

CASE NO. 2009-0213  
IN THE SUPREME COURT OF OHIO

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OHIO APARTMENT ASSOCIATION, GREENWICH APARTMENTS LTD.,  
AND D&S PROPERTIES,  
*Appellants,*

v.

RICHARD A. LEVIN, TAX COMMISSIONER,  
*Appellee.*

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ON APPEAL FROM THE BOARD OF TAX APPEALS  
CASE NO. 2006-0861

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MERIT BRIEF OF APPELLANTS  
OHIO APARTMENT ASSOCIATION, GREENWICH APARTMENTS, LTD.,  
AND D&S PROPERTIES

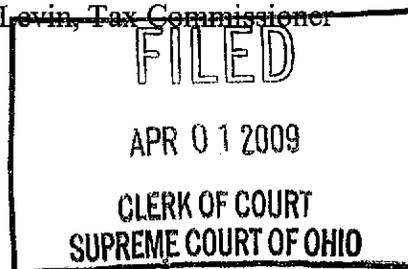
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## I. INTRODUCTION

The Board of Tax Appeals, bound by its limited authority, erred in failing to find that Ohio Department of Taxation Rule 5703-25-18 and Rule 5703-25-10, as required to implement the mandates of Rule 5703-25-18 (collectively, the “Rules”), are unreasonable and unconstitutional. The Rules preclude owners of real property containing four or more residential rental units from enjoying a 10% reduction in real property tax that all other property owners receive, including those owning otherwise identical real property with three or fewer units. The Rules’ two-tiered system is non-uniform and in violation of Article XII, Section 2, of the Ohio Constitution. That constitutional provision explicitly requires a uniform application of real property tax, which is violated on its face when three-unit properties receive a 10% reduction of property tax and four-unit properties do not. The Rules also establish an unconstitutional classification of real property that violates Article I, Section 2, of the Ohio Constitution, which requires that the Tax Commissioner (the “Commissioner”) impose only real and rational classifications. As demonstrated at the hearing of this matter, there is no rational or meaningful basis for distinguishing between rental property containing four units and that containing three or fewer units. Thus, the law and the facts establish that there are two independent bases upon which the Board should have deemed the Rules unreasonable.

## II. STATEMENT OF FACTS

Appellants are, or represent, owners of residential rental properties in Ohio. Appellant Ohio Apartment Association (the “Association”) is a legislative advocacy organization formed to advance the interests of owners of residential rental properties of all sizes. Supplement (“Supp.”) 0006 (Hearing Transcript (“Tr.”), pp. 18-21.) Appellants Greenwich Apartments, Ltd. (“Greenwich”) and D&S Properties (“D&S”) are members of the Association and each owns rental properties containing more than four units. *See* Supp. 0006 (Tr., p. 21), 0049-0052 (Tr.,

Ex. G). For example, D&S owns residential rental units at several sites, which include single-family and duplex rental homes, as well as larger buildings containing over 15 units. Supp. 0014-0015 (Tr., pp. 50-51, 54-55), 0019-0020 (Tr., pp. 73-75). As owners of residential rental property, Appellants provide the same service regardless of the size of the building or the number of units – a home to their tenants. And, as owners of residential rental property, their responsibilities include the maintenance of both the outside and inside of the properties, which also does not vary based on the number of units. *See* Supp. 0015 (Tr., pp. 54-56).

Prior to 2005, all owners of all real property, including Appellants and owners of all residential rental property of any size, received a 10% reduction of their real property tax (the “Rollback”). Then, in 2005, the Commissioner implemented the two Rules precluding Appellants and others similarly situated from enjoying the benefits of the Rollback. The Commissioner’s Rules were created as a result of the Ohio Legislature’s passage of House Bill 66. As described by the Commissioner’s witnesses at hearing, House Bill 66 was intended as a “package” deal that would impart a net benefit to commercial entities. Supp. 0032 (Tr., pp. 124-125), 0037-0038 (Tr., pp. 145-147). House Bill 66’s terms included a phase-out of personal property tax, a repeal of the corporate franchise tax, a reduction in personal income tax that would offset the multimillion dollar real property tax increase imposed selectively on one subset of real property owners. Supp. 0037-0038 (Tr., pp. 145-146). It also explicitly eliminated the Rollback for properties that the Legislature determined to be “intended primarily for use in a business activity.” This element of House Bill 66 was incorporated into Ohio Revised Code § 319.302. According to the Legislature’s classification, only residential rental properties containing four or more units are deemed to be properties “intended primarily for use in a business activity” and, thus, ineligible for the Rollback. *See* O.R.C. § 319.302 (Appendix

("Appx.") 0046). But rental properties containing three or fewer units continue to be eligible for the Rollback.

Using the same categorization established in O.R.C. § 319.302, and nearly identical language, the Commissioner reissued Rule 5703-25-18 on September 29, 2005, instituting the so-called "Partial Exemption From Real Property Tax" that excludes rental properties with four or more units from enjoying the Rollback.

Real property that is not intended primarily for use in a business activity shall qualify for a partial exemption from real property taxation pursuant to section 319.02 of the Revised Code. For purposes of this partial exemption, "business activity" includes all uses of real property, except: . . . (3) Occupying or holding property improved with single-family, two-family, or three-family dwellings; [and] (4) Leasing property improved with single-family, two-family, or three-family dwellings . . . .

O.A.C. 5703-25-18(A) (Appx. 0045). On December 5, 2005, the Commissioner reissued Rule 5703-25-10 to establish the "[c]lassification of real property and coding of records" based on the principal and current use of each parcel of real property that treats residential rental properties containing four units as a separate class of real property from that containing three units.

(4) "Commercial land and improvements" - The land and improvements to land which are owned or occupied for general commercial and income producing purposes and where production of income is a factor to be considered in arriving at true value, including, but not limited to, apartment houses . . . .

(5) "Residential land and improvements" - The land and improvements to the land used and occupied by one, two, or three families.

O.A.C. 5703-25-10(B) (Appx. 0032-0044). These two Rules enacting the Commissioner's differential treatment of real property became effective on December 15, 2005, at which point, property tax for residential rental properties containing four or more units increased. *See* Supp. 0016 (Tr., pp. 58-59).

On July 10, 2006, Appellants filed their Application for Review with the Board of Tax Appeals, seeking to remedy the Rules' unconstitutional and unreasonable treatment of real property and, specifically, residential rental property. Appellants later amended their Application for Review on February 1, 2008. Supp. 0055.

After protracted proceedings, including the Board's denial of several attempts by the Commissioner to avoid a review of the merits of this dispute by the Board and this Court, the matter was heard by the Board on May 28, 2008. The Board issued its decision several months later, on December 30, 2008. Appx. 0015. In its Decision & Order, the Board found the Rules to be reasonable, but acknowledged its limited ability to resolve Appellants' constitutional arguments. *Id.* Appellants appealed the Board's decision by filing a Notice of Appeal with this Court on January 29, 2009. Appx. 0001-0014. As set forth herein, Appellants seek the Court's assistance because the Rules are unconstitutional in that they violate both the Uniformity Clause and the state and federal Equal Protection Clauses.<sup>1</sup>

### III. ARGUMENT

#### A. Rules, Which Apply A 10% Reduction Of Real Property Tax Only To One Class Of Real Property, Are Unreasonable Because They Violate The Uniformity Clause Of The Ohio Constitution

##### 1. The Uniformity Clause clearly mandates the uniform application of real property tax

In no uncertain terms, Article XII, Section 2 of the Ohio Constitution requires that *all* real property be taxed uniformly: "Land and improvements thereon shall be taxed by uniform rule according to value . . ." OHIO CONST. art. XII, § 2 (emphasis added) (Appx. 0048). Uniformity in real property taxation, in fact, has been the law of this State for over 75 years. *See id.*

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<sup>1</sup> Rule 5703-25-18 itself withholds the Rollback from rental properties with four or more units, but it references, and requires, Rule 5703-25-10 in order to effect the elimination of the Rollback and, therefore, Rule 5703-25-10, to that extent, is also unconstitutional. Appellants do not seek to declare Rule 5703-25-10 unconstitutional to the extent it stands alone or implements other Department of Taxation Rules.

(amended in 1931). This constitutional requirement has been applied by this Court in a number of cases over that time, many of which are discussed below. That the Rules are unconstitutional and unreasonable is, thus, a simple and straightforward determination – apparent on the face of the Rules’ non-uniform application of a 10% reduction in property tax for one class of real property, but not another.

This Court’s prior holdings affirm that the Rollback, if applied at all, must be applied uniformly to all types of real property because they illustrate that a “uniform rule” cannot be achieved unless each component of the tax calculation is uniform. Real property tax is calculated by applying a tax rate to the property value: (tax rate) x (taxable value) = property tax. This Court has repeatedly held that, in order to conform with the Uniformity Clause, the State must utilize a uniform percentage of the property value constituting the base taxable value in taxing real property and must utilize uniform valuation methods. *See State, ex rel. The Park Investment Co. v. Bd. of Tax Appeals*, 175 Ohio St. 410 (1964) (“It is clear that under the Ohio law all real property, regardless of its nature or use, may be assessed and taxed only by a uniform rule on the basis of value.”); *Koblentz v. Bd. of Revision*, 5 Ohio St. 2d 214, 218-219 (1966) (following *Park Investments* and requiring the Board to reassess the commercial properties at issue to insure uniformity in the percentage of the properties’ value to which the tax was applied); *Goldberg v. Bd. of Revision*, 7 Ohio St. 2d 139, 141 (1966) (same, quoting *Park Investments*’ requirement that “[a]ll property, whether commercial, residential or vacant, must be assessed on the basis of the same uniform percentage of actual value”); *The Frederick Bldg. Co. v. Bd. of Revision of Cuyahoga Cty.*, 13 Ohio St. 2d 59, syl. (1968) (holding that the Uniformity Clause requires uniformity in the “mode of assessment” and uniformity in the percentage of a property’s fair market value used to determine the property’s taxable value); *State, ex rel. The Park Investment Co. v. Bd. of Tax Appeals*, 32 Ohio St. 2d 28 (1972) (mandating that Ohio

counties employ a uniform fair-market valuation method for real property). Because the Uniformity Clause mandates uniformity in the determination of taxable value, it therefore follows that the tax rate must also be uniform. The resultant tax imposed on real property could not be uniform, as required by the Ohio Constitution, without such a requirement. Thus, the Rules are in conflict with the Ohio Constitution and must be unreasonable.

In *State ex rel. Swetland v. Kinney*, 62 Ohio St. 2d 23 (1980) (known as “*Park V*”), a four-justice majority failed to recognize that the Uniformity Clause requires uniformity in tax rate, but the three dissenting justices’ analysis provides strong and reasoned arguments in support of such a requirement. *See id.* at 32 (W. Brown, J. dissenting). In *Park V*, the Court upheld the constitutionality of a 2.5% reduction of property tax applicable only for “homesteads.” In so holding, the Court affirmed that the Uniformity Clause mandates (1) uniformity in the valuation of real property and (2) uniformity in the percentage of value that would constitute the property tax. *See id.* at 26. But the majority in that decision did not recognize the logical requirement of fully uniform tax rates. Rather, the majority held that the State’s power to determine *exemptions* from taxation is limited only by Ohio’s Bill of Rights, as set forth in Article I of the Ohio Constitution. *Id.* at 27, 31. Appellants respectfully assert that this decision flowed from a series of missteps, which, when examined further and without the backdrop of the specific economic pressures that led to that decision, reveal that the Constitution requires complete uniformity in tax rates.<sup>2</sup>

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<sup>2</sup> The *Park V* decision was issued in April of 1980 during a period of significant recession that placed disproportionate burdens on homeowners. The *Park V* Court acknowledged that the state of the economy was a consideration in its determination of the constitutionality of an additional 2.5% reduction in tax for homesteads: “Our nation and our state are experiencing disturbing, if not distressing, times in our economy. Our citizens are confronted with one of the greatest inflationary trends in recent U.S. history . . . . Taxes, while necessary, are becoming a burdensome problem for our citizens – most particularly the home owner who has been experiencing marked cost increases in every facet of home ownership. With this economic trend, it may reasonably be concluded that the General Assembly enacted . . . this further ‘rollback’ of real estate taxes ‘charged and payable’ on homesteads in order to provide some tax relief by way of a partial exemption to homeowners.” *Id.* at 31.

