

**IN THE SUPREME COURT OF OHIO**

ANDRE BUCKLES, : Supreme Court Case No.08-1104  
Appellant, : On Appeal from the Franklin County  
v. : Court of Appeals, Tenth Appellate  
 : Judicial District.  
THE BOARD OF REVISION OF : Court of Appeals  
FRANKLIN COUNTY, et al., : Case No. 07AP-932  
Appellees. :

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**APPELLEES' FRANKLIN COUNTY BOARD OF REVISION, FRANKLIN COUNTY  
AUDITOR AND THE BOARD OF EDUCATION OF THE GAHANNA-JEFFERSON  
SCHOOL DISTRICT'S JOINT MEMORANDUM IN OPPOSITION TO JURISDICTION**

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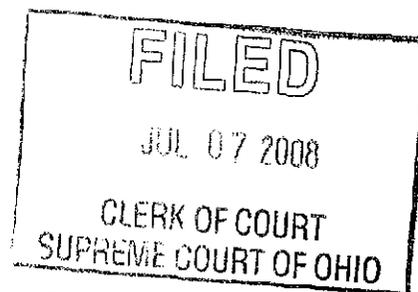
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**TABLE OF CONTENTS**

**Page**

TABLE OF AUTHORITIES.....ii

STATEMENT IN OPPOSITION TO JURISDICTION.....1

STATEMENT OF THE CASE AND FACTS.....5

ARGUMENT

    Proposition of Law No. 1

        A county auditor may revoke CAUV status because a  
        property owner does not take action to produce a  
        commercially viable crop.....7

    Proposition of Law No. 2

        A county auditor may revoke CAUV status  
        if he determines that farming practices  
        conducted will continue to produce no  
        harvestable crop.....10

    Proposition of Law No. 3

        A county auditor has the authority to  
        determine the intent of a property owner  
        seeking CAUV status in determining if the  
        agricultural practices conform with the  
        requirements of R.C. 5313.31.....12

CONCLUSION.....14

CERTIFICATE OF SERVICE.....16

**TABLE OF AUTHORITIES**

<b>Cases</b>	<b><u>Page</u></b>
<i>Augustine v. Geauga Cty. Bd. of Revision</i> (July 16, 2004) Ohio BTA Case No. 203-A-1354 .....	9
<i>Vernon v. Knox Cty. Bd. of Revision</i> (Aug. 18, 2006) Ohio BTA Case No. 2005-M-778 .....	9
<i>Stults v. Delaware Cty Bd. of Revision</i> (Aug. 2, 2004) Ohio BTA Case No. 2003-P-287.....	9
<i>Rocky Fork Hunt &amp; Country Club v. Testa</i> , 100 Ohio App. 3d 570 (10 <sup>th</sup> Dist. 1995).....	10, 11
<i>Kirk &amp; Ackley Enterprises #2 v. Franklin Cty. Bd. of Revision</i> (June 4, 2004), Ohio BTA Case No. 2002-R-2557.....	11
<i>Zoumberakis v. Coshocton County Board of Revision et al.</i> (July 7, 2006) Ohio Board of Tax Appeals Case No. 2004-A-632.....	12
<i>Mentor Exempted Village School Dist. Bd. Of Edn. v. Lake Cty. Bd. of Revision</i> (1979),57 Ohio St.2d 62, 66 386 N.E.2d 1113).....	13
 <b>Statutes</b>	
R.C. 5713.31.....	1, 3, 6, 8, 12
R.C. 5713.30 et seq.....	1, 3, 7, 8
R.C. 5713.30(A)(1).....	2, 8, 12, 13
R.C. 5713.32.....	3
R.C. 5715.19.....	3
R.C.5713.30 .....	11
R.C. 1.42.....	13
 <b>Constitutional Provisions</b>	
Section 36, Article II, Ohio Constitution.....	1, 12
 <b>Other Authority</b>	
<i>Roget's Thesaurus</i> (1996).....	12

## **I. STATEMENT IN OPPOSITION TO JURISDICTION**

This case arises from the Franklin County Auditor's determination that the use of the subject property did not qualify for preferential tax treatment under the Current Agricultural Use Valuation ("CAUV") program, and the affirmance of that decision by the Board of Revision (BOR), the Court of Common Pleas and the Tenth District Court of Appeals.

