

ORIGINAL

IN THE OHIO SUPREME COURT

On Appeal from the Ohio Board of Tax Appeals

OHIO APARTMENT ASSOCIATION, <i>et al.</i> ,	:	CASE NO. 2009-0213
Appellants,	:	
	:	
vs.	:	
	:	Board of Tax Appeals
RICHARD A. LEVIN,	:	Case No. 2006-A-861
TAX COMMISSIONER OF OHIO,	:	
	:	
Appellee.	:	

**MERIT BRIEF OF APPELLEE/CROSS-APPELLANT  
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TAX COMMISSIONER OF OHIO**

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## I. INTRODUCTION

This matter is before the Court as a purported appeal, pursuant to R.C. 5717.04, from a determination by the Ohio Board of Tax Appeals (“BTA”) that two administrative rules promulgated by the Ohio Department of Taxation (the “Department”), Ohio Adm. Code 5703-25-10 and 5703-25-18, are “reasonable” within the parameters of R.C. 5703.14(C). R.C. 5703.14(C) provides for a special quasi-legislative proceeding in which any person who “has been or may be injured by operation of” a rule promulgated by Appellee/Cross-Appellant Richard A. Levin, Tax Commissioner of Ohio (the “Commissioner”) may request the BTA to determine whether the rule is “reasonable”, i.e., whether it conflicts with the legislative directive and/or goes beyond such statutory provisions in any manner or whether it has been properly promulgated. *Baxla v. Tracy* (July 30, 1993) B.T.A. Case No. 91-M-1242, 1993 Ohio Tax LEXIS 1330.

Appellants Ohio Apartment Association, Greenwich Apartments, Ltd. and D & S Properties (“Appellants”), however, have not sought such a determination, neither before this Court, which is part of a pending Motion to Dismiss by the Commissioner, nor before the BTA. Instead, the sole issue raised in their Amended Application to the BTA was whether the rules violate the uniformity provisions of Article XII, Section 2 and the equal protection provisions of Article I, Section 2 of the Ohio Constitution. Since such a review exceeds the quasi-legislative functions of the BTA under R.C. 5703.14(C), Appellants’ Amended Application should have been dismissed outright and the BTA erred in not doing so.

The Amended Application was further defective for two additional and related reasons arising from the unique relationship between the rules and underlying statute. The rules in question were promulgated and/or amended in direct response to the enactment of an amendment

to R.C. 319.302(A )(1) that became effective June 30, 2005, as part of Ohio's tax/reform package in H.B. 66 of the 126<sup>th</sup> General Assembly. That measure eliminated a ten percent (10%) real property tax rollback for commercial properties in exchange for other tax relief provided to businesses within the total tax package and this differentiation is the source of Appellants' constitutional claims. Significantly, the statute completely defined those properties subject to the rollback and those not, and the two rules in question did nothing more than incorporate the statutory distinctions. Thus, as all concede, the real target of Appellants' challenge is the underlying statute, not the rules that merely emulate it.

While Appellants argue that they have a fundamental right to challenge the rules regardless of the underlying statute, the bottom line is that their argument is neither ripe nor do they have standing to assert it under the parameters of R.C. 5703.14(C). The key fact is that, even if they were successful in having the rules revoked, the statute is self-executing and alone would continue to make the same differentiation that they believe is unconstitutional. It is therefore the statute, not the rules, that is the source of Appellants' alleged injury. Without an independent injury caused by the rules, not only is Appellants' Amended Application not ripe but they have also failed to demonstrate that they have or may be injured by the rules in question under the standing requirements of R.C. 5703.14(C). The Commissioner has raised these jurisdictional issues in the aforementioned Motion to Dismiss with respect to this Court's jurisdiction, and through a Cross-Appeal with respect to the BTA's jurisdiction.

Moreover, even if these defects were not fatal to Appellants' Amended Application and the BTA's jurisdiction to consider the reasonableness of the two rules, the Commissioner submits that the BTA properly performed its analysis as evidenced by the fact that Appellants do

not challenge it in their merit brief. The rules are properly promulgated and do not conflict or exceed with the legislative directive. They are therefore reasonable under R.C. 5703.14(C).

Finally, to the extent that this Court has jurisdiction to consider Appellants' constitutional claims, the Ohio Supreme Court has expressly addressed these two issues before and found no constitutional defects. The ten percent (10%) rollback is a partial exemption from real property taxes in conformity with a long line of cases leading up to *Swetland v. Kinney* (1980), 62 Ohio St. 2d 23, a decision in which the Ohio Supreme Court held that partial exemptions of real property taxes do not violate the uniformity requirement of Article XII, Section 2 of the Ohio Constitution. Appellants openly acknowledge that they want to overturn this line of case law but, as noted above, they have chosen the wrong forum in which to do so.

Appellants' Article I, Section 2 equal protection claim is equally defective. This issue also is the subject of an earlier rejected claim made by the apartment owners with respect to an analogous classification in Ohio's tax reduction factor. *Roosevelt Properties Co. v. Kinney* (1984), 12 Ohio St. 3d 7. The only basis asserted by Appellants that all apartment buildings with four or more rental units must be classified as residential property is that people live in the building. However, evidence was presented at the hearing as to the many distinctions between rental property of three or fewer units and rental property with four or more units. The Court found that there simply was a rational basis for the General Assembly to distinguish between three and fewer rental units and four or more rental units. Thus, it held that the creation of these classifications does not violate the equal protection clause of Article I, Section 2 of the Ohio Constitution or the Fourteenth Amendment to the United States Constitution.

This Court should first and foremost dismiss this appeal for the reasons set forth in the Commissioner's pending Motion to Dismiss. In the alternative, it should vacate the BTA ruling

and remand to the BTA with instructions to dismiss Appellants' Amended Application because it lacked jurisdiction. Finally if the Court finds it has jurisdiction over Appellants' Amended Application, it should affirm the BTA decision that Ohio Adm. Code 5703-1-10 and 5703-10-18 are reasonable and/or find the rules constitutional for the reasons more fully set forth below.