First, the *Park V* decision ignores the Uniformity Clause's emphasis on uniformity in taxation – the end result. The majority did not consider that the Court's prior decisions, cited above, required a finding that there be uniformity in tax rates. In fact, the majority opinion does not even mention the impact on taxation caused by differing tax rates. "Tax[ation] by uniform rule" cannot be achieved where one group of property owners pays a 10% lower tax rate than another. Justice Brown's opinion on behalf of the dissenting justices recognized this inconsistency:

The constitutional mandate is that real property be 'taxed by uniform rule according to value.' Plainly, by its terms and as interpreted in the *Park Investment* cases, **this mandate focuses on the bottom line** and not on [valuation or percentage of value constituting the tax base]. We should rule that because this mandate as interpreted in the *Park Investment* cases is herein controlling, a constitutional amendment and not mere legislation is necessary to sustain a real property tax preference for homesteads.

*Park V*, 62 Ohio St. 2d at 34 (W. Brown, J., dissenting) (emphasis added). The Uniformity Clause is clear and it precludes one group of property owners from receiving a 10% reduction in property tax rate that other property owners do not receive. In such a scenario, uniformity only in the taxable value does not result in a uniform rule of taxation as required by the Constitution. The Rules, therefore, are unconstitutional and unreasonable.

- 2. Any exception to this mandate of uniformity must be found in the Constitution – and, although such exceptions exist, none authorize the Rules' disparate treatment of real property.**

As Justice Brown noted, in order to get around the constitutional mandate of uniformity in real property taxation, "a constitutional amendment and not mere legislation is necessary." *Park V*, 62 Ohio St. 2d at 34 (W. Brown, J., dissenting). Indeed, the State has seen fit to amend the Constitution and provide for specific exceptions in uniform real property taxation. For example, Article II, § 36 carves out an exception for the taxation of "land devoted exclusively to

agricultural use.” The Uniformity Clause, itself, allows for non-uniform taxation of property that houses certain disabled and elderly populations. See OHIO CONST. art. XII, § 2 (“Land and improvements thereon shall be taxed by uniform rule according to value, except that laws may be passed to reduce taxes by providing for a reduction in value of the homestead of permanently and totally disabled residents” and certain elderly populations) (emphasis added) (Appx. 0048-0049). But neither of these exceptions, nor the Constitution’s recognition of exemptions and tax reduction factors, which are discussed herein, allows the State via statute or regulation to apply the Rules’ disparate treatment.

**a. The Rules do not constitute an exemption.**

While Rule 5703-25-18 is entitled a “Partial Exemption From Real Property Tax,” this label is insufficient to transform it into an exemption when the Rules clearly do not exempt any class of property from taxation. Rather, the title reflects a transparent attempt by the Commissioner to hide the Rules’ non-uniform taxation within another of the *Park V* Court’s unsupported lines of reasoning.

The Uniformity Clause grants the General Assembly authority to issue legitimate tax exemptions: “Without limiting the general power, subject to the provisions of Article I of this constitution, to determine the subjects and methods of taxation or exemptions therefrom, general laws may be passed . . . .”<sup>3</sup> OHIO CONST. art. XII, § 2 (also enumerating specific categories for

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<sup>3</sup> Article XII, § 2 reads in full:

No property, taxed according to value, shall be so taxed in excess of one per cent of its true value in money for all state and local purposes, but laws may be passed authorizing additional taxes to be levied outside of such limitation, either when approved by at least a majority of the electors of the taxing district voting on such proposition, or when provided for by the charter of a municipal corporation. Without limiting the general power, subject to the provisions of Article I of this constitution, to determine the subjects and methods of taxation or exemptions therefrom, general laws may be passed to exempt burying grounds, public school houses, houses used exclusively for public worship, institutions used exclusively for charitable purposes, and public property used exclusively for any public purpose, but all such laws shall be subject to alteration or repeal; and the value of all property so exempted shall, from time to time, be ascertained and published as may be directed by law.

exemption related to public and charitable property) (Appx. 0048-0049). But, this provision only grants the General Assembly and the Commissioner authority to determine that tax should not be applied at all to certain property because anything exempt from taxation is not taxed at all. *See* Black's Law Dictionary (defining "exempt" as "[f]ree or released from a duty or liability to which others are held"). The Rules do not exempt either of the two classes of real property established by the Rules from taxation. The Rules simply raise one group's taxes by more than 10% and maintain the other's taxes, which is a disparate increase that is entirely different from an exemption.

The distinction between an exemption and a reduction in taxation must exist; otherwise, the State could avoid its constitutional obligation of uniformity by doing indirectly that which it cannot do directly: tax certain classes of real property differently. To interpret an exemption as anything other than a total release from taxation would render the uniformity requirement of the Constitution null. When property is subject to taxation, it must be done uniformly, in accordance with the Uniformity Clause. Thus, the *Park V* Court's refusal to attribute any "mystical significance to the term 'exemption'" is merely a way of misinterpreting it. *Park V*, 62 Ohio St. 2d at 29.

The *Park V* majority overreached by upholding the homestead exemption on the supposed basis of the constitutional authority to issue exemptions. The Court, relying on its analysis in *Denison Univ. v. Board of Tax Appeals*, 2 Ohio St. 2d 17, 25-28 (1965), reasoned that, without the use of the word "all" before "land and improvements thereon," the Constitution purportedly left open the possibility for differences in treatment. *Park V*, 62 Ohio St. 2d at 27. First, it should be noted that this rationalization is inconsistent with the language of the Constitution. The Uniformity Clause requires "land and improvements thereon" to be taxed uniformly and additional language in the clause recognizes explicit exceptions to that

requirement within the same clause. *See* OHIO CONST. art. XII, § 2 (Appx. 0048-0049). If real property is not subject to the explicit exceptions provided for in other constitutional provisions, it must then fall within “land and improvements thereon” requiring uniform tax. And, thus, because the Rules’ differing treatment of rental properties fits within no exception, the 10% Rollback must be granted uniformly to all real property owners.

The *Park V* majority went on to attempt to justify its decision on precedent upholding exemptions that are inapposite because the cited precedent involved complete exemptions from taxation, recognized by the Uniformity Clause, as opposed to preferential reduction imposed by the Rules. *See Park V*, 62 Ohio St. 2d at 26-27, 29. Indeed, the cited cases only highlight the material distinction between exemptions and reductions. For example, in *Denison*, which the *Park V* majority heavily relied on, the Court upheld a complete property tax exemption for buildings connected to public colleges in accordance with State’s authority to determine exemptions subject only to Article I limitations. *Denison Univ.*, 2 Ohio St. 2d at 20-21; *see also Cleveland State Univ. v. Perk*, 26 Ohio St. 2d 1, 8-9 (1971) (buildings connected to public university entitled to complete tax exemption). The *Park V* Court also looked to *Graf v. Warren*, 10 Ohio St. 2d 32 (1967), in which the Court upheld a complete property tax exemption for State Underground Parking Commission parking facilities on statehouse grounds because they serve a “public purpose” as set forth in the Uniformity Clause. *See also Cleveland v. Perk*, 29 Ohio St. 2d 161, 167-168 (1972) (affirming the BTA’s denial of a complete property tax exemption for airport space owned by a municipality, but leased to private retailers, because such property is not “public property used exclusively for a public purpose” as required by the relevant exemption statute). However, none of these decisions support the constitutionality of the Rules (or of the homestead reduction at issue in *Park V*) because each upheld a complete exemption from taxation.

Moreover, each of the prior cases relates to taxes imposed on public property, a class of property for which the General Assembly is granted additional leeway by the Uniformity Clause:

Without limiting the general power, subject to the provisions of Article I of this constitution, to determine the subjects and methods of taxation or exemptions therefrom, **general laws may be passed to exempt** burying grounds, **public school houses**, houses used exclusively for public worship, institutions used exclusively for charitable purposes, **and public property used exclusively for any public purpose**, but all such laws shall be subject to alteration or repeal; and the value of all property so exempted shall, from time to time, be ascertained and published as may be directed by law.

OHIO CONST. art. XII, § 2 (emphasis added) (Appx. 0048-0049). Therefore, the tax treatment affirmed by these prior decisions is distinguishable from, and cannot justify, the Rules.

The *Park V* decision also tried to justify its result by citing the Court's prior ruling in *Dayton v. Cloud*, 30 Ohio St. 2d 295 (1972), which it claimed recognized "partial exemptions" as subject only to Article I protections. See *Park V*, 62 Ohio St. 2d at 28 (relying on *Dayton* and holding that "it may be reasonably concluded that the General Assembly could have granted a partial tax exemption to homesteads in the additional amount of [2.5%] of the real estate taxes otherwise calculated and payable on property falling within that class"); *Dayton*, 30 Ohio St. 2d at syl. ¶2 (holding that a "partial exemption" from property tax for urban renewal improvements does not violate constitutional equal protections). However, what the *Dayton* court referred to as a "partial exemption" was, in fact, a complete exemption from taxation for those portions of a property on which improvements were made where the property is located in a designated "urban renewal area" and financed with a statutory urban renewal bond. *Dayton*, 30 Ohio St. 2d at 301 (holding that O.R.C. Chapter 725, which provided for such a statutory exemption, did not offend the uniformity requirements of Article XII, Section 2, and that such an exemption was limited only by Article I protections); see Ohio Rev. Code § 725.02(A) ("The portion of the assessed valuation of improvements . . . and the portion of the increase in the assessed valuation after . . .

improvements rehabilitated pursuant to [an urban renewal development agreement] declared to be a public purpose . . . shall be exempt from real property taxation by all political subdivisions and taxing districts.”).

Chapter 725 exempts from taxation the entirety of a defined portion of the real property that is financed through public bonds for the time period in which the public bonds are in place. O.R.C. § 725.02(C). Thus, while only part of the total property is exempt from taxation under Chapter 725, that entire portion is completely exempt and, again, the exemption is related to a public purpose. This same distinction is seen in other current tax exemptions. For example, O.R.C. § 5709.40(B) authorizes municipalities to exempt up to 75% (or more in some cases) of the increase in assessed value of real property from taxation for up to 10 years, by declaring such improvements to have a “public purpose.” Thus, the property owner pays no tax on a portion of the assessed value of real property, while it pays taxes on the remaining portion of the assessed value at the same rate as all other property owners. *See also* O.R.C. §§ 5709.87 (completely exempting from taxation for 10 years the increase in assessed value of real property certified by the Director of Environmental Protection as cleaned from contamination), 5709.62 (authorizing municipalities to exempt from taxation up to 75% of the value of real property falling within a specified enterprise zone for a specified period of time not greater than 15 years).

Such limited exemptions as that upheld in *Denison Univ.* and those codified in Ohio law do not and cannot justify the Rules. The Rules do not exempt any real property from taxation or any percentage of the real property’s value from taxation. Rather, they apply a different effective tax rate to two groups of private property owners. The Rules do not withstand scrutiny under the Uniformity Clause and, as such, should be deemed unreasonable and clearly unconstitutional.

**b. And, the Rules do not fall within the constitutional exception for a non-uniform tax reduction factor.**

The constitutional amendment authorizing a non-uniform tax reduction factor highlights the Rules' unconstitutionality. Seven months after the *Park V* decision was issued, the Ohio Constitution was amended to allow for the differing treatment of commercial and residential property for the purposes of a specific tax reduction factor.

Land and improvements thereon in each taxing district shall be placed into one of two classes solely for the purpose of separately reducing the taxes charged against all land and improvements in each of the two classes as provided in division(C)(2) of this section. The classes shall be: (a) Residential and agricultural land and improvements; [and] (b) All other land and improvements.