This case does not involve a substantial constitutional question<sup>1</sup> and is not of great public or general interest because, despite Appellant's mischaracterization of the Court of Appeal's decision, no additional requirements have been imposed upon applicants seeking CAUV status. In order to qualify for CAUV status the subject's land must be "devoted exclusively to agricultural use." See Section 36, Article II, Ohio Constitution; R.C. 5713.31. Both the Franklin County Board of Revision (hereinafter BOR) and the trial court used this standard in analyzing the facts underlying the revocation of Appellant's CAUV status. The Court of Appeals reviewed the action and determined that the trial court's decision, based on these relevant facts, was not an abuse of discretion as required for the Court to reverse the decision.

Appellant's claim that the Court of Appeals decision "effectively gutted" the CAUV program is wild hyperbole. Qualification for the CAUV program has always been subject first to determination by the county auditor pursuant to 5713.30 et seq. of the Revised Code, and subject to further review by county boards of revision and appellate courts. If Appellant's arguments are successful, he will have effectively removed the oversight of the county auditor from the CAUV program. Appellant in this case seeks to relitigate factual issues which have long since been decided against his claim that his facts support continuation of CAUV status for his property.

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<sup>1</sup> No constitutional questions were raised in either of the lower courts and none was created by the Court of Appeals' unanimous decision in favor of the Appellees, which was based on the abuse of discretion standard.

Appellant now asserts that the Court “held that farmers *must* make an effort to improve recognized deficiencies” of their agricultural land... (*Statement in Support of Jurisdiction*, page 1 (Emphasis added)) In fact the Court of Appeals, stated the *opposite*, stating:

“Furthermore, contrary to appellant’s suggestion, the trial court did *not* find that a party must always demonstrate an effort to improve the quality of the land in order to qualify for CAUV status.” 2008-Ohio-1728 ¶ 19 (emphasis added).

Somehow, Appellant omitted the word “not” in claiming in his Memorandum In Support Of Jurisdiction that the Court of Appeals held that farmers must improve recognized deficiencies of their land to qualify for CAUV.

Appellant raised and argued at the Court of Appeals his claims that a CAUV recipient is not required to show an intent to cause a commercially viable agricultural crop to be produced on the property. Again the Trial Court and the Court of Appeals reviewed the evidence of Appellant’s actions and determined that these actions strongly supported a factual determination that Appellant was intending to avoid his fair share of real property taxes by claiming CAUV status when he did not meet the statutory requirements of commercial farming activity as defined by R.C. 5713.30(A)(1).

Appellant lastly claims that the trial court and Court of Appeals relied upon the opinion of the County Auditor regarding farming techniques. Instead the courts determined, based on the facts presented to them, including that Appellant’s choice to leave the field strangled by three feet of weeds naturally resulting in the failure of the seeds planted there year after year, with no change in farming techniques by Appellant, supported the conclusion that the property was not being used in a manner consistent with farm properties entitled to CAUV status.

It is axiomatic that county auditors have the responsibility and duty to determine various real property issues involving taxation. For example, county auditors determine classification of

properties such as agricultural, residential, commercial, and industrial. Likewise county auditors determine the validity of claims by transferees regarding whether property is exempt from transfer fees. Thus it is misleading to claim that this Court of Appeals opinion somehow gives county auditors some new, unprecedented review capability. The CAUV statutes R.C. 5713.30 et seq. contains numerous references to county auditors and their determinations with regard to agricultural lands.

