

STATE OF MICHIGAN
COURT OF APPEALS

COUNTY OF WAYNE, CITY OF DETROIT,
COUNTY OF OAKLAND, COUNTY OF
MACOMB, CITY OF DEARBORN, CITY OF
LIVONIA, CITY OF TAYLOR, and the
CHARTER TOWNSHIP OF VAN BUREN,

Plaintiffs-Appellants,

v

MICHIGAN STATE TAX COMMISSION,

Defendant-Appellee.

UNPUBLISHED

April 2, 2002

No. 227236

Wayne Circuit Court

LC No. 99-940046-AW

Before: Jansen, P.J., and Zahra and Meter, JJ.

PER CURIAM.

Plaintiffs appeal by right from an order granting summary disposition to defendant under MCR 2.116(C)(8). We affirm.

This case involves certain amendments to defendant's Assessor's Manual. The amendments involve multiplier tables used in assessing gas and electric transmission and distribution property. Defendant adopted new multiplier tables on November 23, 1999, and amended the Assessor's Manual accordingly. In December 1999, plaintiffs filed a complaint for mandamus, superintending control, declaratory judgment, and preliminary and permanent injunctive relief, alleging that the multiplier tables significantly undervalued the taxable property of utility companies, resulting in revenue loss for plaintiffs. Specifically, plaintiffs alleged that "the utility multiplier tables incorporate a cost approach concluded value for gas and electric transmission and distribution properties based upon depreciated original costs versus depreciated replacement or reproduction cost required for all other property in Michigan." Plaintiffs further contended that in issuing the Assessor's Manual and its amendments, defendant unlawfully failed to follow the rulemaking procedures set forth in the Administrative Procedures Act (APA), MCL 24.201 *et seq.* With regard to this allegation, the complaint stated that "[p]laintiffs believe that they are without adequate remedy except by aid of a writ of mandamus compelling the State Tax Commission to comply with the provisions of the APA as to [rulemaking] in order to adopt the utility multiplier tables at issue in this case."

Subsequently, the trial court found that it lacked subject matter jurisdiction with regard to plaintiff's substantive allegations about the lawfulness and appropriateness of the multiplier tables. Accordingly, the court transferred these claims to the Tax Tribunal on February 8, 2000. The allegation of an APA violation remained in the circuit court. On February 29, 2000, defendant moved for summary disposition with regard to the remaining claim, arguing that no improper procedures occurred because the Assessor's Manual was not a rule or a set of rules and defendant in fact had no authority to promulgate it as such.

On March 31, 2000, the trial court issued an opinion granting defendant's motion for summary disposition and dismissing the case. The court ruled that no APA violation occurred because (1) defendant had no express rulemaking authority with regard to the Assessor's Manual, and therefore, the manual was not a rule or a set of rules;¹ and (2) even assuming, arguendo, that the general grant of rulemaking authority under MCL 16.109 applied here, the Assessor's Manual did not constitute a rule or a set of rules because it fit within the exceptions to the definition of "rule" found in MCL 24.207(g) ("[a]n intergovernmental, interagency, or intra-agency memorandum, directive, or communication that does not affect the rights of, or procedures and practices available to, the public") and (h) ("[a] form with instructions, an interpretive statement, a guideline, an informational pamphlet, or other material that in itself does not have the force and effect of law but is merely explanatory").

On appeal, plaintiffs argue that the trial court erred in granting defendant summary disposition. Plaintiffs contend that (1) the court employed circular logic in holding that because

¹ The court essentially reasoned that if the Legislature had intended defendant to have rulemaking authority with respect to the Assessor's Manual, it would have specifically mentioned rulemaking in MCL 211.10e. MCL 211.10e states:

All assessing officials, whose duty it is to assess real or personal property on which real or personal property taxes are levied by any taxing unit of the state, shall use only the official assessor's manual or any manual approved by the state tax commission, consistent with the official assessor's manual, with their latest supplements, as prepared or approved by the state tax commission as a guide in preparing assessments. Beginning with the tax assessing year 1978, all assessing officials shall maintain records relevant to the assessments, including appraisal record cards, personal property records, historical assessment data, tax maps, and land value maps consistent with standards set forth in the assessor's manual published by the state tax commission.

The trial court declined to find that the general grant of rulemaking authority in MCL 16.109 "automatically impose[d] on the Commission [rulemaking] authority sufficient to make all of its publications subject to the [rulemaking] provisions of the APA." MCL 16.109 states, in relevant part:

The head of each principal department, and those commissions, boards and agencies granted a type I transfer may promulgate such rules and regulations as may be necessary to carry out the functions now or hereafter vested in them . . .

defendant had not been given rulemaking authority vis-à-vis the Assessor's Manual, the rules contained in the Assessor's Manual, even though they have the force of law, need not have been promulgated under the rulemaking procedures of the APA; (2) the general grant of rulemaking authority in MCL 16.109 sufficiently granted defendant rulemaking authority here, or, alternatively, rulemaking authority could be inferred from the wording of MCL 211.10e; and (3) the Assessor's Manual constitutes a rule or a set of rules because assessors are required to use it and because it affects public rights by improperly shifting the tax burden from utility property owners to others.