OHIO CONST. art. XII, §2a (emphasis added) (Appx. 0050-0052). Section 2a was designed to “offset windfall revenue increases that would otherwise occur when existing real property appreciated in value.” Supp. 0031 (Tr., p. 120). In order to account for the higher rate of appreciation for residential properties occurring at the time, the General Assembly amended the Constitution to allow the State to apply a separate tax reduction factor for residential properties. Supp. 0031 (Tr., pp. 119-121); *see also* OHIO CONST. art XII, §2a (Appx. 0050-0052).

While Article XII, § 2a may employ the same general classification of real property as that applied by the Rules (residential or commercial), its authorized classification applies “solely” to what is referred to as the “tax reduction factor.” *See id.* §2a(C)(2) (“[T]he amount of taxes imposed by such tax against all land and improvements thereon in each class shall be reduced in order that the amount charged for collection against all land and improvements in that class in the current year . . . equals the amount charged for collection against such land and improvements in the preceding year.”) (Appx. 0050-0052). The amendment has no impact on and provides no support for O.R.C. § 319.302 or the Rules. Indeed, as the Commissioner’s

witness explained at the hearing, the concepts of the tax reduction factor and “partial exemptions” are “very separate, very distinct concepts.” Supp. 0031 (Tr., p. 119).

What the Section 2a amendment does do is reflect the General Assembly’s recognition that a constitutional amendment is necessary in order to apply a different tax rate to various types of real property. Indeed, in its “Argument for the Proposed Amendment,” the General Assembly acknowledged that, absent the amendment, the tax rates would have to be uniform for all classes: “[T]he present Ohio Constitution requires uniform application of tax laws, general property tax relief is granted across the board to all property owners, including business land-holders.” Ohio General Assembly “Argument for the Proposed Amendment” *quoted in Roosevelt Properties Co. v. Kinney*, 12 Ohio St. 3d 7, 11 (1984). As a result, the General Assembly sought to, and did, amend the constitution to create a limited exception in Section 2a to apply a non-uniform tax reduction factor. *See* OHIO CONST. art. XII, § 2a (classifications made “solely for the purpose of” applying the H.B. 920 reduction factor) (Appx. 0050-0052). The Rules’ elimination of the Rollback for commercial properties, including those with four or more residential rental units, does not, however, fall within the scope of the Section 2a amendment. Thus, the General Assembly is bound by the Constitution’s requirement for uniformity in taxation of real property, including the application of a 10% rollback, if any, to all properties – absent another constitutional amendment.<sup>4</sup>

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<sup>4</sup> The Commissioner has attempted to justify the Rules’ non-uniform treatment of real property by the Rules’ inclusion in the “package” deal of H.B. 66. *See* Supp. 0032 (Tr., pp. 124-125), 0037-0038 (Tr., pp. 145-147). But, the General Assembly cannot discard the Uniformity Clause’s requirement for uniformity in real property tax simply because it hopes that its legislative and regulatory requirements impart a net benefit to commercial entities.

**B. Rules That Treat Residential Rental Property Containing Four Or More Units Differently Than That Containing Three Or Fewer Units Are Unreasonable Because Their Classification Of Real Property Violates The Equal Protection Clause.**

Article I, Section 2 of the Ohio Constitution provides that:

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly.

OHIO CONST. art. I, § 2 (Appx. 0047). Ohio’s equal protections mirror those at the federal level, found in the Fourteenth Amendment to the United States Constitution, which provides that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1 (Appx. 0053-0054). To survive an equal protection analysis, “[a] classification must not be arbitrary, artificial, or evasive, but there must be a real and substantial distinction in the nature of the class or classes upon which the law operates.” *Park V*, 62 Ohio St. 2d at 15 quoting *Xenia v. Schmidt*, 101 Ohio St. 437, syl. ¶ 5 (1920). Equal protection prohibits discrimination that is not “founded upon a reasonable distinction, or difference in state policy.” *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 526 (1959). Even if the Rules survived scrutiny under the Uniformity Clause – and they do not – the Rules do not survive an equal protection analysis because the Rules are arbitrary and unreasonable.

- 1. The Rules’ categorization of residential rental properties containing four or more units as a separate class of property from all other residential property is arbitrary and unreasonable.**

The Rules purport to treat residential property differently from property that is “intended primarily for use in a business activity.” See O.A.C. 5703-25-18 (Appx. 0045), 5703-25-10 (Appx. 0032-0044). The Rules, however, segregate residential rental properties into two

different classes – one that receives the 10% Rollback and one that does not. In doing so, the Rules unconstitutionally discriminate between different types of residential property.

The Rules define property “intended primarily for use in a business activity,” which is ineligible for the 10% Rollback under the Rules, to include rental properties containing four or more units. The Rules define “residential” property, which enjoys the 10% Rollback under the Rules, to include only single-family homes or rental properties containing fewer than 4 units. *See* O.A.C. 5703-25-18 (Appx. 0045), 5703-25-10 (Appx. 0032-0044). Thus, the Rules apply a different tax rate to people living in an apartment building with four units from those living in an otherwise identical three-unit building or a one-unit home.

This discriminatory treatment is arbitrary because, regardless of the number of units, rental property is residential. A “residence” is defined as “[t]he locale in which one actually or officially lives” or “[a] house or other fixed abode.” Black’s Law Dictionary; *see also Hunt v. Held*, 90 Ohio St. 280, 283 (1914) (“If a building is used as a place of abode and no business carried on[,] it would be used for residence purposes only whether occupied by one family or a number of families . . . . The word ‘residence’ has reference to the use or mode of occupancy to which the building may be put.”). And, these residential properties, regardless of the number of units, stand in sharp contrast to the remaining scope of properties falling in the classification of non-residential property, which includes factories, warehouses and “industrial, mineral and public utility land and improvements.” *See* O.A.C. 5703-25-10(A)(2) (establishing second classification of property apart from “residential property”) (Appx. 0032). As opposed to these properties – which are clearly “intended primarily for use in business activities” – apartment buildings are designed to be and are used as residences. And, all residential properties, including apartment buildings with four or more units, exhibit many of the same characteristics. Residential properties, whether rented or owned, for example, involve similar maintenance

issues. *See* Supp. 0007 (Tr. p. 25) (both may require “carpeting, furnaces, air conditioners, roof, [and] lawn maintenance”). By discriminating between persons who choose to live in an apartment building and those who live in a single-family home, the Rules violate state and federal equal protections. *See* Supp. 0008 (Tr., pp. 27-28) (“A renter can be anybody. It can be me [the Executive Director of the Ohio Apartment Association]. It can be the hearing officer, the court reporter, anybody;” also stating that the choice to rent versus own is often driven simply by lifestyle choices). The Rules are, therefore, unreasonable.

The fact that the Rules utilize the same classification of real property as that utilized for the tax reduction factor authorized by Article XII, § 2a of the Ohio Constitution does not render the classification reasonable or proper in the context of the Rules. While that classification was upheld by this Court in *Roosevelt Properties Co. v. Kinney*, 12 Ohio St. 3d 7 (1984), a specific constitutional amendment was enacted to justify its use. *See id.* at 12. The *Roosevelt Properties* Court recognized the General Assembly’s arguments in support of the amendment and its stated intent to direct tax relief, via the tax reduction factor, to residential and agricultural property that had experienced a disproportionate inflationary increase in value – and, thus, bore a disproportionate tax burden compared to commercial properties. *Id.* at 11-12 (quoting the General Assembly’s “Argument for the Proposed Amendment”). But, the critical distinguishing factor, as set forth in Section A(2)(b) *supra*, is that that classification is authorized by a constitutional amendment that is limited in application to the tax reduction factor and does not extend to the Rules.<sup>5</sup> The Rules’ classification of real property used as residences is arbitrary,

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<sup>5</sup> There also is no evidence reflecting any significant difference in economic burden on either of the Rules’ two classifications of property such as that leading to the Section 2a tax reduction factor amendment. The Commissioner’s records tabulating yearly growth in sales of rental properties and single-family homes reflect that these two groups of properties have not experienced a significant difference in growth between 1993 and 2007. *See* Supp. 0027 (Tr., pp. 102-104) (explaining that Tax Use Codes 401, 402, and 403 reflect residential rental properties containing four or more units and Tax Use Codes 510, 520, and 530 reflect residential properties containing three or fewer units); Supp. 0053-0054 (Tr., Ex. H) (certified Dept. of Taxation data regarding “Sales of Apartments and Single Family Homes”). Residential rental properties

places a disproportionate burden<sup>6</sup> on rental properties with four or more units as compared to all other residential property, and, thus, fails to satisfy equal protection.

**2. The Rules' distinction between residential rental properties containing four or more units and those containing three or fewer units is arbitrary and connotes no real or substantial difference between rental properties.**

The Rules discriminate between different types of residential property, as set forth above, but they also discriminate against certain rental properties as a sub-group in that properties containing four units receive the Rollback and those containing three units do not. *See* O.A.C. 5703-25-18 (Appx. 0045), 5703-25-10 (Appx. 0032-0044). The purported distinction between four-unit and three-unit rental properties is illusory; there is no evidence of any relevant difference between residential rental properties other than the number of units. *See* Supp. 0027 (Tr., p. 22) (“[T]he scope [of the two categories of rental properties] may be different based on the size of the business entity that owns the residential rental property, but it still residential rental property . . .”). The responsibilities of owners of three unit properties are no different than those for owners of four unit properties. Supp. 0015 (Tr., pp. 54-55) (a rental property owner is responsible for the outside and inside of the building the same for properties containing four or more units as for those with fewer than four units). Nor is there any difference between

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containing four or more units have experienced growth, albeit erratic, during this time period. (*Id.*) And, all other residential properties, in Tax Use Codes 501-503, also experienced modest gains in yearly median price for sales between 1993 and 2007. (*Id.*) But, there is no significant difference in the growth rates that would support any basis to differentiate the tax treatment of these properties, even if a constitutional amendment authorized non-uniformity. Any arguments in support of a classification to remedy severe inflationary burdens on certain residential property owners in the instant circumstances fall short.

<sup>6</sup> The *Park V* Court recognized that a disproportionate burden could rise to the level that would have led it to reach a different result “in that such a law might have been determined to place an undue and unreasonable burden on owners of other types of real property, and would, in such an instance, not have passed constitutional muster.” *Park V*, 62 Ohio St. 2d at 31 (noting that such a disproportionate burden may arise if the proposed “exemption” of homesteads was total, rather than “partial”). Here, the Commissioner’s application of the Rules, eliminating the Rollback for Appellants and others similarly situated, results in a disproportionate burden in real property tax for rental properties containing four or more units in the form of a more than 10% increase in property tax. *See* O.A.C. 5703-25-18 (Appx. 0045).

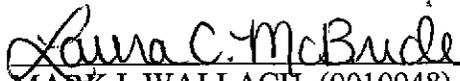
the people who rent residential units in properties with a larger number of units as opposed to a smaller number of units. Supp. 0015 (Tr., p. 56). Moreover, the tax treatment for expenses incurred in owning rental properties containing more than four units is the same as that for properties containing fewer than four units. Supp. 0023-0024 (Tr., pp. 89-90) (expenses are deductible business expenses no matter how many units exist). Indeed, the lack of any real difference between rental properties containing three and four units is evidenced by the fact that any one owner of rental property may own properties of both sizes. Supp. 0049-0052 (Tr., Ex. G) (reflecting ownership of David Fisher, principal of Appellant D&S Properties, in rental properties including those with 54, 12, 8, 2, and 1 residential units). The distinction between rental properties based on the number of units, and specifically a distinction between three-unit and four-unit properties, is utterly arbitrary and connotes no reasonable basis for the Rules' classifications. The Rules violate state and federal equal protection.

#### IV. CONCLUSION

Two separate and independent constitutional provisions prohibit the Commissioner's implementation of the Rules' differing effective tax rates on rental properties containing four or more residential units versus that applied to all other properties, including rental properties containing fewer than four residential units. The Uniformity Clause requires, absent a constitutional amendment, that all real property be taxed uniformly. But the Rules grant one group of real property an additional 10% discount on real property tax where as the other group does not. Even if the Rules were uniform, the Equal Protection Clause, found in both the Ohio and United States Constitutions, requires that the Commissioner utilize only real and reasonable classifications in applying tax rates. But, the Rules establish two categories – segregating both residential property and rental property – that are unrelated to any true differences in the property. Because the Rules effect a non-uniform and discriminatory application of the 10%

Rollback, the Board clearly erred in finding the Rules reasonable. The Commissioner should be ordered to apply the Rollback to all real property in accordance with constitutional mandates and as applied prior to the Rules' enactment.