## II. STATEMENT OF CASE AND FACTS

- A. The elimination of the ten percent (10%) rollback from property used in business set forth in R.C. 319.302, as amended in 2005, was part of a massive tax reform to balance benefits provided to businesses through other tax provisions with the state's need to preserve revenue sources from real property taxes.**

The partial exemption known as the ten percent (10%) rollback, at issue here, had its origin in a 1971 provision enacted as a part of the overall tax reform in H.B. 475 of the 109<sup>th</sup> General Assembly. Supp. 0032 (123:19-124:15). H.B. 475 provided a uniform percentage reduction in all real estate taxes as a trade-off for the introduction of the personal income tax in the same legislation. Supp. 0032 (124:4-15).<sup>1</sup> Former R.C. 319.301 implemented the rollback, providing:

In December, 1972, and each year thereafter, each county auditor shall reduce the amount of taxes certified to be levied against all real property listed on the general tax list and duplicate of real and public utility property of each county for that calendar year by ten percent of such amount.

(Emphasis added). The rollback was moved to the newly enacted R.C. 319.302 in 1980 at the time of the implementation of the tax reduction factor mandated by the constitutional enactment

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<sup>1</sup> The "Summary of 1971 Enactments," published by Ohio Legislative Service Commission, summarizes House Bill No. 475 as providing "three types of reductions in property taxes – an annual, uniform percentage reduction in all real estate taxes; a homestead exemption for homeowners 65 and over; and a reduction in the percentage at which tangible personal property is assessed." *Id.* at 135. It further explains that "[t]he act requires each county treasurer to reduce all 1971 tax bills in the county by 5% for real and public utility property and the county auditor to reduce the general tax list and duplicate by 10% for 1972 taxes and each year thereafter." *Id.*

of Article XII, Section 2a of the Ohio Constitution which resulted in the latter provision then being placed in R.C. 319.301. This across-the-board approach to the rollback remained in effect until tax year 2005 when the General Assembly eliminated the rollback for real property that is intended primarily for use in a business activity. Summary of 2005 Enactments, published by Ohio Legislative Service Commission, p. 580.

Like H.B. 475, Am. Sub. H.B. 66 was passed as a broad tax reform to “overhaul the way businesses are taxed” and “improve the business atmosphere in the state.” Supp. 0032 (124:19-125:4); Supp. 0045 (174:21-23; 176:13-16). This reform was carried out as a “package deal,” Supp. 0037 (145:10), whereby “there was a series of both tax decreases and increases.” Supp. 0043 (167:24-25.) On the one hand, over a five-year period, the personal property tax and the corporate franchise tax were phased out and the personal income tax on individuals was lowered by twenty-one percent (21%). Supp. 0043 (167:25-168:10). Also, the tangible personal property tax was phased out over a four-year period. *Id.* On the other hand, the commercial activity tax was created and phased in over five years; the cigarette tax was increased by seventy cents per pack; and the ten percent (10%) rollback on real property used in business was eliminated. Supp. 0043 (168:11-169:14); Supp. 0044 (173:23-174:23).

Am. Sub. H.B. 66 was never considered a revenue-neutral tax reform as it creates a significant tax cut in aggregate. Supp. 0045 (176:13-177:9). According to the Department’s projection, the net revenue loss in fiscal year 2010 will amount to \$3.7 billion and the five year impact by 2010 will total over \$10 billion even after factoring in the revenue-balancing attempts such as the partial elimination of the ten percent (10%) rollback. *Id.*; Supp. 0060.

Despite the expected fiscal loss, the 126th General Assembly decided to enact Am. Sub. H.B. 66 because the overall reform of the state business tax scheme was much needed.

According to Mike Sobul, an administrator in the Department's Tax Analysis Division, "the tangible personal property tax and the franchise tax both had serious problems from both the policy and an administrative standpoint."<sup>2</sup> Supp. 0045 (175:2-5). Over the last forty (40) years, "every single [tax study] recommended the elimination of the tangible personal property tax because it was a hindrance to capital formation." Supp. 0045 (175:5-10); *See also* Supp. 0037 – 0038 (145:16-146:2) ("[T]he tangible personal property tax on general business had long been considered an impediment to investment and economic growth within the State of Ohio ... because [a taxpayer's] liability is the highest at the point in investment before [the taxpayer] actually have started making money on [her] expensive new machinery and equipment."). The corporate franchise tax posed a different problem. It created a number of loopholes and avoidance possibilities and, consequently, produced comparatively low yield even with a relatively high tax rate. Supp. 0045 (175:11-24).

With this general tax reform objective in the backdrop and to provide a trade-off for the resultant tax liability decreases, R.C. 319.302 was amended by Am. Sub. H.B. 66. R.C. 319.302, a self-executing statute,<sup>3</sup> provides in pertinent part:

**(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-**

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<sup>2</sup> A copy of the pertinent portions of the Final Analysis of Am. Sub. H.B. 66 is included in the Appendix.

<sup>3</sup> In view of the detailed directive of this provision and the instruction in division (C) that the tax commissioner may promulgate an administrative rule, it is manifest that the statute is self-executing in the sense that it is enforceable without any further administrative rule-making. *Singleton v. City of Hamilton* (1986), 33 Ohio App. 3d 187, 191. ("Self-executing' city charter provision is one which includes the rules or means by which it will be enforced, while a charter provision which is not self-executing is one which requires some additional expression, legislative or otherwise, which makes it enforceable.") (citation omitted).

**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.

\* \* \*

**(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.

(Emphasis added.)

The effect of the amendment was to eliminate the ten percent (10%) rollback for taxpayers who owned commercial property as an exchange for such taxpayers’ reduction of business taxes on the same group of property owners. In classifying property not intended primarily for use in a business activity, the General Assembly utilized the historical dividing point between residential and commercial dwellings, i.e., single-family, two-family, or three-family dwellings are residential and those of greater number are not.

**B. Ohio Adm. Code 5703-25-18 and 5703-25-10 were promulgated by the Commissioner to track R.C. 319.302 verbatim.**

**1. Ohio Adm. Code 5703-25-18**

Following Am. Sub. H.B. 66’s amendment of R.C. 319.302, the Commissioner promulgated Ohio Adm. Code 5703-25-18, effective December 15, 2005. Supp. 0033 (128:3-6;

131:13-14). The rule added nothing substantive to the statute but merely mirrored R.C.

319.302(A)(1):

(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.**

(Emphasis added.) See also Supp. 0033 (128 – 129). As stated by the Executive Administrator of the Tax Equalization Division: “We took a special care in promulgating

that rule to make sure that it precisely followed the instructions that were contained in the statute.” Supp. 0034 (131).