For example, R.C. 5713.31 states in part,

“On or before the second Tuesday after the first Monday in March, the auditor shall determine whether the current owner of any lot , parcel, or tract of land or portion thereof contained in the preceding tax year’s agricultural land tax list failed to file an initial or renewal application, as appropriate...” (Emphasis added)

Also in R.C. 5713.32, the statute requires that

“Prior to the first Monday in August the county auditor shall notify, by certified mail, each person who filed an application...and whose land the auditor determines is not land devoted exclusively to agricultural use, of the reason for such determination..” (Emphasis added)

Clearly the statute makes the county auditor the public official who must decide if a property claimed to be eligible for CAUV status meets those requirements. If not the county auditor, who makes this determination?

These determinations by the County Auditor are based on the facts as literally “shown on the ground.” Appellant, who disagrees with such a determination, has the right to appeal, pursuant to R.C. 5715.19, the Auditor’s decision to the BOR, the Court of Common Pleas, and to the Court of Appeals. This is the very path Appellant has elected to pursue. He now seeks to have this Court, once again, review the facts as they have been decided during the extensive appeal process. This does not raise constitutional issues or issues of great public or general

interest as this case and the Court of Appeals decision revolve solely upon the factual issues of this particular property and the clear lack of evidence of any true effort to meet minimum CAUV standards concerning commercial crop production.

Appellant makes the blanket statement, supported by the self serving statement contained in the Farm Bureau Federation's Amicus Brief that "there is currently tremendous pressure for county auditors and other local governmental entities to increase their tax revenues by pushing property out of the CAUV program." There is not a scintilla of evidence in this case that supports this statement which impugns the integrity of the county officials responsible for insuring fair and equal taxation under the law, nor for the proposition that the Court of Common Pleas and Court of Appeals would go along with such a scheme. The facts in this case actually support an inference that a property owner is seeking a tax advantage, to which he knows he is not entitled, for the purpose of avoiding his fair share of the real property taxes due.

Further, the article cited to support this overbroad statement, does not address the issue of properties being rejected for CAUV status, but in fact deals with issues concerning the valuation of property in CAUV status. Neither Appellant nor the Ohio Farm Bureau in their Amicus Brief, can point to, and the record does not contain, any evidence of an effort by this County Auditor or any public official to remove properties from CAUV status. Rather than accept that his particular property does not qualify for CAUV status, Appellant seeks to expand his claim of great public interest to all properties that do qualify for CAUV. This is simply an attempt to hide his own failure to commercially farm his property among the legitimate farming operations in the CAUV program.

Appellant's assertion that "the Court of Appeals decision will seriously undermine the CAUV program" is a gross exaggeration for purposes of seeking review by this Court. The

CAUV program in Franklin County is well established and thriving for those farm properties whose owners appropriately qualify them.

## **II. STATEMENT OF THE CASE AND FACTS**

The property consists of 122 acres situated in the City of Gahanna which has been in the Buckles family for many years. Because of commercial activity, growth of the City of Gahanna, and the construction of Interstate 270, the parcel constitutes the residue of a previous farm tract originally consisting of 475 acres (BOR hearing transcript pages 9,10,12,14,15,16)

Appellant Owner is a farm owner by profession, owning 2700 acres of farmland in Madison County, Ohio. Appellant Owner retains a farm manager for purposes of the actual farming of his property.

Appellant Owner and his farm manager claimed to have engaged in what they consider to be generally accepted farming practices on the property. The BOR and the Trial Court determined these practices were not accepted farming practices as they displayed no true intent to realize commercial crops on the property.

The parties agree that "no till" seeding is an accepted agricultural practice in Franklin County, however such practice in order to be successful, requires prior preparation to the property such as a reduction of weeds and other plants through cutting or using herbicides to prevent competition with the seeds distributed in the no-till process.

The property is located on Hamilton Road in an area in which there has been significant commercial, retail and residential expansion. Appellant has steadfastly sold off the vast majority of the original farm land. The fact that this property is located in an urban area and requires the transportation of large farm equipment to marginally farm it, supports the conclusion that the agricultural activity on the property is for purposes of retaining CAUV status and not for the

purpose of meeting the requirement of R.C.5713.31. Appellant owner in fact testified at the BOR that in 2007 the property was under contract to be purchased by an unnamed buyer for an amount that is not specified in the record.