Respectfully submitted,

  
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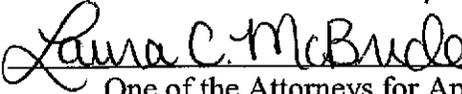
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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing *Merit Brief of Appellants Ohio Apartment Assoc., Greenwich Apartments, Ltd., and D&S Properties* was served this 31st day of March, 2009, by First Class U.S. Mail, postage pre-paid upon:

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# APPENDIX

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IN THE SUPREME COURT OF OHIO

Case No. 09-0213

Ohio Apartment Association, Greenwich  
Apartments, Ltd., and D&S Properties,

Appellants,

v.

Richard A. Levin, Tax Commissioner,

Appellee.

On Appeal from the Board of Tax Appeals

Board of Tax Appeals Case No. 2006-A-861

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**NOTICE OF APPEAL OF OHIO APARTMENT ASSOCIATION,  
GREENWICH APARTMENTS, LTD., AND D&S PROPERTIES**

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DOCKETED

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FILED  
JAN 29 2009  
CLERK OF COURT  
SUPREME COURT OF OHIO

APP0001

Appellants, Ohio Apartment Association, Greenwich Apartments, Ltd., and D&S Properties (collectively "Appellants"), hereby give notice of their appeal to the Supreme Court of Ohio from the Decision and Order of the Board of Tax Appeals (the "Board"), entered in Case No. 2006-A-816 and issued on December 30, 2008 (the "Order"). A true and accurate copy of the Board's Order is attached hereto as Exhibit A and incorporated herein by reference.

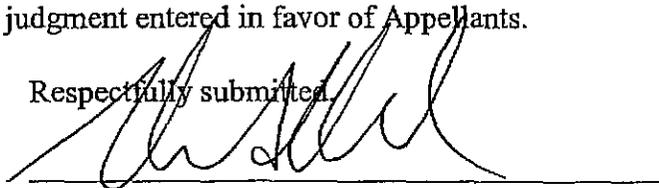
Appellants complain and allege that the Order is unlawful and unreasonable in the following respects:

1. The Board's finding that the Tax Commissioner's Rules 5703-25-18 and 5703-25-10 (collectively the "Rules") are reasonable violates Article XII, Section 2 of the Ohio Constitution, which requires taxation on real property "by uniform rule according to value."

2. The Board's finding that the Rules are reasonable violates Article I, Section 2 of the Ohio Constitution, which provides equal protection to Appellants.

WHEREFORE, Appellants respectfully submit that the Board's Order is unlawful and unreasonable, and should be reversed with judgment entered in favor of Appellants.

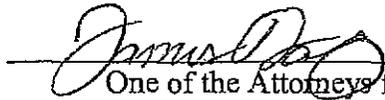
Respectfully submitted,



Mark I. Wallach  
Counsel of Record for Appellants

**CERTIFICATE OF FILING**

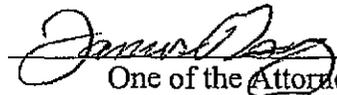
A copy of the foregoing *Notice of Appeal of Ohio Apartment Association, Greenwich Apartments, Ltd., and D&S Properties* has been filed with the docketing division of the Board of Tax Appeals, in accordance with R.C. § 5717.04, this 28th day of January, 2009.

  
One of the Attorneys for Appellants

**CERTIFICATE OF SERVICE**

A copy of the foregoing *Notice of Appeal of Ohio Apartment Association, Greenwich Apartments, Ltd., and D&S Properties* was served by **certified mail**, postage prepaid, on the 27th day of January, 2009, on:

Larry D. Pratt, Esq.  
Alan Schwepe, Esq.  
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Columbus, Ohio 43215

  
One of the Attorneys for Appellants

# EXHIBIT A

OHIO BOARD OF TAX APPEALS

Ohio Apartment Association	)	
	)	CASE NO. 2006-A-861
and	)	
	)	(RULE REVIEW)
Greenwich Apartments, Ltd.	)	
	)	DECISION AND ORDER
and	)	
	)	
D & S Properties,	)	
	)	
Appellants,	)	
	)	
vs.	)	
	)	
William W. Wilkins, Tax Commissioner	)	
of Ohio,	)	
	)	
Appellee.	)	

APPEARANCES:

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Entered DEC 30 2008

Ms. Margulies, Mr. Eberhart, and Mr. Dunlap concur.

This cause and matter comes on to be considered by the Board of Tax Appeals pursuant to an application for rule review. By such application, this board has

been asked to review Ohio Adm. Code 5703-25-18 and 5703-25-10 (only insofar as and to the extent that it is the mechanism by which the commissioner would effect the changes set forth in Ohio Adm. Code 5703-25-18), pursuant to the powers vested in this board by R.C. 5703.14. Such request for review arises out of what the appellants claim is the disparate treatment of different classes of real property owners resulting from the amendment of R.C. 319.302 in 2005 which precluded certain property owners from continuing to receive a 10% real property tax rollback.

The matter is considered by the Board of Tax Appeals upon the application for review, the evidence and testimony presented at a hearing before the board, and the briefs submitted by counsel.

At the outset, we will review the pertinent rules and statutes under consideration in this matter. First, R.C. 5703.14 (C) sets forth the rule review process, including this board's role, as follows:

“Applications for review of any rule adopted and promulgated by the commissioner may be filed with the board by any person who has been or may be injured by the operation of the rule. The appeal may be taken at any time after the rule is filed with the secretary of state, the director of the legislative service commission, and, if applicable, the joint committee on agency rule review. Failure to file an appeal does not preclude any person from seeking any other remedy against the application of the rule to the person. The applications shall set forth, or have attached thereto and incorporated by reference, a true copy of the rule, and shall allege that the rule complained of is unreasonable and shall state the grounds upon which the allegation is based. Upon the filing of the application, the board shall notify the commissioner of the filing of the application, fix a time for hearing the application, notify the commissioner and the applicant of the time for the hearing, and afford both the opportunity to be heard. The

appellant, the tax commissioner, and any other interested persons that the board permits, may introduce evidence. The burden of proof to show that the rule is unreasonable shall be upon the appellant. After the hearing, the board shall determine whether the rule complained of is reasonable or unreasonable. A determination that the rule complained of is unreasonable shall require a majority vote of the three members of the board, and the reasons for the determination shall be entered on the journal of the board.”

Appellants have requested our review of two rules. The relevant portions of the first, Ohio Adm. Code 5703-25-18, provide in pertinent part, as follows:

“(A) Real property that is not intended primarily for use in a business activity shall qualify for a partial exemption from real property taxation pursuant to section 319.302 of the Revised Code. For purposes of this partial exemption, ‘business activity’ includes all uses of real property, except:

“ \*\*\*

“(3) occupying or holding property improved with single-family, two-family, or three-family dwellings;

“(4) leasing property improved with single-family, two-family, or three-family dwellings; and

“(5) holding vacant land that the county auditor determines will be used for farming or to develop single-family, two-family, or three-family dwellings.

“ \*\*\*

“(C) In determining whether real property is qualified for the partial exemption, each separate parcel of real property shall be classified according to its principal and current use, and each vacant parcel of land shall be classified in accordance with its location and its highest and best probable legal use. In the case where a single parcel has

multiple uses the principal use shall be the use to which the greatest percentage of the value of the parcel is devoted.

“(D) In determining whether real property is qualified for the partial exemption, the county auditor shall be guided by the property record of taxable real property coded in accordance with the code groups provided for in paragraph (C) of rule 5703-25-10 of the Administrative Code.”

The relevant portions of the second rule, Ohio Adm. Code 5703-25-10, provide in pertinent part, as follows:

“(A) As required by section 5713.041 of the Revised Code, the county auditor shall classify each parcel of taxable real property in the county into one of the two following classifications, which are:

“(1) Residential and agricultural land and improvements;

“(2) All other taxable land and improvements, including commercial, industrial, mineral and public utility land and improvements.

“(B) Each separate parcel of real property with improvements shall be classified according to its principal and current use, and each vacant parcel of land shall be classified in accordance with its location and its highest and best probable legal use. In the case where a single parcel has multiple uses the principal use shall be the use to which the greatest percentage of the value of the parcel is devoted. The following definitions shall be used by the county auditor to determine the proper classification of each such parcel of real property:

“ \*\*\*

“(4) ‘Commercial land and improvements’ – The land and improvements to land which are owned or occupied for general commercial and income producing purposes and where production of income is a factor to be considered in

arriving at true value, including but not limited to, apartment houses \*\*\*.

“(5) ‘Residential land and improvements’ – The land and improvements to the land used and occupied by one, two, or three families.”

The foregoing rule also requires that each property record be coded according to the code groups listed within the rule, which include Code 401, Apartments, 4-19 rental units; Code 402, Apartments, 20-39 rental units; Code 403, Apartments, 40 or more rental units; Code 510, Single family dwelling; Code 520, Two family dwelling; and Code 530, Three family dwelling.

Also relevant to this discussion is R.C. 319.302, which, upon its amendment in 2005, provided the following:

“(A)(1) Real property that is not intended primarily for use in a business activity shall qualify for a partial exemption from real property taxation. For purposes of this partial exemption, ‘business activity’ includes all uses of real property, except farming; leasing property for farming; occupying or holding property improved with single-family, two-family, or three-family dwellings; leasing property improved with single-family, two-family, or three-family dwellings; or holding vacant land that the county auditor determines will be used for farming or to develop single-family, two-family, or three-family dwellings. \*\*\*”

At the hearing before the board, Jay Scott, executive director for both the Columbus and Ohio Apartment Associations, as well as David Fisher, general partner of D&S Properties, owners of residential rental properties, testified on behalf of appellants. Mr. Scott indicated that the Ohio Apartment Association, which is made

up of local apartment associations from around the state, decided to be a party to the instant rule review request because:

“[i]t’s the loss of the 10 percent rollback that is - that was taken away from properties that have more than four residential rental apartments or units on a property. Again, we are looking at that, that there is no differentiation between a residential rental property – the scope may be different based on the size of the business entity that owns the residential rental property, but it is still residential rental property, and so the loss of that, that 10 percent, it basically equated to a 10 percent tax increase. Those larger rental property owners are not able to pass along that tax increase to residential rental residents. The market will not bear that. And \*\*\* this is an argument or this is a fact that the members wanted to fight.” H.R. at 22.

Mr. Fisher testified about his business, which includes about 500 units ranging from single family homes to multiple unit buildings. H.R. at 51-56. He indicated that his taxes are higher on the properties with four or more units, and, as a result, his profit margins got tighter, with rent levels decreasing and vacancy increasing. H.R. at 58-59.

At the outset, the appellee has raised a procedural issue which must be addressed prior to beginning our rule review. Counsel for the appellee argues that “[t]he appellants lack standing to challenge Ohio Adm. Code 5703-25-18 as any injury is caused by the enabling statute, R.C. 319.302, and not by the rule itself.” Brief at 12. We acknowledge that “[a] preliminary inquiry in all legal claims is the issue of standing.” *Cuyahoga Cty. Bd. of Commrs. v. State*, 112 Ohio St.3d 59, 2006-Ohio-6499, \*\*\*, ¶22. ‘It has been long and well established that it is the duty of every judicial tribunal to decide actual controversies between parties legitimately affected by

specific facts and to render judgments which can be carried into effect.” *Fortner v. Thomas* (1970), 22 Ohio St.2d 13, 14 \*\*\*.” *State ex rel. Ohio Gen. Assembly v. Brunner*, 114 Ohio St.3d 386, 2007-Ohio-3780, at ¶15. However, we find that appellee’s position that the appellants lack standing because any injury that may have occurred was caused by operation of statute, and not by the rules, is merely an argument in semantics. The amendment of the statute in question and the enactment of the rules thereafter in accordance therewith, as well as the overall implementation of all of them, have caused the “injury,” if any. The statute and rules, in effect, contain the same provisions and operate concurrently, and as such, both have caused the “injury” of which appellants complain. Accordingly, we find that appellants have standing to bring their requested rule review.