## 2. Ohio Adm. Code 5703-25-10

At the time of the passage of Am. Sub. H.B. 66, Ohio Adm. Code 5703-25-10, which identifies a series of standard uses of property throughout the state, was already in existence as a tool of standardization for appraisal and tax reduction factor classification purposes dating back to 1973. Supp. 0033 -- 0034 (129:9-130:6). See former Ohio Adm. Code 5705-3-06. These purposes remained unaffected by the enactment of Am. Sub. H.B. 66. As applied to dwellings, absolutely nothing was changed. Supp. 0033 (128-129). The only effect of amending Ohio Adm. Code 5703-25-10 was to “provide some additional land use codes to identify the specific commercially timbered properties that would not be eligible for the 10 percent (10%) rollback pursuant to House Bill 66.” Supp. 0032 (124:13-22). Accordingly, three new land codes – 122, 123, and 124 – were created in relation to timber or forest land.<sup>4</sup>

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<sup>4</sup> The newly added codes are as follows:

Code 122 - Timber land taxed at its “current agricultural use value” as land used for the commercial growth of timber

Code 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

Code 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

Along with creation of new land codes, the Commissioner made minor changes to Ohio Adm. Code 5703-25-10 pursuant to R.C. 319.302, such as the change of code numbers from 003, 005, and 007 to 103, 105, and 107 respectively. Also, the titles for code 120 and 121 were modified, which is of no significance to the case at bar. See Ohio Adm. Code 5703-25-10(C).

**C. The ten percent (10%) rollback, as amended by Am. Sub. H.B. 66, is consistent with other partial exemptions enacted by the General Assembly.**

The ten percent (10%) rollback is by no means unique in Ohio's real property tax scheme. Supp. 0034 (131-132). R.C. 323.152(A)<sup>5</sup> creates a partial exemption for real property owned by persons who are disabled, over 65, or surviving spouse of same. R.C. 323.152(B), also amended by Am. Sub. H.B. 66, provides a 2.5% partial exemption for persons who reside on their own property. R.C. 323.158 provides for still another partial exemption for homesteads located in counties where at least one major league professional team plays its home schedule. All of these exemptions have one common theme consistent with long-standing public policy – tax relief for property primarily identified with homeowners, a goal uniquely different from property identified with commercial ventures such as apartments, see *Roosevelt Properties Co.*, 12 Ohio St. 3d at 16-21.

**D. Appellants filed an action in mandamus challenging the constitutionality of both R.C. 319.302 and the two underlying rules that was subsequently dismissed. They have not challenged either the rules or the statute through an appeal of an individual tax assessment pursuant to R.C. Chapter 5715 or by filing an original action for declaratory judgment and/or injunctive relief.**

Prior to the effective date of the amendment to R.C. 319.302(A)(1), Appellants filed an original action in mandamus in the Tenth District Court of Appeals, *State ex rel. Ohio Apt. Assn. v. Wilkins*, 10<sup>th</sup> Dist. No. 06AP-198, 2006-Ohio-6783, challenging the constitutionality of both the statute and rules. The Commissioner was named as a respondent as was the Auditor of Franklin County, Ohio. Appellants requested an order finding that the statute and rules were unconstitutional in violation of the uniformity provisions of Article XII, Section 2 and the equal protection provisions of Article I, Section 2 of the Ohio Constitution, and further compelling respondents to apply the version of R.C. 319.302 in effect prior to its amendment by Am. Sub.

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<sup>5</sup> Recently amended by H.B. 199, eff. 6-30-07.

H.B. No. 66. Respondents filed a motion for judgment on the pleadings and, on December 21, 2006, the Tenth District issued a decision dismissing the mandamus action. The court noted that “relator’s allegations indicate that the real goals of the mandamus action are declaratory judgment and a prohibitory injunction” and concluded that “that is precisely [sic] the relief that relators must obtain here before a court even reaches the issue of whether the repealed statute can be revived and enforced.” *Id.* at ¶10. The decision was not appealed and no declaratory judgment and/or injunctive action was initiated. Nor, to the Commissioner’s knowledge, have Appellants challenged the constitutionality of R.C. 319.302 or the rules under R.C. Chapter 5715 in any appeal from a real property tax assessment.

**E. Appellants elected to challenge the constitutionality of the rules alone by filing an application for rule review under R.C. 5703.14(C).**

In July 2006, Appellants filed an Application with the BTA to review the two rules pursuant to R.C. 5703.14(C). *Ohio Apartment Assc v. Wilkins* (December 30, 2008), B.T.A. Case No. 2006-A-861, at 1-2. R.C. 5703.14(C) allows the BTA to review and, if necessary, revoke a rule if it is “unreasonable.” In addressing the reasonableness of a rule, the BTA considers whether a rule has been properly promulgated and whether it is consistent with legislative enactments. *Ohio Apartment Assc.* at 2-3, 7-10. If it is found unreasonable, the decision is filed with the secretary of state, the director of the legislative service commission and the joint committee on agency rule review. Ten days later the “rule shall cease to be in effect.” R.C. 5703.14(C)(1) and (2).

The statute requires that, in its application, the applicant “shall allege that the rule complained of is unreasonable and shall state the grounds upon which the allegation is based.” In their Amended Application, eventually amended, Appellants cited as the sole grounds for unreasonableness that the two rules are “unreasonable and unconstitutional for two independent

reasons.” They identified the “two independent reasons” as an alleged violation of Article XII, Section 2 of the Ohio Constitution, the uniformity clause, and an alleged violation of Article 1, Section 2 of the Ohio Constitution, Ohio’s equal protection clause. (Appellant’s Appendix APP0048, APP0047). Appellants did not assert that Ohio Adm. Code sections 5703-25-18 and 5703-25-10 were in conflict or otherwise exceeded the scope of R.C. 319.302 or that the rules were improperly promulgated. Instead, they raised the same two constitutional claims originally brought in the above-referenced collateral action. *Ohio Apartment Assc.* at 7-8.