Appellant owner claims that in June of 2005 he purchased soybean seeds and rented equipment for the purpose of cultivating the Hamilton Road property. No receipts for any of the equipment allegedly rented and/or the delivery of the soybean seeds was introduced into evidence. Although several affidavits from various parties, some of whom did not appear at the BOR hearing thereby precluding cross examination of their statements, were introduced at the BOR hearing, it is unclear from the record produced by the owner when cultivation of the subject property began.

Appellant also claims that the record indisputably demonstrates that the beans were killed as the result of the application of the herbicide Roundup the potency of which had been spiked by the inclusion of 2-4 D. However, the only evidence of record to support this supposedly established claim was the affidavit of a witness (Mr. Potts, the herbicide applicator) not present for cross-examination that the Roundup was "*possibly*", not probably contaminated<sup>2</sup>.

The record does contain testimony and documentary evidence produced by Deputy Auditor Mark Calhoun. This evidence shows that on June 21, 2005, July 6, 2005 and July 12, 2005 when he visited the property there were no indications of any heavy equipment having been used in an attempt to cultivate the property. On July 18, 2005, Deputy Auditor Calhoun visited the property and testified that there was only then visible evidence of equipment having been driven on the property. (BOR Hearing Transcript, pg 75 through 79)

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<sup>2</sup> The accuracy of these claims was cast into further doubt as the weeds, which should have been killed by the Roundup alone, even without the 2-4 D spiking, remained unabated.

Appellant Owner also claimed that he had caused winter wheat to be planted on the property in November 2005, well beyond the optimum time period of early October for the planting of such crops. This winter wheat crop was also placed on the property without any preparation such as removal of competing plant species or tilling of the land, thereby significantly increasing the probability of a failed winter wheat crop.

The Auditor through the Deputy Auditor issued his denial letter on November 30, 2005 citing the lack of effort by the owner to properly cultivate the property with any expectation of successful commercial agricultural products being produced.

### **III. ARGUMENT IN RESPONSE TO APPELLANT'S PROPOSITIONS OF LAW.**

The propositions of law propounded by Appellant attempt to further define and limit the role of the county auditor in determining CAUV status for purported agricultural properties. As explained above, the law in this area is clear and established and therefore requires no additional guidance from this Court. A simple reading of the unambiguous language of 5713.30 et seq. shows the authority of the county auditor to make such determinations. Appellant's propositions of law concerning limitations he wishes this Court to impose on the actions of county auditors can be analogized to a batter in a baseball game who is able to call his own balls and strikes or a basketball player who calls a personal foul on himself only when he believes he committed the infraction. Appellant apparently believes that only he can determine what, if any, activity constitutes farming for CAUV purposes.

#### **Proposition of Law No. 1<sup>3</sup>**

**A county auditor may revoke CAUV status because a property owner does not take action to produce a commercially viable crop.**

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<sup>3</sup> Appellees recognize that the Ohio Farm Bureau Federation has filed an Amicus Curiae Brief in Support of Jurisdiction. Appellees have elected not to address that brief, except sparingly, because it raises identical issues, albeit abbreviated, to those presented by Appellant and does not add legal support but only moral support to Appellant's arguments. Appellees have completely addressed all issues herein.

Ohio law requires that property in the CAUV program pursuant to 5713.30 et seq. be devoted exclusively to agricultural use. RC 5713.30(A)(1) defines land devoted exclusively to agricultural use as meaning:

(1) Tracts, lots, or parcels of land totaling not less than ten acres that, during the three calendar years prior to the year in which application is filed under section 5713.31 of the Revised Code, and through the last day of May of such year, were devoted exclusively to commercial animal or poultry husbandry, aquaculture, apiculture, *the production for a commercial purpose of timber, field crops*, tobacco, fruits, vegetables, nursery stock, ornamental trees, sod, or flowers, or the growth of timber for a noncommercial purpose, if the land on which the timber is grown is contiguous to or part of a parcel of land under common ownership that is otherwise devoted exclusively to agricultural use, or were devoted to and qualified for payments or other compensation under a land retirement or conservation program under an agreement with an agency of the federal government; (emphasis added)

The fact that Appellant made a superficial effort to plant crops does not in and of itself meet the standard set forth in the statute. These crops, planted in 2005, were planted too late in the season to be successful and without proper preparation of the ground. As a result, they had almost no chance for successful harvest. This fact, coupled with the failure to harvest a viable commercial crop for the previous two years (2003, 2004) using these same farming techniques, undercuts any claim of Appellant that he was commercially farming this property.