As we begin the review of the rules in question, we acknowledge that our duty in this matter is straightforward; if the appellants have carried their burden of proof, then we must find the rule(s) unreasonable. Contrary to appellants’ statement in their post-hearing brief, this board cannot declare the subject rules “unconstitutional.” Brief at 2. While the Ohio Supreme Court has authorized this board to accept evidence on constitutional points, it has clearly stated that we have no jurisdiction to decide constitutional claims. *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St.3d 229; *MCI Telecommunications Corp. v. Limbach* (1994), 68 Ohio St.3d 195, 198. Thus, the only issue before this board is one of the reasonableness of the rules.

R.C. 5705.14 requires the taxpayer to list the reasons the rules in question are unreasonable. In their application for review, the taxpayers state that “the

Rules are unreasonable and unconstitutional for two independent reasons. They argue that “the Commissioner has a clear constitutional duty to apply the Rollback to all rental properties, regardless of the number of units contained, because Article XII, Section 2 [sic] explicitly requires a uniform application of property tax to the full range of real properties, including rental properties, and because Article I, Section 2 [sic] requires that the Rules’ classification of rental properties be eliminated.” Application at 4.

As we consider the rules under challenge, we will review prior case law dealing with rules promulgated by the Tax Commissioner. As we stated in *Baxla v. Tracy* (July 30, 1993), BTA No. 1991-M-1242, unreported, at 8-10:

“In *The Kroger Grocery & Baking Co. v. Glander* (1948), 149 Ohio St. 121, the Ohio Supreme Court considered a rule promulgated by the Tax Commissioner under a direct grant of statutory authority. Therein the Court stated:

“Sections 1464-3, 5546-5 and 5546-31, General Code, authorize and direct the Tax Commissioner to adopt for the administration of the Sales Tax Act such rules and regulations as he may deem necessary to carry out the provisions of the act. Such rules and regulations are necessary because of the infinite detail essential in the consideration of an application and the interpretation of the law to concrete and specific circumstances and situations, the incorporation of which in the statute itself would be impracticable or impossible.”

“The Court cited the specific Tax Commissioner’s rule in issue in that case, and, thereafter, set a standard for review of similar rules:

“This rule, like those of other administrative agencies, issued pursuant to statutory authority, has the force and effect of law unless it is unreasonable or is in clear

conflict with statutory enactment governing in the same subject matter.’

“\*\*\*

“We have also reviewed prior decisions of this Board wherein rules promulgated by the Tax Commissioner have been considered under R.C. 5705.14(C). Rules have been found reasonable when they carry out the intent of the legislature, *Atlas Crankshaft Corp. v. Lindley* (August 15, 1978), B.T.A. Case No. 3-1816, affirmed on other grounds, 58 Ohio St.2d 299; *Roosevelt Properties, et al. v. Kinney* (January 11, 1983), B.T.A. Case No. 81-F-666, 667, unreported, affirmed, 12 Ohio St.3d 7. Rules have been found to be unreasonable when they have not been properly promulgated, or are in conflict with legislative enactments. *William J. Stone, et al. v. Limbach* (June 30, 1988), B.T.A. Case No. 85-C-931, unreported.”

Having reviewed the prior law, we now turn to the rules in issue. In order to determine whether the commissioner acted within his authority we must look to the commissioner’s enabling statute. R.C. 319.302 sets forth the commissioner’s power to promulgate rules dealing with the partial exemption granted in the statute:

“(C) The tax commissioner may adopt rules governing the administration of the partial exemption provided for by this section.”

Pursuant to the above-cited grant of authority, the commissioner promulgated Ohio Adm. Code 5703-25-18 and amended 5703-25-10, although not with regard to dwellings.<sup>1</sup> The General Assembly delegated to the Tax Commissioner the power to promulgate rules which would assist in the administration of the partial exemption set forth in R.C. 319.302. “Bearing in mind that ‘administrative agency

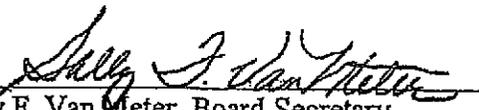
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<sup>1</sup> The appellants have acknowledged that their only reason for including Ohio Adm. Code 5703-25-10 was insofar as and to the extent that it is the mechanism by which the commissioner would effect the changes made to Ohio Adm. Code 5703-25-18.

rules are an administrative means for the accomplishment of a legislative end,' *Carroll v. Dept. of Admin. Services* (1983), 10 Ohio App.3d 108," *Baxla*, supra, at 14, this board finds the rules in issue to be reasonable – they are administrative regulations, "promulgated to implement legislative policy, not to create it." *Baxla*, supra, at 14. In this regard, we find Ohio Adm. Code 5703-25-18 and 5703-25-10 do not conflict with the legislative directive to the Tax Commissioner to promulgate rules relating to the administration of the partial exemption as the rules specifically replicate the language of R.C. 319.302 and do not go beyond such statutory provisions in any manner.

Based on the foregoing, it is the decision of the Board of Tax Appeals that Ohio Adm. Code 5703-25-18 and 5703-25-10 are reasonable on the basis that each simply provides administrative means by which the Tax Commissioner can implement statutory provisions relating to the partial exemption provided for in R.C. 319.302.

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.

  
Sally F. Van Meter, Board Secretary

**OHIO BOARD OF TAX APPEALS**

Ohio Apartment Association )  
 )  
 and )  
 )  
 Greenwich Apartments, Ltd. )  
 )  
 and )  
 )  
 D & S Properties, )  
 )  
 Appellants, )  
 )  
 vs. )  
 )  
 William W. Wilkins, Tax Commissioner )  
 of Ohio, )  
 )  
 Appellee. )

CASE NO. 2006-A-861  
(RULE REVIEW)  
DECISION AND ORDER

APPEARANCES:

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Cleveland, Ohio 44114

For the Appellee - Nancy H. Rogers  
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Lawrence D. Pratt  
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Assistant Attorneys General  
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Columbus, Ohio 43215

Entered **DEC 30 2008**

Ms. Margulies, Mr. Eberhart, and Mr. Dunlap concur.

This cause and matter comes on to be considered by the Board of Tax

Appeals pursuant to an application for rule review. By such application, this board has

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APP0015

been asked to review Ohio Adm. Code 5703-25-18 and 5703-25-10 (only insofar as and to the extent that it is the mechanism by which the commissioner would effect the changes set forth in Ohio Adm. Code 5703-25-18), pursuant to the powers vested in this board by R.C. 5703.14. Such request for review arises out of what the appellants claim is the disparate treatment of different classes of real property owners resulting from the amendment of R.C. 319.302 in 2005 which precluded certain property owners from continuing to receive a 10% real property tax rollback.

The matter is considered by the Board of Tax Appeals upon the application for review, the evidence and testimony presented at a hearing before the board, and the briefs submitted by counsel.

At the outset, we will review the pertinent rules and statutes under consideration in this matter. First, R.C. 5703.14 (C) sets forth the rule review process, including this board's role, as follows:

“Applications for review of any rule adopted and promulgated by the commissioner may be filed with the board by any person who has been or may be injured by the operation of the rule. The appeal may be taken at any time after the rule is filed with the secretary of state, the director of the legislative service commission, and, if applicable, the joint committee on agency rule review. Failure to file an appeal does not preclude any person from seeking any other remedy against the application of the rule to the person. The applications shall set forth, or have attached thereto and incorporated by reference, a true copy of the rule, and shall allege that the rule complained of is unreasonable and shall state the grounds upon which the allegation is based. Upon the filing of the application, the board shall notify the commissioner of the filing of the application, fix a time for hearing the application, notify the commissioner and the applicant of the time for the hearing, and afford both the opportunity to be heard. The

appellant, the tax commissioner, and any other interested persons that the board permits, may introduce evidence. The burden of proof to show that the rule is unreasonable shall be upon the appellant. After the hearing, the board shall determine whether the rule complained of is reasonable or unreasonable. A determination that the rule complained of is unreasonable shall require a majority vote of the three members of the board, and the reasons for the determination shall be entered on the journal of the board.”

Appellants have requested our review of two rules. The relevant portions of the first, Ohio Adm. Code 5703-25-18, provide in pertinent part, as follows:

“(A) Real property that is not intended primarily for use in a business activity shall qualify for a partial exemption from real property taxation pursuant to section 319.302 of the Revised Code. For purposes of this partial exemption, ‘business activity’ includes all uses of real property, except:

“ \*\*\*

“(3) occupying or holding property improved with single-family, two-family, or three-family dwellings;

“(4) leasing property improved with single-family, two-family, or three-family dwellings; and

“(5) holding vacant land that the county auditor determines will be used for farming or to develop single-family, two-family, or three-family dwellings.

“ \*\*\*

“(C) In determining whether real property is qualified for the partial exemption, each separate parcel of real property shall be classified according to its principal and current use, and each vacant parcel of land shall be classified in accordance with its location and its highest and best probable legal use. In the case where a single parcel has

multiple uses the principal use shall be the use to which the greatest percentage of the value of the parcel is devoted.

“(D) In determining whether real property is qualified for the partial exemption, the county auditor shall be guided by the property record of taxable real property coded in accordance with the code groups provided for in paragraph (C) of rule 5703-25-10 of the Administrative Code.”

The relevant portions of the second rule, Ohio Adm. Code 5703-25-10, provide in pertinent part, as follows:

“(A) As required by section 5713.041 of the Revised Code, the county auditor shall classify each parcel of taxable real property in the county into one of the two following classifications, which are:

“(1) Residential and agricultural land and improvements;

“(2) All other taxable land and improvements, including commercial, industrial, mineral and public utility land and improvements.

“(B) Each separate parcel of real property with improvements shall be classified according to its principal and current use, and each vacant parcel of land shall be classified in accordance with its location and its highest and best probable legal use. In the case where a single parcel has multiple uses the principal use shall be the use to which the greatest percentage of the value of the parcel is devoted. The following definitions shall be used by the county auditor to determine the proper classification of each such parcel of real property:

“ \*\*\*

“(4) ‘Commercial land and improvements’ – The land and improvements to land which are owned or occupied for general commercial and income producing purposes and where production of income is a factor to be considered in

arriving at true value, including but not limited to, apartment houses \*\*\*.

“(5) ‘Residential land and improvements’ – The land and improvements to the land used and occupied by one, two, or three families.”

The foregoing rule also requires that each property record be coded according to the code groups listed within the rule, which include Code 401, Apartments, 4-19 rental units; Code 402, Apartments, 20-39 rental units; Code 403, Apartments, 40 or more rental units; Code 510, Single family dwelling; Code 520, Two family dwelling; and Code 530, Three family dwelling.

Also relevant to this discussion is R.C. 319.302, which, upon its amendment in 2005, provided the following:

“(A)(1) Real property that is not intended primarily for use in a business activity shall qualify for a partial exemption from real property taxation. For purposes of this partial exemption, ‘business activity’ includes all uses of real property, except farming; leasing property for farming; occupying or holding property improved with single-family, two-family, or three-family dwellings; leasing property improved with single-family, two-family, or three-family dwellings; or holding vacant land that the county auditor determines will be used for farming or to develop single-family, two-family, or three-family dwellings. \*\*\*”

At the hearing before the board, Jay Scott, executive director for both the Columbus and Ohio Apartment Associations, as well as David Fisher, general partner of D&S Properties, owners of residential rental properties, testified on behalf of appellants. Mr. Scott indicated that the Ohio Apartment Association, which is made

up of local apartment associations from around the state, decided to be a party to the instant rule review request because:

“[i]t’s the loss of the 10 percent rollback that is - that was taken away from properties that have more than four residential rental apartments or units on a property. Again, we are looking at that, that there is no differentiation between a residential rental property – the scope may be different based on the size of the business entity that owns the residential rental property, but it is still residential rental property, and so the loss of that, that 10 percent, it basically equated to a 10 percent tax increase. Those larger rental property owners are not able to pass along that tax increase to residential rental residents. The market will not bear that. And \*\*\* this is an argument or this is a fact that the members wanted to fight.” H.R. at 22.

