluntary acquiescence with the order. See 4 Am. Jur., Appeal and Error, §§260, 262.

for their argument that the Kelly I order has been superseded by Section 641(b). The respondents' reliance on that case is misplaced however since it did not involve actions alleged to be unconstitutional. It merely involved the question of whether a corporate taxpayer was entitled to an exemption. Interestingly enough, respondents cite a quote from Chief Justice Marshall made more than 150 years ago, Thrope v. Housing Authority of Durham, 393 U.S. 268, 282 (1969):

> If subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional . . . I know of no court which can contest its obligation. (Emphasis this Court's.)

The respondents appear to overlook that the petitioners contended and the Court in Kelly I found that the method of selecting properties for reassessment was in violation of the Constitution. Moreover, respondents did not seek to take an appeal from that decision but, in the words of the Director of Finance and Revenue have: "[F]ollowed the guidelines set forth in Kelly v. District of Columbia (Docket No. 2225), since this decision was rendered July 25, 1974". Motion Exhibit A.

As this Court has noted previously, the respondents acquiescence in the decision and their prompt compliance with the ruling and their notification to all taxpayers that they intended to comply with the Kelly I order rendered any appeal from Kelly I moot.[12/] Thus, if the Court should hold that

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12/ See footnote 11.

Section 641(b) does not supersede the Kelly I order, such a holding would not be at cross-purposes with the statement of Chief Justice Marshall since Section 641(b) was enacted on September 3, 1974 after any appeal of Kelly I was moot and more important, though the section is constitutional on its face, its application to include a reassessment of Group A properties in Fiscal Year 1978, would be unconstitutional.

Respondents argue that Section 641(b) is constitutional on its face and this Court agrees. It is equally true that the requirement of that section that all real properties be reassessed annually is fair. However, the issue before the Court cannot be decided in a vacuum and in complete disregard of the history of this litigation and the order of the Court. The Court in Kelly I found that the respondents had utilized a constitutionally infirm method of selecting properties for reassessment - a method which did not even result in an equalization of property values in the District. The Court, in an attempt to cure the defect in the selection process, directed the respondents to institute a cyclical reassessment program beginning with Fiscal Year 1975. This was done by the respondents.

The problem raised by the present motion is that, if granted, it would permit the respondents to stop the cyclical reassessment program in the middle of the cycle without completing that cycle which was the original complaint made by the petitioners in 1974. In support of the argument that

they should be permitted to do so, the respondents contend that "[T]he fact that certain properties are assessed more frequently than others in the course of following a statutory mandate to achieve annual assessment of all properties in the jurisdiction does not suggest a constitutional violation". They cite Recanzone v. Nevada Tax Commission, 550 P 2d 401 (Nev. 1976) in support of their argument. That case neither supports the above statement nor the respondents' argument in support of their motion.

In Recanzone, the county assessor began the process of reassessing all real property and had thought that the task could be completed within a period of five years. He successfully completed the task within five years however, the petitioner-taxpayers argued that no reassessed values should appear on the tax rolls until after the entire reassessment program had been completed. Thus, if their contention had been accepted, the five years would have elapsed before any of the tax bills based upon the reassessment program could be sent to property owners. The county assessor had been rendering bills each year within the five years as properties had been reassessed. The court upheld the county assessor and noted that (Id at 404):

> Only where the implementation of a cyclical reappraisal program results in intentional discrimination, arbitrary action, constructive fraud, or grossly and relatively unfair assessments are the constitutional provisions relating to equal protection and uniformity violated.

Although the above case had not been decided prior to Kelly I, the result in Kelly I and in Recanzone are consistent. In Kelly I the Court directed respondents to institute a cyclical reassessment program, similar to that used in Recanzone. Respondents were never prohibited from rendering bills to taxpayers during the fiscal year for which the reassessment was made. Respondents were never required to await the completion of the cycle before rendering bills for all fiscal years. Obviously, Recanzone does not support the respondents position but that case is consistent with Kelly I and with those cases discussed in Kelly I. See Kelly I, Part VIII.