A motion by the Commissioner to dismiss was denied, *Ohio Apartment Assc. v. Wilkins*, (November 9, 2007 Order), Case No.2006-A- 861, unreported, and the matter proceeded to hearing and adjudication with a final decision issued on December 30, 2008. In its decision, the BTA properly notes that it lacks jurisdiction to decide the constitutional issues raised by Appellants and that its review is limited to one of reasonableness - a determination that the rules have been properly promulgated and are not in conflict with the statute. *Ohio Apartment Assc.* at 7-8. And although the Amended Application for review only raised the constitutional issues, the BTA nevertheless went on, *sua sponte*, to perform its normal rule review and find the rules to be reasonable, noting that they “are administrative regulations” that “specifically replicate the language of R.C. 319.302 and do not go beyond such statutory provisions in any manner.” *Ohio Apartment Assc.* at 10.

As noted above, Appellants have now sought review in this Court of the same two constitutional issues and nothing more. The Commissioner timely cross-appealed raising issues with respect to BTA’s jurisdiction. On March 30, 2009, the Commissioner filed a Motion to Dismiss asserting that this Court also does not have jurisdiction over an appeal of a rule review pursuant to R.C. 5703.14(C). The pending motion states four independent reasons why

Appellants' appeal should not be dismissed, including the argument, as this Court has previously ruled in the context of R.C. 5703.14©, that the Court does not have appellate jurisdiction over a quasi-legislative matter.

### **III. ARGUMENT**

At the outset, it should be noted that each and every of the following Propositions of Law is premised on the Court denying the Commissioner's Motion to Dismiss.

#### **COMMISSIONER'S PROPOSITIONS OF LAW IN SUPPORT OF CROSS-APPEAL**

##### **First Proposition of Law:**

*The BTA is without jurisdiction to entertain an application, pursuant to R.C. 5703.14(C), where the sole stated grounds for the requested review of an administrative rule asserts that the rule is unconstitutional as opposed to an assertion that the administrative rule was improperly promulgated or is in conflict with, or exceeds the scope of, the enabling statute.*

##### **A. Consideration of constitutional claims is not consistent with the quasi-legislative character of R.C. 5703.14(C).**

The legislature has created a complex of administrative agencies with both quasi-legislative and quasi-judicial powers. *Princeton City Sch. Dist. Bd. of Ed. v. Ohio St. Bd. of Ed.* (1994), 96 Ohio App. 3d 558, 561-2. As this Court concluded in *Zangerle v. Evatt* (1942), 139 Ohio St 563, in reviewing the General Code version of R.C. 5703.14(C), the BTA acts in both capacities. When reviewing a specific tax assessment or other specific tax determination, it is acting in a quasi-judicial capacity. When conducting a rule review under R.C. 5703.14(C) to determine whether a rule is "reasonable" or "unreasonable" however, it is acting in a quasi-legislative capacity:

The making of rules for the valuation of property by the Department of Taxation is not a quasi-judicial function, and the fact that the Board of Tax Appeals ....may review any rule adopted and promulgated by the Tax Commissioner... does not result in a quasi-judicial proceeding.

Id at 571. To the same effect, see *Fortner v. Thomas* (1970), 22 Ohio St. 2d 13 (special proceeding providing for court of common pleas rule review of regulations adopted by the Ohio Liquor Control Commission is a quasi-legislative function).

This distinction is critical in addressing whether or not the BTA can consider constitutional questions. When acting in a quasi-judicial capacity, the BTA, as an adjunct to the judicial branch, can allow constitutional issues, even if, because the agency itself can't adjudicate constitutional claims, its role is to take evidence for ultimate consideration by the Court on appeal. *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St. 3d 229, 232. When acting in a quasi- legislative capacity, however, the BTA only has such powers as the legislative branch and those do not encompass constitutional questions. As stated by the Court in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St. 3d 451, 462:

“The people possessing all governmental power, adopted constitutions completely distributing it to appropriate departments.” *Hale v. State* (1896), 55 Ohio St. 210, 214, 45 N.E. 199, 200. They vested the legislative power of the state in the General Assembly (*Section 1, Article II, Ohio Constitution*), the executive power in the Governor (*Section 5, Article III, Ohio Constitution*), and the judicial power in the courts (*Section 1, Article IV, Ohio Constitution*). They also specified that “the general assembly shall [not] \* \* \* exercise any judicial power, not herein expressly conferred.” *Section 32, Article II, Ohio Constitution*.

The power and duty of the judiciary to determine the constitutionality and, therefore, the validity of the acts of the other branches of government have been firmly established as an essential feature of the Ohio system of separation of powers. See, e.g., *Beagle v. Walden* (1997), 78 Ohio St. 3d 59, 62, 676 N.E.2d 506, 508 (“interpretation of the state and federal Constitutions is a role exclusive to the judicial branch”).

See also Article II, Section 32 Ohio Constitution; *Beagle v. Walden* (1997), 78 Ohio St. 3d 59, 62. Moreover, when the Court itself is barred by the constitution from even considering an

appeal from a quasi-legislative proceeding, *Zangerle*, 139 Ohio St at 579, the taking of evidence on constitutional questions by the BTA would be a totally vain act.

It is anticipated that Appellants will argue, as they did in response to the Commissioner's Motion to Dismiss, that the scope of review is quasi-judicial in the instant case because *Zangerle* is distinguishable from the process that went on in the instant case. They will base this distinction on that fact the the applicants in *Zangerle* were local officials (county auditors), whereas here they are taxpayers. But this is a distinction without a difference. In concluding that the BTA's review of the reasonableness of Commissioner's rules is not a "quasi-judicial" proceeding, the Court in *Zangerle* determined that the BTA review lacked a key determinant of "judicial" or "quasi-judicial" proceedings. The Court held that, when the BTA undertakes its rule review function, the functions performed differ in kind from the judicial functions engaged in by courts because, unlike judicial reviews, the BTA's consideration of the reasonableness of a challenged rule "is not applied to the **facts of a particular justiciable case.**" *Id.* at 571-72 (emphasis added). See also *Id.* at paragraph five of the syllabus.

Indeed, the *Zangerle* Court emphasized the lack of any "**concrete**" fact setting under which the reasonableness of the challenged rule could be tested, and found that the BTA's "**abstract**" ruling on the reasonableness of the rule was the antithesis of a "judicial" or "quasi-judicial" determination. *Id.* at 578 (holding that "[c]ourts decide **concrete and not abstract questions.** No person to be affected may be denied full opportunity to be heard before any order may be made determining or affecting his rights or property.") (emphasis added). See also *Fortner*, paragraph two of the syllabus, 17.