Mr. Fisher testified about his business, which includes about 500 units ranging from single family homes to multiple unit buildings. H.R. at 51-56. He indicated that his taxes are higher on the properties with four or more units, and, as a result, his profit margins got tighter, with rent levels decreasing and vacancy increasing. H.R. at 58-59.

At the outset, the appellee has raised a procedural issue which must be addressed prior to beginning our rule review. Counsel for the appellee argues that “[t]he appellants lack standing to challenge Ohio Adm. Code 5703-25-18 as any injury is caused by the enabling statute, R.C. 319.302, and not by the rule itself.” Brief at 12. We acknowledge that “[a] preliminary inquiry in all legal claims is the issue of standing.” *Cuyahoga Cty. Bd. of Commrs. v. State*, 112 Ohio St.3d 59, 2006-Ohio-6499, \*\*\*, ¶22. ‘It has been long and well established that it is the duty of every judicial tribunal to decide actual controversies between parties legitimately affected by

specific facts and to render judgments which can be carried into effect.” *Fortner v. Thomas* (1970), 22 Ohio St.2d 13, 14 \*\*\*.” *State ex rel. Ohio Gen. Assembly v. Brunner*, 114 Ohio St.3d 386, 2007-Ohio-3780, at ¶15. However, we find that appellee’s position that the appellants lack standing because any injury that may have occurred was caused by operation of statute, and not by the rules, is merely an argument in semantics. The amendment of the statute in question and the enactment of the rules thereafter in accordance therewith, as well as the overall implementation of all of them, have caused the “injury,” if any. The statute and rules, in effect, contain the same provisions and operate concurrently, and as such, both have caused the “injury” of which appellants complain. Accordingly, we find that appellants have standing to bring their requested rule review.

As we begin the review of the rules in question, we acknowledge that our duty in this matter is straightforward; if the appellants have carried their burden of proof, then we must find the rule(s) unreasonable. Contrary to appellants’ statement in their post-hearing brief, this board cannot declare the subject rules “unconstitutional.” Brief at 2. While the Ohio Supreme Court has authorized this board to accept evidence on constitutional points, it has clearly stated that we have no jurisdiction to decide constitutional claims. *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St.3d 229; *MCI Telecommunications Corp. v. Limbach* (1994), 68 Ohio St.3d 195, 198. Thus, the only issue before this board is one of the reasonableness of the rules.

R.C. 5705.14 requires the taxpayer to list the reasons the rules in question are unreasonable. In their application for review, the taxpayers state that “the

Rules are unreasonable and unconstitutional for two independent reasons. They argue that “the Commissioner has a clear constitutional duty to apply the Rollback to all rental properties, regardless of the number of units contained, because Article XII, Section 2 [sic] explicitly requires a uniform application of property tax to the full range of real properties, including rental properties, and because Article I, Section 2 [sic] requires that the Rules’ classification of rental properties be eliminated.” Application at 4.

As we consider the rules under challenge, we will review prior case law dealing with rules promulgated by the Tax Commissioner. As we stated in *Baxla v. Tracy* (July 30, 1993), BTA No. 1991-M-1242, unreported, at 8-10:

“In *The Kroger Grocery & Baking Co. v. Glander* (1948), 149 Ohio St. 121, the Ohio Supreme Court considered a rule promulgated by the Tax Commissioner under a direct grant of statutory authority. Therein the Court stated:

“Sections 1464-3, 5546-5 and 5546-31, General Code, authorize and direct the Tax Commissioner to adopt for the administration of the Sales Tax Act such rules and regulations as he may deem necessary to carry out the provisions of the act. Such rules and regulations are necessary because of the infinite detail essential in the consideration of an application and the interpretation of the law to concrete and specific circumstances and situations, the incorporation of which in the statute itself would be impracticable or impossible.’

“The Court cited the specific Tax Commissioner’s rule in issue in that case, and, thereafter, set a standard for review of similar rules:

“‘This rule, like those of other administrative agencies, issued pursuant to statutory authority, has the force and effect of law unless it is unreasonable or is in clear

conflict with statutory enactment governing in the same subject matter.’

“\*\*\*

“We have also reviewed prior decisions of this Board wherein rules promulgated by the Tax Commissioner have been considered under R.C. 5705.14(C). Rules have been found reasonable when they carry out the intent of the legislature, *Atlas Crankshaft Corp. v. Lindley* (August 15, 1978), B.T.A. Case No. 3-1816, affirmed on other grounds, 58 Ohio St.2d 299; *Roosevelt Properties, et al. v. Kinney* (January 11, 1983), B.T.A. Case No. 81-F-666, 667, unreported, affirmed, 12 Ohio St.3d 7. Rules have been found to be unreasonable when they have not been properly promulgated, or are in conflict with legislative enactments. *William J. Stone, et al. v. Limbach* (June 30, 1988), B.T.A. Case No. 85-C-931, unreported.”

Having reviewed the prior law, we now turn to the rules in issue. In order to determine whether the commissioner acted within his authority we must look to the commissioner’s enabling statute. R.C. 319.302 sets forth the commissioner’s power to promulgate rules dealing with the partial exemption granted in the statute:

“(C) The tax commissioner may adopt rules governing the administration of the partial exemption provided for by this section.”

Pursuant to the above-cited grant of authority, the commissioner promulgated Ohio Adm. Code 5703-25-18 and amended 5703-25-10, although not with regard to dwellings.<sup>1</sup> The General Assembly delegated to the Tax Commissioner the power to promulgate rules which would assist in the administration of the partial exemption set forth in R.C. 319.302. “Bearing in mind that ‘administrative agency

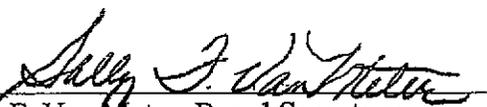
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<sup>1</sup> The appellants have acknowledged that their only reason for including Ohio Adm. Code 5703-25-10 was insofar as and to the extent that it is the mechanism by which the commissioner would effect the changes made to Ohio Adm. Code 5703-25-18.

rules are an administrative means for the accomplishment of a legislative end,' *Carroll v. Dept. of Admin. Services* (1983), 10 Ohio App.3d 108," *Baxla*, supra, at 14, this board finds the rules in issue to be reasonable – they are administrative regulations, "promulgated to implement legislative policy, not to create it." *Baxla*, supra, at 14. In this regard, we find Ohio Adm. Code 5703-25-18 and 5703-25-10 do not conflict with the legislative directive to the Tax Commissioner to promulgate rules relating to the administration of the partial exemption as the rules specifically replicate the language of R.C. 319.302 and do not go beyond such statutory provisions in any manner.

Based on the foregoing, it is the decision of the Board of Tax Appeals that Ohio Adm. Code 5703-25-18 and 5703-25-10 are reasonable on the basis that each simply provides administrative means by which the Tax Commissioner can implement statutory provisions relating to the partial exemption provided for in R.C. 319.302.

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.

  
Sally F. Van Meter, Board Secretary

OHIO BOARD OF TAX APPEALS

Ohio Apartment Association	)	
	)	CASE NO. 2006-A-861
and	)	
	)	(RULE REVIEW)
Greenwich Apartments, Ltd.	)	
	)	ORDER
and	)	
	)	(Denying Appellee's Motions)
F & W Properties,	)	
	)	
Appellants,	)	
	)	
v.	)	
	)	
William W. Wilkins, Tax Commissioner	)	
of Ohio,	)	
	)	
Appellee.	)	

APPEARANCES:

For the Appellants - Calfee, Halter & Griswold LLP  
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 Columbus, Ohio 43215

Entered NOV 9 2007

Ms. Margulies, Mr. Eberhart, and Mr. Dunlap concur.

This cause and matter came on to be considered by the Board of Tax

Appeals upon a motion to dismiss the instant appeal for ripeness, or in the alternative,

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APP0025

a motion for a summary ruling in the appellee's favor, filed by the Tax Commissioner. The matter was submitted to the Board of Tax Appeals upon the motion and brief in support of said motion, a response to said motion filed by the appellant taxpayers, and a response thereto filed by the commissioner.

Specifically, the motion provides as follows:

"The Appellee, Richard A. Levin [William W. Wilkins], hereby moves the Board of Tax Appeals to dismiss the Appellants' Application for Review on the basis of ripeness. Appellee submits that, to the extent that any claim of unconstitutionality can fall within the scope of a review for 'reasonableness' under R.C. 5703.14, it is premature to request this Board to review Ohio Adm. Code 5703-25-10<sup>1</sup> and Ohio Adm. Code 5703-25-18<sup>2</sup> for

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<sup>1</sup> That section, entitled "classification of real property and coding of records," provides in pertinent part that:

"(A) As required by section 5713.041 of the Revised Code, the county auditor shall classify each parcel of taxable real property in the county into one of the two following classifications, which are:

"(1) Residential and agricultural land and improvements;

"(2) All other taxable land and improvements, including commercial, industrial, mineral and public utility land and improvements.

"(B) Each separate parcel of real property with improvements shall be classified according to its principal and current use, and each vacant parcel of land shall be classified in accordance with its location and its highest and best probable legal use. In the case where a single parcel has multiple uses the principal use shall be the use to which the greatest percentage of the value of the parcel is devoted. The following definitions shall be used by the county auditor to determine the proper classification of each such parcel of real property:

\*\*\*\*

"(4) 'Commercial land and improvements' - The land and improvements to land which are owned or occupied for general commercial and income producing purposes and where production of income is a factor to be considered in arriving at true value, including, but not limited to, apartment houses, hotels, motels, theaters, office buildings, warehouses, retail and wholesale stores,

their alleged unconstitutionality when they are based upon and tract (sic) the language of an underlying statute, R.C. 319.302(A)(1),<sup>3</sup> which itself has not been ruled to be

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bank buildings, commercial garages, commercial parking lots, and shopping centers.

“(5) ‘Residential land and improvements’ - The land and improvements to the land used and occupied by one, two, or three families.”

<sup>2</sup> That section, entitled “partial exemption from real property tax,” provides in pertinent part that:

“(A) Real property that is not intended primarily for use in a business activity shall qualify for a partial exemption from real property taxation pursuant to section 319.302 of the Revised Code. For purposes of this partial exemption, “business activity” includes all uses of real property, except:

“(1) Farming;

“(2) Leasing property for farming;

“(3) Occupying or holding property improved with single-family, two-family, or three-family dwellings;

“(4) Leasing property improved with single-family, two-family, or three-family dwellings; and

“(5) Holding vacant land that the county auditor determines will be used for farming or to develop single-family, two-family, or three-family dwellings.

“\*\*\*”

<sup>3</sup> R.C. 319.302, entitled “partial tax exemption for real property not intended primarily for use in business activity,” provides in pertinent part that:

“(A)(1) Real property that is not intended primarily for use in a business activity shall qualify for a partial exemption from real property taxation. For purposes of this partial exemption, ‘business activity’ includes all uses of real property, except farming; leasing property for farming; occupying or holding property improved with single-family, two-family, or three-family dwellings; leasing property improved with single-family, two-family, or three-family dwellings; or holding vacant land that the county auditor determines will be used for farming or to develop single-family, two-family, or three-family dwellings. For purposes of this partial exemption, ‘farming’ does not include land used for the commercial production of timber that is receiving the tax benefit under section 5713.23 or

unconstitutional. The latter is, of course, an issue over which this tribunal clearly has no jurisdiction, nor has it been raised in the instant action. In fact, the Appellants have failed to follow the directive of the Franklin County Court of Appeals in *State ex. rel. Ohio Apt. Assn. v. Wilkins*, 2006 Ohio 6783, to have the constitutionality of R.C. 319.302(A)(1), Ohio Adm. Code 5703-25-10 and Ohio Adm. Code 5703-25-18 determined in a declaratory judgment action in the court of common pleas. Alternatively, until R.C. 319.302(A)(1) has been declared unconstitutional, Ohio Adm. Code 5703-25-10 and 5703-25-18 are as a matter of law reasonable under R.C. 5703.14(C) as they incorporate the same standards set forth in R.C. 319.302(A)(1). Thus, the Board of Tax Appeals should dismiss this matter for ripeness, or must issue a summary decision affirming the reasonableness of the rules. \*\*\*”

First, the commissioner claims that “[u]ntil R.C. 319.302(A)(1) is ruled unconstitutional, this action pursuant to R.C. 5703.14(C) is not ripe for adjudication.” Motion at 3. However, we find such contention is not supported by the provisions of R.C. 5703.14(C). The Tax Commissioner, either through a general power provided in R.C. 5703.05(M), or more specific legislative grants, has the power to promulgate rules for the administration of the tax laws. The Board of Tax Appeals, through R.C. 5703.14, has the power to review rules promulgated by the Tax Commissioner. Specifically, that section provides in pertinent part that:

“Applications for review of any rule adopted and promulgated by the commissioner may be filed with the board [of Tax Appeals] by any person who has been or

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5713.31 of the Revised Code and all improvements connected with such commercial production of timber.