Although the Nevada court stated that the fact that some of the taxpayers properties were reassessed twice between 1969 and 1974 does not suggest a constitutional violation, 550 P 2d at 404, the Court noted that those taxpayers had constructed certain improvements and that the reassessments involved those improvements. The petitioners in Kelly I did not represent or request any relief for property owners whose property had been razed or destroyed or those who had new buildings or structures added to the property. Kelly I, Wash. L. Rptr. at 2086, 2087, Slip Op. at 8. In the District of Columbia such reassessments would normally be made pursuant to D. C. Code 1973, §47-711. Kelly I only involves the regular annual assessments program formerly found in D. C. Code 1973, §47-709 and now found in Section 47-646.

If the Court were to grant respondents' motion, it would undo what was accomplished in Kelly I. There the Court established a fair and equitable method for selecting real properties for reassessment pending the ability of the respondents to comply with old Section 47-702, now Section 47-641(b). Granting the respondents motion would result in an arbitrary and discriminatory action against Group A property owners. This the Court cannot do since it would violate the Fifth Amendment of the Constitution.

IV

Respondents also argue that Congress deliberately directed the beginning of a single year reassessment program even though that body: "[W]as specifically aware that the two-year cycle [Kelly I] was begun in Fiscal Year 1975". (Matter in brackets, the Court's.) Respondents' memorandum filed February 4, 1977, p. 16. Respondents cite H.R. Rep. 93-1203, 93d Cong. 2d Sess. 32 (1974) in support of that representation. It is true that the report does state that: "The District has been operating for a number of years on a reassessment cycle of approximately every three years. In 1975 the District Government will narrow that to every two years". The statement that the District has been operating on a three-year reassessment cycle is clearly erroneous but the Committee did not know that at the time. This Court found in Kelly I that the District had not been operating under a cyclical reassessment program for at least several years prior

to Fiscal Year 1975. Furthermore, the respondents specifically denied that they were operating reassessment cycles. Kelly I, Wash. L. Rptr. at 2085, Slip Op. at 4. The source of that statement is obviously the respondents or their representatives who had advised Congress, the City Council and the taxpayers for a number of years prior to Fiscal Year 1975 that they were operating reassessment cycles. Kelly I, Part IV-A. It was those erroneous representations to Congress, the City Council, and the taxpayers which this Court critcized in Kelly I. It also follows that the representation concerning the intent to commence two-year cycles in 1975 was also made by the respondents or their representatives. That the report does not make reference to Kelly I is clear since the report is dated July 17, 1974, and the Kelly I order directing the establishment of two-year cycles was not filed until July 25, 1974, eight days thereafter. One can surmise that Congress included the provision for two-year cycles in Section 641(b) as a result of the above committee report. Apparently Congress was not aware of this Court's Kelly I order when it directed that all real properties be reassessed for Fiscal Year 1978 since the respondents have presented nothing, although requested to do so, which would indicate that they or anyone else had brought this matter to the attention of the Committee in Congress.

The respondents also cite the Court to 120 Cong. Rec. 7215-7219, 7251-7258, 7269, 7271-7272 (daily ed. July 29, 1974). Those debates took place four days after Kelly I, and on that

day Congress was aware that the Kelly I ruling had been filed, however there is no suggestion that anyone had had an opportunity to read that decision. Id. at 7216. Moreover, there is no suggestion that Congress realized that the Court had found that the District had not been operating reassessment cycles or that the Court had determined that the District's method of selecting real properties for reassessment was unconstitutional.[13/]

This Court concludes, based upon the legislative history of 641(b) that Congress did not intend to overrule or modify the Court's Kelly I order. In fact, the history suggests that Congress and the Court were working towards the same end; the establishment of a fair and equitable system for the reassessment of real properties in the District of Columbia. See H.R. Rep. No. 93-1203, 93d Cong., 2d Sess. 29 (1974).