The same reasoning underpinning this Court's holding in *Zangerle* is equally applicable here. Contrary to Appellants' belief that merely inserting a taxpayer as a party turns a quasi-

legislative proceeding into a quasi-judicial one, the law holds otherwise. It is the property itself, not merely the taxpayer, that is the central focus of real property tax assessment and, accordingly, any quasi-judicial proceeding contesting it. As stated in *Zangerle*, 139 Ohio St at 579 “[w]hen a case reaches this court involving the valuation for taxation of **some specific property** of a taxpayer and the question of whether rule No. 2 or any other rule is reasonable and lawful is presented, we will, of course, pass upon such concrete question.” (Emphasis added.) And there simply was no specific real property assessment at issue in the proceedings below. The Amended Application neither identifies a specific property or assessment nor requests an adjudication with respect to a specific property or assessment. (Supp. 0055) (Information regarding any property at all was introduced in the record merely as statistical information to address the constitutional claims in the event that this Court would assume jurisdiction over them.) Indeed, there could be no adjudication with respect to specific property. As noted above, the only remedy obtainable in a R.C. 5703.14(C) proceeding is the legislative act of repealing the rule. R.C. 5703.14(C)(1) and (2).

Therefore, just as in *Zangerle*, the BTA’s decision in this case as to the “reasonableness” of the challenged rules here “would bind no one.” Specifically, as in *Zangerle*, “any rule which this court might declare reasonable in an **abstract** case could not be considered by us as binding in any future **concrete** case.” *Id.* (Emphasis added). In other words, the BTA’s rule review process is not judicial or quasi-judicial because it entails only an abstract determination of the reasonableness of the Commissioner’s rules, unmoored to any concrete fact setting. This observation is as equally true of the BTA’s decision upholding the reasonableness of the challenged Commissioner’s rules here as it was in *Zangerle*.

It is this critical factor that sets R.C. 5703.14(C) apart from other proceedings that proceed through the BTA and in which constitutional issues may be raised for later determination by the Court on appeal. In particular, it is very different from the quasi-judicial proceeding that specifically allows a property owner to challenge a determination under the very statute and rules at issue herein. See R.C. 5715.19(A)(1)(f). Pursuant to this authority a taxpayer is authorized to file a complaint with the county auditor, contesting “any determination under division (A) of section 319.302 of the Revised Code,” to have that complaint heard before a local county board of revision, to appeal to the BTA pursuant to R.C. 5717.01 and have a complete evidentiary hearing, and to finally appeal to this Court pursuant to R.C. 5717.04 with the ability to then have constitutional questions addressed. *State ex rel. Iris Sales Co. v. Voinovich* (1975), 43 Ohio App. 2d 18. Unlike a proceeding under R.C. 5703.14(C), proceedings under Chapter 5715 and R.C. 5717.01 do concern justiciable controversies, i.e., rights concerning specific property. Unlike proceedings under R.C. 5703.14(C), which are by no means exclusive, proceedings under Chapter 5715 and R.C. 5717.01 are both exclusive (“[f]ailure to file an appeal [an application for review] does not preclude any person from seeking any other remedy against application of the rule to the person,”) and final. *State ex rel. Iris Sales Co.*, 43 Ohio App 2d at 23. Because of this, it is clear why constitutional issues can be raised in a quasi-judicial proceeding, even though resolution is deferred until appeal to the Court. *Cleveland Gear*, 35 Ohio St 3d at 232. With the consequence being finality with respect to the taxpayer’s individual tax liability, to not allow constitutional issues to be addressed would raise potential due process issues. The same is not true of a proceeding under R.C. 5703.14(C) which is not directed at any given tax liability and/or determination and which specifically recognizes

that it is not the exclusive remedy to address a taxpayer's concerns about a rule. There is therefore no reason to permit the consideration of constitutional claims.

**B. The plain meaning of the language of R.C. 5703.14(C) clearly shows that the scope of the proceeding is limited to consideration of "reasonableness", specifically whether a given rule was improperly promulgated or is in conflict with or exceeds the scope of the enabling statute. It does not encompass constitutional claims.**

Even if the Court should conclude that a proceeding under R.C. 5703.14 (C) is quasi-judicial in nature, the proceeding is still limited to non-constitutional issues. "The Board of Tax Appeals, being a creature of statute, is limited to the powers conferred upon it by statute." *Morgan County Budget Commission v. Board of Tax Appeals* (1963), 175 Ohio St. 225, 227, citing *Steward v. Evatt* (1944), 143 Ohio St. 547. R.C. 5703.14(C) provides, in pertinent part:

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 applications ... shall allege that the rule complained of is unreasonable and shall state the grounds upon which the allegation is based.... The burden of proof to show that the rule is unreasonable shall be upon the appellant.

Simply put, "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." *Baxla*, 1993 Ohio Tax LEXIS 1330, at 7. Accordingly, to invoke the rule review power of this Board under R.C. 5703.14, a relator must establish that: (1) he is injured by an administrative rule, and (2) the injury is due to unreasonableness of the administrative rule.

The terms "reasonable" and "unreasonable" are not defined in the statute but, in addition to the instant case, the question of what constitutes "reasonableness" under the statute has been addressed once by this Court and several times by the BTA. In *Roosevelt Properties Co.*, the Court found a rule reasonable because it was "consistent with the language and purpose of" the enabling provisions. 12 Ohio St. 3d at 12. In *Baxla*, the BTA stated that when it "reviewed prior

decisions of this Board wherein rules promulgated by the Commissioner have been considered under R.C. 5703.14(C),” “[r]ules have been found reasonable when they carry out the intent of the legislature.” 1993 Ohio Tax LEXIS 1130 at 11, citing *Atlas Crankshaft Corp. v. Lindley* (August 15, 1978), B.T.A. Case No. 3-1816, 1978 Ohio Tax LEXIS 192, unreported, affirmed on other grounds, 58 Ohio St. 2d 299; *Roosevelt Properties Co. v. Kinney* (January 11, 1983), B.T.A. Case Nos. 81-F-666, 667, 1983 Ohio Tax LEXIS 698, unreported, affirmed, 12 Ohio St. 3d 7. Conversely, “[r]ules have been found to be unreasonable when they have not been properly promulgated, or are in conflict with legislative enactments.” *Baxla*, 1993 Ohio Tax LEXIS 1130. at 11-12, citing *William J. Stone v. Limbach* (June 30, 1988), B.T.A. Case No. 85-C-931, unreported.