In this case the trial court and the Court of Appeals focused on all of the facts, which supported a finding of a pattern of actions by Appellant which were not only not aimed at producing a commercial crop, but prevented a viable commercial crop from being harvested. Appellant's theory seems to be that so long as he does some type of agricultural activity on the property, which leads to multiple years of failed crops, the county auditor and subsequent

reviewing bodies can not determine that his actions are not bona fide and merely a pretense to obtain favorable tax status.

Appellant focuses on the failed crops of 2005 using these as if this was the only evidence before the trial court. In fact, the record shows a pattern of multiple consecutive years when despite marginal efforts by the owner no harvest of any crop was made on this property. The county auditor, BOR and the trial court all recognized that this continuation of these so called “farming practices”, which never resulted in a harvest of any crop, made this property ineligible for CAUV status.

Appellant suggests that the court and, by extension, the auditor required improvement of the property to qualify for CAUV status. This is not the key focus of the county auditor’s analysis. Had Appellant produced a viable crop, regardless of the crop’s profitability and with or without any of the improvements to the property (some examples of which were noted by the trial court) his CAUV status would have been unchanged for 2005. However, improvements, as used by the trial court and the Court of Appeals are meant to include actions such as removal of significant ground vegetation and planting crops during or close to their optimum growing season. These actions would have caused Appellant to be successful in his farming efforts. To place seed on a property without proper preparation and well out of season, is evidence of a complete lack of professionalism.

Appellant has cited a number of cases involving the mere “modicum of professionalism” in the maintenance of cultivation of a parcel. See e.g. *Augustine v. Geauga Cty. Bd. of Revision* (July 16, 2004), Ohio BTA Case No. 203-A-1354; *Vernon v. Knox Cty. Bd. of Revision* (Aug. 18, 2006), Ohio BTA Case No. 2005-M-778 and *Stults v. Delaware Cty Bd. of Revision* (Aug. 2, 2004), Ohio BTA Case No. 2003-P-287. Evidently it is the Appellant’s position that using no-

till farming techniques to place seed on an otherwise unprepared farm field constitutes maintenance or cultivation of a crop. Appellees note that planting out of season, without any preparation, resulting in multiple consecutive years of crop failures cannot be construed as a “modicum of professionalism.”

In summary, the Court of Appeals determined that the trial court, BOR and auditor did not abuse their discretion in identifying the actions of Appellant as focused on obtaining favorable tax status and not on producing a viable commercial crop.

### **Proposition of Law No. 2**

**A county auditor may revoke CAUV status if he determines that farming practices conducted will continue to produce no harvestable crop.**

Appellant cites *Rocky Fork Hunt & Country Club v. Testa*, 100 Ohio App. 3d 570 (10<sup>th</sup> Dist. 1995) for the proposition that the intent<sup>4</sup> of an owner to put a crop in the field is sufficient for CAUV status even when, due to weather conditions, the actual planting is prevented. Clearly on the facts, *Rocky Fork* is distinguishable from the present case. There were no catastrophic weather conditions or other unmanageable obstacles to the proper preparation, planting and harvesting of Appellant’s agricultural fields. It was Appellant’s decision alone (or those of his farm manager) to plant both a soybean crop and the winter wheat crop out of season in 2005. Likewise, it was Appellant’s decision to take no action to remove the undergrowth vegetation prior to using the no-till seed application. This undergrowth vegetation, was, as the record shows, the result of a number of consecutive years of crops not being harvested from this property. To continue farming techniques which have consistently failed to produce harvest of commercial crops, as the trial court found, “defies logic”. It doesn’t defy logic, however, if the

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<sup>4</sup> While Appellant believes that *Rocky Fork* supports his position even though it only goes to an intent to plant a crop, he argues in Proposition of Law No. 3 that intent is not to be used by the county auditor in his review of the validity of a CAUV renewal application. This inconsistent position is unexplained in the Appellant’s brief.

purpose of the attempted no-till seeding was not to produce a viable commercial crop but only to maintain the appearance of farming for CAUV purposes. Thus *Rocky Fork* provides no legal support for Appellant's Proposition of Law No.2.