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“(C) The tax commissioner may adopt rules governing the administration of the partial exemption provided for by this section.”

may be injured by the operation of the rule. The appeal may be taken at any time after the rule is filed with the secretary of state, the director of the legislative service commission, and if applicable, the joint committee on agency rule review. Failure to file an appeal does not preclude any person from seeking any other remedy against the application of the rule to the person.”

As this board stated in *Baxla v. Tracy* (July 30, 1993), BTA No. 1991-M-1242, “[t]he General Assembly has given wide latitude to a taxpayer who wishes to challenge a rule promulgated by the Tax Commissioner. R.C. 5703.14(C) permits any taxpayer who has been or may be affected by such a rule the ability to challenge the reasonableness of that rule. The legislature allows a taxpayer to challenge a rule as a separate appeal, or within an appeal of an underlying assessment if the rule appears to be in issue.” *Id.* at 6. Thus, based upon the foregoing, we do not agree that there must be a prerequisite finding that an underlying statute is unconstitutional before an appeal to this board for review of rules related to that underlying statute can be considered “ripe.”

Further, the commissioner claims that “as a matter of law, Ohio Adm. Code 5703-25-10 and 57-25-18 [sic] must be determined to be ‘reasonable’ under R.C. \*\*\* 5703.14(C).” Motion at 4. The conclusion sought by the commissioner is premature, as the appellants are entitled to provide evidence and testimony to this board in support of their position that the rules in question are “unreasonable.” In this regard, we find our prior decision in *Roosevelt Properties Co. v. Kinney* (Jan. 11, 1983), BTA Nos. 1981-F-666, 1981-A-667, unreported, affirmed (1984), 12 Ohio St.3d 7 to be instructive. Contrary to the commissioner’s suggestion, we believe that

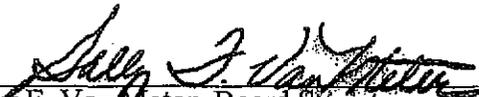
our holding in *Roosevelt* demonstrates this board's ability to review the reasonableness of a rule, without determining its constitutionality or that of the statute which it purports to amplify. The Supreme Court, on appeal in *Roosevelt*, confirmed that: "[a] regularly enacted statute of Ohio is presumed to be constitutional and is therefore entitled to the benefit of every presumption in favor of its constitutionality. This court has held enactments of the General Assembly to be constitutional unless such enactments are clearly unconstitutional beyond a reasonable doubt." *State, ex rel. Dickman, v. Defenbacher* (1955), 164 Ohio St. 142, 147 [57 O.O. 134]. Accord *Bd. of Edn. v. Walter* (1979), 58 Ohio St. 2d 368, 376 [12 O.O.3d 327]. This principle applies equally to administrative regulations. *Pacific States Box & Basket Co. v. White* (1935), 296 U.S. 176. Cf. *State, ex rel. Shafer v. Ohio Turnpike Comm.* (1953), 159 Ohio St. 581, 590 [50 O.O. 465], wherein it was recognized that administrative regulations are presumed reasonable, both factually and legally, and the burden rests on the party challenging the rule to introduce evidence to the contrary." *Id.* at 13. Appellants are attempting to exercise their statutory right to challenge the rules in question herein, and we believe the statute requires that they be afforded the opportunity to do so.

Finally, the commissioner argues that appellants have failed "to follow the directive of the Franklin County Court of Appeals to file a declaratory judgment action seeking a declaration that R.C. 319.302(A)(1), Ohio Adm. Code 5703-25-10 and Ohio Adm. Code 5703-25-18 are unconstitutional." Motion at 7. Regardless of any "directive" set forth in the court of appeals' decision in *State ex rel. Ohio Apt. Assn. v.*

*Wilkins*, 2006-Ohio-6783, we note that the ability of the appellants to file a rule review appeal with this board was never addressed therein. Further, we find nothing in the court's discussion that could be construed to preclude a rule review appeal with this board.

Thus, based upon the foregoing, the commissioner's motions must be and hereby are, denied. During the pendency of the instant motions, the parties informally requested, and were granted, a stay of the scheduling order previously issued herein on July 27, 2007 (see *Ohio Apartment Association, et al. v. Wilkins* (Int. Order, July 27, 2007), BTA No. 2006-A-861, unreported). Therefore, the parties are hereby directed to provide this board with a new scheduling agreement within fourteen days of the issuance of the instant order.

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.

  
Sally F. Van Meter, Board Secretary

## **5703-25-10 Classification of real property and coding of records.**

(A) As required by section 5713.041 of the Revised Code, the county auditor shall classify each parcel of taxable real property in the county into one of the two following classifications, which are:

- (1) Residential and agricultural land and improvements;
- (2) All other taxable land and improvements, including commercial, industrial, mineral and public utility land and improvements.

(B) Each separate parcel of real property with improvements shall be classified according to its principal and current use, and each vacant parcel of land shall be classified in accordance with its location and its highest and best probable legal use. In the case where a single parcel has multiple uses the principal use shall be the use to which the greatest percentage of the value of the parcel is devoted. The following definitions shall be used by the county auditor to determine the proper classification of each such parcel of real property:

- (1) "Agricultural land and improvements" – The land and improvements to land used for agricultural purposes, including, but not limited to, general crop farming, dairying, animal and poultry husbandry, market and vegetable gardening, floriculture, nurseries, fruit and nut orchards, vineyards and forestry.
- (2) "Mineral land and improvement" – Land, and the buildings and improvements thereon, used for mining coal and other minerals as well as the production of oil and gas including the rights to mine and produce such minerals whether separated from the fee or not.
- (3) "Industrial land and improvements" – The land and improvements to land used for manufacturing, processing, or refining foods and materials, and warehouses used in connection therewith.
- (4) "Commercial land and improvements" – The land and improvements to land which are owned or occupied for general commercial and income producing purposes and where production of income is a factor to be considered in arriving at true value, including, but not limited to, apartment houses, hotels, motels, theaters, office buildings, warehouses, retail and wholesale stores, bank buildings, commercial garages, commercial parking lots, and shopping centers.
- (5) "Residential land and improvements" – The land and improvements to the land used and occupied by one, two, or three families.

(C) Each property record of taxable real property shall be coded in accordance with the code groups provided for in this paragraph. Each property record of exempt property shall also be coded in accordance with the code groups for exempt property. The county auditor shall annually furnish to the tax commissioner an abstract of taxable values in which is set out in separate columns the aggregate taxable values of land and improvements in each taxing district for each of the major code groups provided for in this paragraph, and an abstract of exempt values in which is set out in separate columns the aggregate exempt values of land and improvements in each taxing district for each of the major exempt code groups provided for in this paragraph.

---

Major Use and Codes

---

Code No. Group Use

---

---

100 to 199 Incl. Taxable agricultural real property

---

200 to 299 Incl. Taxable mineral lands and rights

---

300 to 399 Incl. Taxable industrial real property

---

400 to 499 Incl. Taxable commercial real property

---

500 to 599 Incl. Taxable residential real property

---

600 to 699 Incl. Exempt real property

---

700 to 799 Incl. Special tax abatements for improvements

---

800 to 899 Public Utilities

---

The first digit identifies the major use and the last two digits the sub-use or group. Parcels, other than exempt property, that are vacant (no structures or improvements present) shall be coded 100, 200, 300, 400 or 500 depending on the respective class unless part of an existing unit. Certain numbers are left blank to provide for future expansion.

---

Use

---

100 Agricultural vacant land

---

101 Cash – grain or general farm

---

102 Livestock farms other than dairy and poultry

---

103 Dairy farms

---

104 Poultry farms

---

105 Fruit and nut farms

---

106 Vegetable farms

---

107 Tobacco farms

---

108 Nurseries

---

109 Green houses, vegetables and floraculture

---

110 Agricultural vacant land “qualified for current agricultural use value”

---

111 Cash – grain or general farm “qualified for current agricultural use value”

---

112 Livestock farms other than dairy and poultry "qualified for current agricultural use value"

---

113 Dairy farms "qualified for current agricultural use value"

---

114 Poultry farms "qualified for current agricultural use value"

---

115 Fruit and nut farms "qualified for current agricultural use value"

---

116 Vegetable farms "qualified for current agricultural use value"

---

117 Tobacco farms "qualified for current agricultural use value"

---

120 Timber or forest lands not qualified for the Current Agricultural Use Value program pursuant to section 5713.31 of the Revised Code or the Forest Land Tax program pursuant to section 5713.23 of the Revised Code

---

121 Timber land taxed at its "current agricultural use value" as land used for the growth of noncommercial timber pursuant to section 5713.30(A)(1) of the Revised Code

---

122 Timber land taxed at its "current agricultural use value" as land used for the commercial growth of timber

---

123 Forest land qualified for and taxed under the Forest Land Tax program in compliance with the program requirements in place prior to November 7, 1994

---

124 Forest land qualified for and taxed under the Forest Land Tax program in compliance with the program requirements in place on or after November 7, 1994

---

---

190 Other agricultural use

---

199 Other agricultural use "qualified for current use value"

---

210 Coal lands – surface and rights

---

220 Coal rights – working interest

---

230 Coal rights – separate royalty interest

---

240 Oil and gas rights – working interest

---

250 Oil and gas rights – separate royalty interest

---

260 Other minerals

---

300 Industrial – vacant land

---

310 Food and drink processing plants and storage

---

320 Foundries and heavy manufacturing plants

---

330 Manufacturing and assembly, medium

---

340 Manufacturing and assembly, light

---

350 Industrial warehouses

---

360 Industrial truck terminals

---

370 Small shops (machine, tool & die, etc.)

---

380 Mines and quarries

---

390 Grain elevators

---

399 Other industrial structures

---

400 Commercial - vacant land

---

401 Apartments - 4 to 19 rental units

---

402 Apartments - 20 to 39 rental units

---

403 Apartments - 40 or more rental units

---

410 Motels and tourist cabins

---

411 Hotels

---

---

412 Nursing homes and private hospitals

---

415 Trailer or mobile home park

---

416 Commercial camp grounds

---

419 Other commercial housing

---

420 Small (under 10,000 sq. ft.) detached retail stores

---

421 Supermarkets

---

422 Discount stores and junior department stores

---

424 Full line department stores

---

425 Neighborhood shopping center

---

426 Community shopping center

---

427 Regional shopping center

---

429 Other retail structures

---

430 Restaurant, cafeteria and/or bar

---

435 Drive-in restaurant or food service facility

---

439 Other food service structures

---

440 Dry cleaning plants and laundries

---

441 Funeral homes

---

442 Medical clinics and offices

---

444 Full service banks

---

445 Savings and loans

---

447 Office buildings – 1 and 2 stories

---

448 Office buildings – 3 or more stories – walk up

---

449 Office buildings – 3 or more stories – elevator

---

450 Condominium office units

---

452 Automotive service station

---

453 Car washes

---

454 Automobile car sales and services

---

455 Commercial garages

---

456 Parking garage, structures and lots

---

460 Theaters

---

461 Drive-in theaters

---

462 Golf driving ranges and miniature golf courses

---

463 Golf courses

---

464 Bowling alleys

---

465 Lodge halls and amusement parks

---

480 Commercial warehouses

---

482 Commercial truck terminals

---

490 Marine service facilities

---

496 Marina (small boat)

---

499 Other commercial structures

---

500 Residential vacant land

---

510 Single family dwelling

---

520 Two family dwelling

---

530 Three family dwelling

---

550 Condominium residential unit

---

560 House trailers or mobile homes affixed to real estate

---

599 Other residential structures

---

In the residential coding the third or last digit indicates the size of tract used for residential property.