The BTA’s construction of “reasonableness” mirrors that placed on the scope of an agency’s quasi-legislative process by the courts themselves. That construction consistently focuses on the relationship between the rule and the underlying legislation. “An Ohio Administrative Code section is a further arm, extension, or explanation of statutory intent implementing a statute passed by the General Assembly.” *Meyers v. State Lottery Comm.* (1986), 34 Ohio App. 3d 232, 234. Therefore, it is well-settled that administrative rules enacted pursuant to a specific grant of legislative authority are to be given the full force and effect of law unless they are in clear conflict with the enabling statute, are unreasonable, or in excess of legislative policy. *Chicago Pacific Corp. v. Limbach* (1992), 65 Ohio St. 3d 432, 435; *Doyle v. Ohio Bur. of Motor Vehicles* (1990), 51 Ohio St. 3d 46, paragraph one of the syllabus. A rule, “issued pursuant to statutory authority, has the force and effect of law unless it is unreasonable or is in clear conflict with statutory enactment....” *The Kroger Grocery & Baking Co. v. Glander* (1948), 149 Ohio St. 120, 125. When the potential for conflict arises, the proper subject for

determination is whether the rule contravenes an express provision of the statute. See *Carroll v. Dept. of Admin. Services* (1983), 10 Ohio App. 3d 108; *Kelly v. Accountancy Bd. of Ohio* (1993), 88 Ohio App. 3d 453. As noted in *Kristler v. Conrad*, 10th Dist. Nos. 04AP-1095 and 04AP-110, 2006-Ohio-3308, ¶33:

It is generally accepted that “[t]he purpose of administrative rulemaking is to facilitate the implementation of legislative policy.” *Knutty v. Wallace* (1992), 84 Ohio App. 3d 623, 627, 617 N.E.2d 783, quoting *Carroll v. Dept. of Adm. Serv.* (1983), 10 Ohio App. 3d 108, 10 Ohio B. 132, 460 N.E.2d 704. The delegation of rulemaking authority is generally thought to be 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.” *Taber v. Ohio Dept. of Human Services* (1998), 125 Ohio App. 3d 742, 750, 709 N.E.2d 574, quoting *Kroger Grocery & Baking Co. v. Glander* (1948), 149 Ohio St. 120, 124, 77 N.E.2d 921. **“The basic limitation on this authority is that an administrative agency may not legislate by enacting rules which are in excess of legislative policy, or which conflict with the enabling statute.”** *P.H. English v. Koster* (1980), 61 Ohio St. 2d 17, 19, 399 N.E.2d 72. (Emphasis added.)

Such a review does not encompass independent constitutional claims. First, as a generic matter, the BTA, as is the case with all administrative agencies, is without jurisdiction to consider such claims. This was recognized in *Baxla* when the BTA stated “it is axiomatic that [the] Board is without jurisdiction to determine the constitutional validity of a given statute or rule.” *Baxla*, 1993 Ohio Tax LEXIS 1130, at 19. It has long been held that “[t]he Board of Tax Appeals is an administrative agency, a creature of statute, and is without jurisdiction to determine the constitutional validity of a statute.” *S.S. Kresge Co. v. Bowers* (1960), 170 Ohio St. 405, paragraph one of the syllabus. More pertinent to the case at hand, this jurisdictional restriction is not confined to the BTA’s authority to pass upon the constitutionality of a **statute**, but extends also to administrative rules promulgated pursuant to an enabling statute. The Court

has held that “administrative bodies have no authority to interpret the Constitution” with respect to “a statute, ordinance, or administrative rule.” *Jones v. Village of Chagrin Falls* (1997), 77 Ohio St. 3d 456, 460. “Because administrative bodies have no authority to interpret the Constitution, requiring litigants to assert constitutional arguments administratively would be a waste of time and effort for all involved.” *Id.* at 460-61.

Second, and even more important for this Court’s consideration on appeal, the BTA has expressly differentiated reasonableness from a constitutional claim. In addition to the instant case, the BTA was presented with constitutional claims by essentially the same applicants in *Roosevelt Properties Co.* Unlike the instant case, the applicants therein also argued that the rule in question, a real property tax reduction rule, exceeded and/or conflicted with the underlying statute, thus presenting a reasonableness claim within the parameters set forth above. In addressing its ability to rule on the respective issues, the BTA noted that “[t]he applications for review of the rule of the Commissioner of Tax Equalization present two basic issues. The first issue questions whether the appellee’s rule is **consistent and reasonable** with Revised Code section 5713.041. The second issue is whether the rule is consistent with, and not a violation of, the provisions of Article XII, Section 2a, Ohio Constitution.” 1983 Ohio Tax LEXIS 698, at 9. After noting that, as an administrative body, it was without jurisdiction to address the constitutional claim, the BTA then went on to analyze what it did have jurisdiction to address, specifically, “the former issue, **that of reasonableness.**” *Id.* at 10 (emphasis added.) The Court’s decision on appeal recognizes this same distinction in the type of relief sought by the applicant. *Roosevelt Properties Co.*, 12 Ohio St. 3d 8.

The fact that this Court, because no jurisdictional challenge was raised, may have improperly assumed jurisdiction over *Roosevelt Properties Co.* on appeal, is addressed in the

Commissioner's Motion to Dismiss. And while the Court did ultimately address the two constitutional claims, it is significant that it did so only after first independently addressing the one claim that did fall within the parameters of reasonableness and concluding that the rule was not in conflict with or exceed the scope of the underlying statute. Though the Court may have mistakenly believed that it had quasi-judicial jurisdiction to also address the constitutional claims, it never characterized its analysis in dealing with those claims as one performed in the context of reasonableness.

The instant case is quite different. There is no underlying reasonableness claim. Consequently there is no claim that the BTA could even address and the BTA, obviously realizing this, went on to conduct an analysis that wasn't even raised by Appellants, instead of dismissing the Amended Application as it jurisdictionally should have done. To conclude that the General Assembly intended that the scope of R.C. 5703.14(C) be so broad as to encompass an application where the BTA, as here, cannot address any of the arguments raised by the applicants, is so illogical that it defies sound statutory construction.