Defendant argues that no APA violation occurred here because (1) the Assessor's Manual is simply an agency guideline, without the force of law, from which assessors can deviate and therefore does not fall within the definition of a rule; and (2) given that defendant has received no rulemaking authority from the Legislature with regard to Assessor's Manual, the manual does not constitute a rule or a set of rules. Upon our de novo review, see *Silver Creek Township v Corso*, 246 Mich App 94, 97; 631 NW2d 346 (2001) (setting forth the standard of review for summary disposition cases), we agree with defendant and the trial court that no APA violation occurred here because the Assessor's Manual does not fall within the APA's definition of "rule."

MCL 24.207 states, in part:

"Rule" means an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission of the law enforced or administered by the agency. Rule does not include any of the following:

* * *

(g) An intergovernmental, interagency, or intra-agency memorandum, directive, or communication that does not affect the rights of, or procedures and practices available to, the public.

(h) A form with instructions, an interpretive statement, a guideline, an informational pamphlet, or other material that in itself does not have the force and effect of law but is merely explanatory.

MCL 211.10e states that "[a]ll assessing officials . . . shall use only the official assessor's manual or any manual approved by the state tax commission . . . as a *guide* in preparing assessments" (emphasis added). If evidence of a different true cash value is apparent, a party may obtain a deviation from the manual. See, e.g., *Jones & Laughlin Steel Corp v City of Warren*, 193 Mich App 348, 353, 356; 483 NW2d 416 (1992). Ultimately, the true cash value of the property controls. See generally *Washtenaw County v State Tax Commission*, 422 Mich 346, 364-365; 373 NW2d 697 (1985). Accordingly, the Assessor's Manual does not constitute a binding rule of law that definitively establishes the true cash value of taxable property.

The case of *Clonlara, Inc v State Bd of Education*, 442 Mich 230; 501 NW2d 88 (1993), is instructive here. In *Clonlara*, the plaintiffs argued that certain nonpublic school and home

school compliance procedures used by the Department of Education constituted rules that should have been promulgated under the rulemaking procedures of the APA. *Id.* at 233-234. The compliance procedures specified under which circumstances the department could “institute enforcement proceedings for noncompliance with the provisions of the nonpublic school act.” *Id.* at 235-236. The Court noted:

Underlying many of the arguments . . . is the sense that these procedures must be legislative rules rather than interpretive statements because they have a substantial effect.

* * *

The compliance procedures do not create or destroy rights. A home school parent may ignore the compliance procedures at the risk of having the department seek a hearing under . . . the nonpublic school act. At such a hearing, it is the underlying statute that would control whether the home school parent violated the law, not the department’s interpretation. At such a proceeding, the department would seek to convince a court that its interpretation of the statute is correct and that in fact the parents had violated the statute. The department must show violation of the statute, not violation of an interpretive rule. [*Id.* at 244-245.]

Similarly, in the instant case, the multiplier tables in the Assessor’s Manual represent defendant’s interpretation of true cash value, but this interpretation is not ultimately controlling.² *Jones, supra* at 353-356. Indeed, MCL 211.10e itself mandates that the manual be used as a “guide” in preparing assessments. Accordingly, we agree with the trial court that the Assessor’s Manual does not have the force and effect of law and does not affect the public’s right to have property assessed at “true cash value.” The exceptions to the definition of “rule” contained in MCL 24.207(g) and (h) apply here, and therefore no APA violation occurred.³ Given this

² Plaintiffs contend in their appellate brief that “[f]actual development by Plaintiffs in this case would show that assessors are not free to deviate from the Assessor’s Manual because other reliable evidence of true cash value is not available to assessors under current reporting requirements mandated by [defendant]” (emphasis in original). The appropriate place to argue for further factual development, however, was the trial court, not the Court of Appeals.

³ We note that plaintiffs imply in their appellate brief that a violation of the Open Meetings Act, MCL 15.261, *et seq.*, occurred in this case. This issue was not raised in the complaint and is not preserved for appellate review. Accordingly, we do not address it. Similarly, plaintiffs briefly contend in their brief that if the Assessor’s Manual is deemed an agency guideline (as opposed to a rule) in this case, an error nonetheless occurred because defendant did not follow the procedures for the adoption of guidelines. Once again, this issue was not raised in the complaint, and we therefore do not address it. Moreover, plaintiffs give cursory treatment to the issue, thereby waiving it for purposes of appeal. *Silver Creek, supra* at 99.

conclusion, we need not address the trial court's alternative conclusion that defendant was not legislatively authorized to promulgate the Assessor's Manual as a rule or set of rules.

Affirmed.

/s/ Kathleen Jansen

/s/ Brian K. Zahra

/s/ Patrick M. Meter