Appellant also cites *Kirk & Ackley Enterprises #2 v. Franklin Cty. Bd. of Revision* (June 4, 2004), Ohio BTA Case No. 2002-R-2557, in support of this proposition of law. Citing the BTA decision, which stated

*Based upon the testimony and evidence received, this board concludes that the subject property is devoted exclusively to agricultural use, pursuant to R.C.5713.30, and thus meets the standards for the property to retain CAUV status.*

*Despite the fact that at the time of the inspections by the county auditor's office there was no evidence of growing crops, K&A produced competent probative evidence that winter wheat and hay were being grown on the subject property in the year in question and all relevant years... (Emphasis added)*

Clearly *Kirk & Ackley* was decided based upon competent, probative evidence of a crop being produced. In the instant case, Appellant had three opportunities to provide evidence of growing crops. First, he could have provided the county auditor with such evidence and, if need be, the evidence could have been provided to the BOR and to the trial court. Appellant's claim that the Court of Appeals decision was factually erroneous is clearly wrong. The trial court's analysis, upon which the appellate decision was based, specifically found, after a review of all the evidence that "it is clear to this Court that there had been no action taken whatsoever that was consistent with, and conformed with, commercial agricultural practices." *Trial Court Decision page 7*. Without the key underpinning of competent reliable evidence, Appellant's reliance on *Kirk & Ackley* is misplaced. In fact, *Kirk & Ackley* supports Appellees contention that this case was decided on the facts, and that there are no legal issues which rise to the threshold standard for review by this Court.

### Proposition of Law No. 3

**A county auditor has the authority to determine the intent of a property owner seeking CAUV status in determining if the agricultural practices conform with the requirements of R.C. 5713.31.**

Appellant mischaracterizes the issue in this proposition of law as one exclusively involving future intent. In fact, in every case, whether involving CAUV or some other question of usage of real property, a reviewer or trier of fact, who makes an objective review of the evidence, will, in his or her decision, have determined the intent of the party at the time he is seeking a particular status. The fact that the trial court in this case explicitly explained its analysis of the evidence, including its conclusion regarding the intent of the Appellant, does not mean that it did not use an objective standard in reviewing the evidence.

Likewise, the Court of Appeals looked to the purpose of the farming activities in construing whether or not the evidence supported a “commercial purpose.” Since R.C. 5313.30(A)(1) requires “*the production for a commercial purpose of .. field crops*”, there is no question that the purpose, or intent, of the owner must be determined by the court. Thus, for purposes of the Court of Appeals decision, the terms “purpose” and “intent” are essentially interchangeable. See also *Zoumberakis v. Coshocton County Board of Revision et al.* (July 7, 2006) Ohio Board of Tax Appeals Case No. 2004-A-632 (CAUV exemption denied to property owner despite evidence that he planted trees because there was “no evidence in the record ..of any commercial enterprise being conducted” and “no evidence offered of any substantial steps taken in furtherance of a *commercial intent*”(emphasis added) and there was “no evidence of maintenance or cultivation of subject parcel for commercial production.”)

In common usage of the English language, as set forth in *Roget's Thesaurus* (1996), the first synonym of the word “intention” is “purpose”. Thus, while section 36, Article II, Ohio

Constitution, does not use the word “intent”, R.C. 5713.30(A)(1), in its defining of property “devoted exclusively to agricultural use” does explicitly require the auditor to look at the “purpose” i.e. the “intent” of the property owner in granting or rejecting CAUV status. See O.R.C. Sec. 1.42 (“Words and phrases shall be read in context and construed according to the rules of grammar and common usage.”)