**Second Proposition of Law:**

*An issue is not ripe for review if it involves a challenge to the constitutionality of rules that merely track an underlying enabling statute whose constitutionality itself is not being considered.*

As noted above, the language of the rules challenged by Appellants through the rule review proceeding now being appealed, essentially do nothing more than track the language of the self-executing statute under which the rules are enacted. Appellants' Amended Application did not request a declaration that R.C. 319.302 is unconstitutional nor could it within the scope of R.C. 5703.14(C). They don't seek that relief in their Notice of Appeal to this Court. Even Appellants concede this jurisdictional limitation. But until R.C. 319.302(A)(1) is ruled

unconstitutional, their attempt to have the two rules found unconstitutional is simply not ripe for adjudication.

In *State ex rel. Elyria Foundry Co. v. Indus. Comm. of Ohio* (1998), 82 Ohio St. 3d 88, 89, the Court thoroughly explained the principle of ripeness and its discussion succinctly shows why it applies to the instant case:

Ripeness “is peculiarly a question of timing.” *Regional Rail Reorganization Act Cases* (1974), 419 U.S. 102, 140, 95 S. Ct. 335, 357, 42 L. Ed. 2d 320, 351. The ripeness doctrine is motivated in part by the desire “to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies \* \* \* .” *Abbott Laboratories v. Gardner* (1967), 387 U.S. 136, 148, 87 S. Ct. 1507, 1515, 18 L. Ed. 2d 681, 691. As one writer has observed:

“The basic principle of ripeness may be derived from the conclusion that ‘judicial machinery should be conserved for problems which are real or present and imminent, not squandered on problems which are abstract or hypothetical or remote.’ \* \* \* The prerequisite of ripeness is a limitation on jurisdiction that is nevertheless basically optimistic as regards the prospects of a day in court: the time for judicial relief is simply not yet arrived, even though the alleged action of the defendant foretells legal injury to the plaintiff.” Comment, *Mootness and Ripeness: The Postman Always Rings Twice* (1965), 65 Colum.L.Rev. 867, 876.

This is precisely the situation in the present case. Appellants have not been harmed and do not seek redress from an injury, they only seek a determination that certain rules are unconstitutional. If the BTA were to have found the rules in question unreasonable, if this Court finds that the rules are unreasonable, or if this Court finds that the rules are unconstitutional, Appellants’ injuries will still exist because R.C. 319.203 will still be in effect and in essence will continue to inflict any purported injury upon them that they complain with respect to the rules. No purpose can therefore be served by the pursuit of this action since in the absence of a determination of unconstitutionality regarding the underlying statute, the Commissioner and Appellants would still be bound by it. To the extent that the BTA and this Court otherwise have

jurisdiction, Appellants' claims are still not ripe for any meaningful adjudication unless and until there is a determination by a court of competent jurisdiction that R.C. 319.302 is unconstitutional. Accordingly, this matter should have been dismissed.

**Third Proposition of Law:**

***R.C. 5703.14(C) does not confer standing to challenge the reasonableness of a rule if the actual or potential injury to the applicant is caused by the enabling statute and not the administrative rule for which the review is sought.***

Unless there is an injury by an administrative rule, there cannot be standing to challenge the rule under R.C. 5703.14(C). Thus, it is incumbent on Appellants to establish such injury even where, unlike here, the Commissioner has not raised it. As the BTA stated in *Baxla*:

It is a generally accepted proposition of administrative law that only one who is injured by a statute or order of an administrative body may question the validity of the statute or order. *Rollman & Sons Co. v. Bd. of Revision (1955), 163 Ohio St. 363*. This proposition is codified in the above cited statute. While appellee does not claim that appellant has not been affected by Ohio Adm. Code 5703-1-10, this Board finds it necessary to make a specific finding in order to satisfy jurisdictional requirements. Therefore, it is the order of this Board that appellant offer testimony and evidence sufficient to place appellant into that class of persons affected by the rule in issue in this case.

1993 Ohio Tax LEXIS 1330, at 2.

Appellants never met this burden and the BTA erred finding otherwise. The BTA concluded that rule and statute equally injured Appellants but the application of the provisions demonstrates otherwise. Ohio Adm. Code 5703-25-18 is at the center of Appellants' challenge as the principal rule withholding the benefit of the ten percent (10%) tax rollback from Appellants. As discussed above, the rule is nothing but a replica of the statute mirroring the language of R.C. 319.302(A)(1). It naturally follows that even if the rule is found to be unconstitutional, the enabling statute remains intact, and so does the alleged injury to Appellants.

In this sense, if Appellants are injured at all, such injury is not caused by the rule but by the statute.

The rule review process in R.C. 5703.14(C) is very narrow in its scope. A rule must be held to be reasonable if it is not in conflict with the enabling provision. Although the validity of a regulation may be challenged in other quasi-judicial or judicial proceedings, this was not contemplated by the General Assembly in a rule review under R.C. 5703.14(C).

The rule in question is therefore much like the Commissioner's bulletin at issue in *MCI Telecommunications Corp. v. Limbach* (June 19, 1992), BTA Nos. 88-Z-1133 through 1136, 1992 Ohio Tax LEXIS 684, unreported, a case in which the taxpayer appealed from an assessment contesting whether certain carrier access charges should be included in the tax base under R.C. 5727.32. Although the charges were includable under the plain language of the statute, the Commissioner had also issued a bulletin pursuant to R.C. 5703.141 in order to inform telephone companies of the administrative construction of the statute. The taxpayer attempted to argue that the bulletin was an invalid rule. In rejecting the argument, the BTA, in part, relied on the fact that:

Additionally, MCI has not shown that it was harmed in any way by the Release. See, e.g. R.C. 5703.14(C). MCI's 1984 report year is not at issue here, and no penalties or other charges were added to MCI's basic tax liability for the pertinent years. **In any case, the increase of MCI's tax base by the inclusion of access payments resulted from the application of the unambiguous language of the statutes, not the information contained in the Release.**

Id. at 15-16 (emphasis added). Although there is no dispute that, unlike the bulletin in the *MCI Telecommunications* case, Ohio Adm. Code 5705-25-18 certainly carries the weight of a rule, the scope of that rule is identical to the bulletin. It is the unambiguous language of the statute that

removed the ten percent (10%) rollback from Appellants' property, not the information contained in the rule.