---

0 Platted Lot

---

1 Unplatted -0 to 9.99 acres

---

2 " 10 to 19.99 acres

---

3 " 20 to 29.99 acres

---

4 " 30 to 39.99 acres

---

5 " 40 or more acres

---

---

600 Exempt property owned by United States of America

---

610 Exempt property owned by state of Ohio

---

620 Exempt property owned by counties

---

630 Exempt property owned by townships

---

640 Exempt property owned by municipalities

---

645 Exempt property owned or acquired by metropolitan housing authorities

---

650 Exempt property owned by board of education

---

660 Exempt property owned by park districts (public)

---

670 Exempt property owned by colleges, academies (private)

---

680 Charitable exemptions - hospitals - homes for aged, etc.

---

685 Churches, etc., public worship

---

690 Graveyards, monuments, and cemeteries

---

700 Community urban redevelopment corporation tax abatements (R.C. 1728.10)

---

710 Community reinvestment area tax abatements (R.C. 3735.61)

---

720 Municipal improvement tax abatements (R.C. 5709.41)

---

730 Municipal urban redevelopment tax abatements (R.C. 725.02)

---

740 Other tax abatements (R.C. 165.01 and 303.52)

---

800 Agricultural land and improvements owned by a public utility other than a railroad

---

810 Mineral land and improvements owned by a public utility other than a railroad

---

820 Industrial land and improvements owned by a public utility other than a railroad

---

830 Commercial land and improvements (including all residential property) owned by a public utility

---

other than a railroad

---

840 Railroad real property used in operations

---

850 Railroad real property not used in operations

---

860 Railroad personal property used in operations

---

870 Railroad personal property not used in operations

---

880 Public Utility personal property other than rail-roads

---

(D) The coding system provided in this rule shall be effective for tax year 1985.

(E) Nothing contained in this rule however, shall cause the valuation of any parcel of real property to be other than its true value in money or be construed as an authorization for any parcel of real property in any class in any county to be valued for tax purposes at any other value than its "taxable value" as set out in rule 5703-25-05 of the Administrative Code.

Effective: 12/15/2005

R.C. 119.032 review dates: Exempt

Promulgated Under: 5703.14

Statutory Authority: 5703.05

Rule Amplifies: 5713.041

Prior Effective Dates: 12/28/1973, 11/1/1977, 10/20/1981, 9/14/1984 (Emer.), 12/11/1984, 9/18/03

## **5703-25-18 Partial exemption from real property tax.**

(A) Real property that is not intended primarily for use in a business activity shall qualify for a partial exemption from real property taxation pursuant to section 319.302 of the Revised Code. For purposes of this partial exemption, "business activity" includes all uses of real property, except:

- (1) farming;
- (2) leasing property for farming;
- (3) occupying or holding property improved with single-family, two-family, or three-family dwellings;
- (4) leasing property improved with single-family, two-family, or three-family dwellings; and
- (5) holding vacant land that the county auditor determines will be used for farming or to develop single-family, two-family, or three-family dwellings.

(B) For purposes of this partial exemption, "farming" does not include land used for the commercial production of timber that is receiving the tax benefit under section 5713.23 or 5713.31 of the Revised Code and all improvements connected with such commercial production of timber.

(C) In determining whether real property is qualified for the partial exemption, each separate parcel of real property shall be classified according to its principal and current use, and each vacant parcel of land shall be classified in accordance with its location and its highest and best probable legal use. In the case where a single parcel has multiple uses the principal use shall be the use to which the greatest percentage of the value of the parcel is devoted.

(D) In determining whether real property is qualified for the partial exemption, the county auditor shall be guided by the property record of taxable real property coded in accordance with the code groups provided for in paragraph (C) of rule 5703-25-10 of the Administrative Code.

Effective: 12/15/2005

R.C. 119.032 review dates: Exempt

Promulgated Under: 5703.14

Statutory Authority: 5703.05

Rule Amplifies: 319.302, 5713.23, 5713.31

## **319.302 Reduction of remaining taxes.**

(A)(1) Real property that is not intended primarily for use in a business activity shall qualify for a partial exemption from real property taxation. For purposes of this partial exemption, "business activity" includes all uses of real property, except farming; leasing property for farming; occupying or holding property improved with single-family, two-family, or three-family dwellings; leasing property improved with single-family, two-family, or three-family dwellings; or holding vacant land that the county auditor determines will be used for farming or to develop single-family, two-family, or three-family dwellings. For purposes of this partial exemption, "farming" does not include land used for the commercial production of timber that is receiving the tax benefit under section 5713.23 or 5713.31 of the Revised Code and all improvements connected with such commercial production of timber.

(2) Each year, the county auditor shall review each parcel of real property to determine whether it qualifies for the partial exemption provided for by this section as of the first day of January of the current tax year.

(B) After complying with section 319.301 of the Revised Code, the county auditor shall reduce the remaining sums to be levied against each parcel of real property that is listed on the general tax list and duplicate of real and public utility property for the current tax year and that qualifies for partial exemption under division (A) of this section, and against each manufactured and mobile home that is taxed pursuant to division (D)(2) of section 4503.06 of the Revised Code and that is on the manufactured home tax list for the current tax year, by ten per cent, to provide a partial exemption for that parcel or home. Except as otherwise provided in sections 323.152, 323.158, 505.06, and 715.263 of the Revised Code, the amount of the taxes remaining after any such reduction shall be the real and public utility property taxes charged and payable on each parcel of real property, including property that does not qualify for partial exemption under division (A) of this section, and the manufactured home tax charged and payable on each manufactured or mobile home, and shall be the amounts certified to the county treasurer for collection. Upon receipt of the tax duplicate, the treasurer shall certify to the tax commissioner the total amount by which taxes were reduced under this section, as shown on the duplicate. Such reduction shall not directly or indirectly affect the determination of the principal amount of notes that may be issued in anticipation of any tax levies or the amount of bonds or notes for any planned improvements. If after application of sections 5705.31 and 5705.32 of the Revised Code and other applicable provisions of law, including divisions (F) and (I) of section 321.24 of the Revised Code, there would be insufficient funds for payment of debt charges on bonds or notes payable from taxes reduced by this section, the reduction of taxes provided for in this section shall be adjusted to the extent necessary to provide funds from such taxes.

(C) The tax commissioner may adopt rules governing the administration of the partial exemption provided for by this section.

(D) The determination of whether property qualifies for partial exemption under division (A) of this section is solely for the purpose of allowing the partial exemption under division (B) of this section.

Effective Date: 06-15-2004; 06-30-2005

Baldwin's Ohio Revised Code Annotated Currentness

Constitution of the State of Ohio (Refs & Annos)

▣ Article I. Bill of Rights (Refs & Annos)

→ **O Const I Sec. 2 Equal protection and benefit**

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly.

CREDIT(S)

(1851 constitutional convention, adopted eff. 9-1-1851)

Current through the end of the 127th General Assembly. As of 3/24/09 no legislation from the 128th General Assembly has been approved or filed with the Secretary of State.

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## Baldwin's Ohio Revised Code Annotated Currentness

## Constitution of the State of Ohio (Refs &amp; Annos)

## ▣ Article XII. Finance and Taxation (Refs &amp; Annos)

**→ O Const XII Sec. 2 Property taxation by uniform rule; ten-mill limitation; homestead valuation reduction; exemptions**

No property, taxed according to value, shall be so taxed in excess of one per cent of its true value in money for all state and local purposes, but laws may be passed authorizing additional taxes to be levied outside of such limitation, either when approved by at least a majority of the electors of the taxing district voting on such proposition, or when provided for by the charter of a municipal corporation. Land and improvements thereon shall be taxed by uniform rule according to value, except that laws may be passed to reduce taxes by providing for a reduction in value of the homestead of permanently and totally disabled residents, residents sixty-five years of age and older, and residents sixty years of age or older who are surviving spouses of deceased residents who were sixty-five years of age or older or permanently and totally disabled and receiving a reduction in the value of their homestead at the time of death, provided the surviving spouse continues to reside in a qualifying homestead, and providing for income and other qualifications to obtain such reduction. Without limiting the general power, subject to the provisions of Article I of this constitution, to determine the subjects and methods of taxation or exemptions therefrom, general laws may be passed to exempt burying grounds, public school houses, houses used exclusively for public worship, institutions used exclusively for charitable purposes, and public property used exclusively for any public purpose, but all such laws shall be subject to alteration or repeal; and the value of all property so exempted shall, from time to time, be ascertained and published as may be directed by law.

CREDIT(S)

(1990 HJR 15, am. eff. 1-1-91; 1974 HJR 59, am. eff. 1-1-75; 1970 SJR 8, am. eff. 1-1-71; 115 v Pt 2, 446, am. eff. 1-1-34; 113 v 790, am. eff. 1-1-31; 107 v 774, am. eff. 1-1-19; 1912 constitutional convention, am. eff. 1-1-13; 97 v 652, am. eff. 1-1-06; 1851 constitutional convention, adopted eff. 9-1-1851)

Current through the end of the 127th General Assembly. As of 3/24/09 no legislation from the 128th General Assembly has been approved or filed with the Secretary of State.

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## Baldwin's Ohio Revised Code Annotated Currentness

## Constitution of the State of Ohio (Refs &amp; Annos)

## § Article XII. Finance and Taxation (Refs &amp; Annos)

→ **O Const XII Sec. 2a Classification of real estate for taxation; when different rates permitted**

(A) Except as expressly authorized in this section, land and improvements thereon shall, in all other respects, be taxed as provided in Section 36, Article II and Section 2 of this article.

(B) This section does not apply to any of the following:

(1) Taxes levied at whatever rate is required to produce a specified amount of tax money or an amount to pay debt charges;

(2) Taxes levied within the one per cent limitation imposed by Section 2 of this article;

(3) Taxes provided for by the charter of a municipal corporation.

(C) Notwithstanding Section 2 of this article, laws may be passed that provide all of the following:

(1) Land and improvements thereon in each taxing district shall be placed into one of two classes solely for the purpose of separately reducing the taxes charged against all land and improvements in each of the two classes as provided in division (C)(2) of this section. The classes shall be:

(a) Residential and agricultural land and improvements;

(b) All other land and improvements.

(2) With respect to each voted tax authorized to be levied by each taxing district, the amount of taxes imposed by such tax against all land and improvements thereon in each class shall be reduced in order that the amount charged for collection against all land and improvements in that class in the current year, exclusive of land and improvements not taxed by the district in both the preceding year and in the current year and those not taxed in that class in the preceding year, equals the amount charged for collection against such land and improvements in the preceding year.

(D) Laws may be passed to provide that the reductions made under this section in the amounts of taxes charged for the current expenses of cities, townships, school districts, counties, or other taxing districts are subject to the limitation that the sum of the amounts of all taxes charged for current expenses against the land and improvements thereon in each of the two classes of property subject to taxation in cities, townships, school districts, counties, or other types of taxing districts, shall not be less than a uniform per cent of the taxable value of the property in the districts to which the limitation applies. Different but uniform percentage limitations may be established for cities, townships, school districts, counties, and other types of taxing districts.

#### CREDIT(S)

(1980 HJR 39, adopted eff. 11-4-80)

Current through the end of the 127th General Assembly. As of 3/24/09 no legislation from the

128th General Assembly has been approved or filed with the Secretary of State.

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## United States Code Annotated Currentness

## Constitution of the United States

## ▣ Annotated

▣ Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement (Refs & Annos)

**→ AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT**

**Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Section 2.** Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representa-

tion therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

**Section 3.** No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

**Section 4.** The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

**Section 5.** The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.