V

It is important to note that the issue raised by the respondents' motion could have been avoided if the respondents had fully followed Kelly I. This Court recognized that, in the event the respondents were unable to reassess all properties for Fiscal Year 1977, that they may have wished to

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13/ Although this point may not be important when considering the effect of subsequent legislation on a prior court order, Kelly II, Part III, it does negate the respondents' argument that Congress specifically directed the establishment of a single year reassessment program on all properties notwithstanding the order in Kelly I.

modify the order to provide for an even number of properties in Group A and Group B for Fiscal Years 1977 and 1978. The Court invited them to return if they felt any such modification was in order. Kelly I, Slip Op. at 50, n 14. That the respondents were aware that the inability to begin a single year reassessment program in Fiscal Year 1977 would result in the beginning of a second two-year cycle is equally clear. Wash. L. Rptr. at 2101-2102, Slip Op. at 50, 55. Under those circumstances, it was incumbent upon the respondents to come back before the Court and seek some modification of the Order before acting for Fiscal Year 1977 or to seek some amendment or modification of Section 641(b) from Congress. Respondents took neither step, presumably because they never intended to comply with Section 641(b) for Fiscal Year 1978 or because they felt it was unnecessary to comply with the Court's order.

Respondents could easily have acted in such a way as to be in full compliance with both Kelly I and Section 641(b) since those two directives are not really at odds but have only been brought seemingly to a point of confrontation by the action or inaction of the respondents and/or their representatives. At the completion of the first cycle (1975-1976) the respondents had three choices. First, they could have reassessed all properties for Fiscal Year 1977 assuming that they had the available resources. Such action would have been in full compliance with both Kelly I and Section 641(b). Second, in the event they did not have sufficient resources to reassess all properties for Fiscal Year 1977, they could

have made no reassessments for that fiscal year but marshaled all of their resources for Fiscal Year 1978 and reassessed all real properties for that year. This also would have brought them in full compliance with both Kelly I and Section 641(b). Accepting the respondents' statement that they could not be ready to reassess all properties in Fiscal Year 1977 the latter would have been the logical choice. Instead of either of the above, the respondents embarked upon a third choice, that is to begin a second cycle when they knew to do so would either bring them into conflict with the Court's Order or in conflict with Section 641(b).

The record in this case makes it appear that the respondents decided to comply with Kelly I and that they did not decide to comply with Section 641(b) until September 1976. At no time did the respondents come back to the Court, even as late as September 1976. When they eventually did come back before the Court it was based upon a letter sent to the Court by counsel representing the petitioners in which he questioned whether the District was going to comply with the Kelly I Order for Fiscal Year 1978.[14/]

14/ The Corporation Counsel's office suggested at the January 18, 1977 hearing that that office was unaware that the Department of Finance and Revenue intended to proceed contrary to the Kelly I order until January 14, 1977, the date that office received the Director's memorandum.

VI

To summarize, the Court finds that Section 641(b) is constitutional on its face but that any action to begin a single year reassessment program for Fiscal Year 1978, in the middle of the second two-year cycle, would be unfair to and would improperly discriminate against Group A property owners. It is an intentional discrimination since the respondents, without notice to the legislature or the Court, long ago set a course which they knew would run them afoul of either Section 641(b) or Kelly I. Their actions if they were permitted to reassess Group A properties for Fiscal Year 1978 would be arbitrary and grossly unfair to Group A owners, and would necessarily violate the equal protection and due process clauses of the Constitution. This matter is further complicated by the fact that the respondents, when faced with three choices, two of which would have raised no question of constitutionality, decided upon the third which they knew would bring them in obvious conflict with the Court or Congress. Since this Court has now determined that to begin a single year reassessment program for Fiscal Year 1978 would violate the Constitution, the Court must conclude that the act of Congress did not supplant the Court's order and must further conclude that the respondents motion to revise must be denied.

It is hereby

ORDERED that the respondents' motion to revise the Court's July 25, 1974 order is denied.

Dated: February 23, 1977

JOHN GARRETT PENN
Judge

Gilbert Hahn, Esq.
Attorney for Petitioners

Melvin Washington, Esq.
Attorney for Respondents