Appellant’s reliance on *Mentor Exempted Village School Dist. Bd. of Edn. v. Lake Cty. Bd. of Revision* (1979), 57 Ohio St. 2d 62, 386 N.E. 2d 1113, is also misplaced. The footnote cited in Appellant’s Brief in Support of Jurisdiction, page 14, deals with questions of future intended use of a property. This Court essentially said that if the current use qualifies for CAUV, it is immaterial what the owner’s intention was when he purchased the property for possible future development. In other words, this reference merely stands for the fact that although property may be purchased with the future intent to develop it at some point in time, so long as the property continues to be used for a commercial agricultural purpose, it qualifies for CAUV. In the instant case, Appellant’s purpose/intent was exposed by his actions, or lack of actions, which showed he did not produce a commercial agricultural crop. Instead the Court found that the actions of Appellant were meant to invoke the benefits of reduced taxation.

Appellees would suggest that the Appellate Court’s decision in this case does not conflict with cases cited by the Appellant, as they can be distinguished from this case on both their respective facts and the issues of law raised in them.

Appellant also claims that it is bad public policy for the county auditor to have the authority to determine the intent of CAUV participants. While Appellees agree that there is no obligation for citizens to maximize their tax obligations, this completely avoids the true issue. The determination of an owner’s “purpose” is mandated by the statute. If an owner makes

rudimentary attempts to produce a crop, it is the county auditor's obligation to review those activities and determine if they fall within the statutorily prescribed boundaries. In other words, if a taxpayer wishes to take advantage of a tax relief program, he must meet all of the standards, which the program prescribes. In this case, Appellant, by his objective actions, failed to prove the required purpose, and the county official, with the duty and responsibility of oversight of the program, determined he had failed to meet the statutory requirements.

This would be no different than if a taxpayer on his individual income tax return, sought a deduction, for example the mortgage interest deduction, for which he was not entitled. The oversight agency, in this example, the IRS, would have the duty and obligation to reject such a claimed tax advantage. This case presents the county auditor with the same situation. Thus the claims of Appellant that county auditors will be free to make subjective determinations of the intent<sup>5</sup> of landowners seeking CAUV status is neither a substantial constitutional question nor does it raise issues of great general and public interest. Accordingly, this Court should not accept review of this case based on any of the propositions of law set forth in Appellant's brief.

### **CONCLUSION**

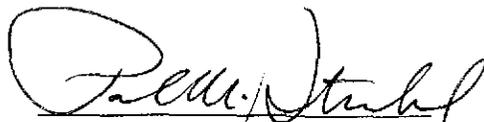
For the reasons set forth herein, Appellees Franklin County Auditor, Franklin County Board of Revision and Gahanna Jefferson School Board respectfully requests that this Court not assume jurisdiction of this case.

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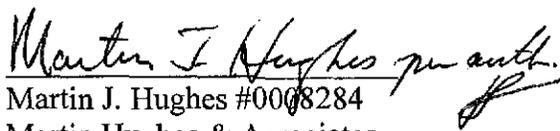
<sup>5</sup> Appellant claims that there is no evidence in the record to suggest Appellant did not expect a harvestable field crop from the property in 2005. In actuality, the evidence of late planting, questionable planting techniques based on the condition of the property, e.g. heavy undergrowth vegetation, and a track record of ongoing failed crops, more than adequately supports the trial court's determination of the intent of the property owner.

Respectfully Submitted,

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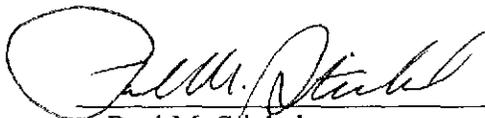
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing *Appellee's Franklin County Board of Revision, Franklin County Auditor and the Board of Education of the Gahanna-Jefferson School District's Joint Memorandum in Opposition to Jurisdiction* was served by U.S. Mail, First Class, Postage Prepaid on this 7<sup>th</sup> day of July, 2008 upon the following:

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