The current challenge to Ohio Adm. Code 5703-25-18 is distinguishable from cases where an injury by an administrative rule occurs for the reason that a relator claimed that the rule exceeded a statutorily demarcated limit. For instance, in *Roosevelt Properties Co.*, relators argued that an administrative standard adopted for the purpose of real property classification was unauthorized by an enabling statute. *Id.* at 2 (questioning, *inter alia*, the reasonableness of Ohio Adm. Code 5705-3-06 promulgated pursuant to R.C. 5713.041). For another example, in *Baxla*, the relator challenged Ohio Adm. Code 5703-1-10 as having built an unauthorized jurisdictional barrier. 1993 Ohio Tax LEXIS 1330. Unlike these examples, however, nowhere do Appellants assert the argument that the rules at issue in this case causes them any injury different in nature from or excessive of the injury that the enabling statute, R.C. 319.302, itself inflicts. Thus, it is not a coincidence that Appellants failed to put forth any concrete evidence demonstrating any injury by Ohio Adm. Code 5703-25-18 independent of the enabling statute.

Based on the foregoing, it follows that if, *arguendo*, Appellants are injured by the disparate treatment regarding the ten percent (10%) rollback, the injury is caused by R.C. 319.302, not Ohio Adm. Code 5703-25-18 which only reiterates a part of the self-executing statute, R.C. 319.302. They, therefore, lack standing to challenge the rules under R.C. 5703.14(C).

**COMMISSIONER'S PROPOSITIONS OF LAW IN OPPOSITION TO APPELLANTS' APPEAL.**

**Fourth Proposition of Law:**

*Ohio Adm. Code 5703-25-18 and 5703-25-10 are reasonable under R.C. 5703.14(C) as they were properly promulgated and do not conflict with or exceed the scope of R.C. 309.312.*

Assuming that the review under R.C. 5703.14(C) is a quasi-judicial process over which the Court has jurisdiction, the Court must affirm the finding of the BTA that Ohio Adm. Code 5703-25-18 and 5703-25-10 are reasonable under R.C. 5703.14(C). In *Baxla*, the BTA held that when it “reviewed prior decisions of this Board wherein rules promulgated by the Commissioner have been considered under R.C. 5703.14(C),” “[r]ules have been found reasonable when they carry out the intent of the legislature.” 1993 Ohio Tax LEXIS, at 11, citing *Atlas Crankshaft Corp.*, supra. Conversely, “[r]ules have been found to be unreasonable when they have not been properly promulgated, or are in conflict with legislative enactments.” *Id.* at 11-12, citing *William J. Stone*, supra.

Given the definition of “reasonable” for purposes of R.C. 5703.14(C), the Court must affirm the BTA is its holding that Ohio Adm. Code 5703-25-18 and 5703-25-10 are “reasonable” as they simply mirror and/or are totally non-conflicting with the language of R.C. 319.302 as amended by Am. Sub. H.B. 66.<sup>6</sup>

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<sup>6</sup> Appellants did not raise in their Notice of Appeal as error the reasons given by the BTA in holding that Ohio Adm. Code 5703-25-18 and 5703-25-10 are reasonable under R.C. 5703.14(C). This issue is therefore not properly before the Court. The Commissioner nevertheless addresses the issue herein in case the Court determines that it has been properly raised by Appellants.

**Fifth Proposition of Law:**

***This Court only has appellate jurisdiction to review those matters over which the BTA has jurisdiction to consider under R.C. 5703.14(C).***

In *Polaris Amphitheater Concerts, Inc. v. Delaware Co. Bd. of Rev.*, 118 Ohio St. 3d 330, 2008-Ohio-2454, at ¶13, the Court stated that its jurisdiction to consider appeals from decisions of the BTA is limited to that jurisdiction that is conferred upon the BTA:

Our authority to review decisions issued by the BTA emanates from *Section 2(B)(2)(d), Article IV, Ohio Constitution*, which states that this court's appellate jurisdiction encompasses "[s]uch revisory jurisdiction of the proceedings of administrative officers or agencies as **may be conferred by law.**" (Emphasis added.) The General Assembly conferred such appellate power on this court through *R.C. 5717.04*, and that statute strictly defines our authority to correct alleged errors committed by the BTA.

Assuming that a rule review pursuant to R.C. 5717.04 is quasi-judicial in nature, this Court's appellate review is limited to a review for error by the BTA. Thus, the scope of the Court's jurisdiction is naturally limited by the scope of the reasonableness set forth in R.C. 5703.14(C):

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 applications ... shall allege that the rule complained of is **unreasonable** and shall state the ground upon which the allegation is based.... The burden of proof to show that the rule is **unreasonable** shall be upon the appellant.

(Emphasis added.) Simply put, "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." *Baxla*, 1993 Ohio Tax LEXIS 1330, at 7.

As discussed in the prior section, the determination of whether of the reasonableness of Ohio Adm. Code 5703-25-18 and 5703-25-10 is based upon whether the rules were properly promulgated, or are in conflict with the language of R.C. 319.302 as amended by Am. Sub. H.B. 66. R.C. 5703.14(C) does not confer upon the BTA, and thus this Court in an appeal, the

jurisdiction to consider the two constitutional challenges raised by Appellants in their Notice of Appeal. This Court does not have jurisdiction to review for error matters that over which the BTA did not have jurisdiction since there could not have been any error committed due to the lack of jurisdiction.

**Sixth Proposition of Law:**

***Ohio Adm. Code 5703-25-18 and 5703-25-10 do not violate Article XII, Section 2 of the Ohio Constitution since the ten percent (10%) rollback is a partial exemption allowable under the Uniformity Clause.***

The Court can only address Appellants' Propositions of Law if it determines that the constitutional issues are properly before it. If the Court so determines, then Appellants must prove beyond a reasonable doubt that Ohio Adm. Code 5703-25-18 and 5703-25-10 are in violation of Article XII, Section 3 and Article I, Section 2 of the Ohio constitution. See *Columbia Gas Transmission v. Levin*, 117 Ohio St. 3d 122, 2008-Ohio-511, at ¶41; *Ohio v. Smith* (1997), 80 Ohio St. 3d 89, 99; *Arnold v. Cleveland* (1993), 67 Ohio St. 3d 35, 38.

With respect to the first constitutional issue, it is a cornerstone principle of Ohio tax law that “[t]he General Assembly has plenary power to determine exemptions from taxation, limited only by the provisions of Article I of the Constitution of Ohio...” *Dayton v. Cloud* (1972), 30 Ohio St. 2d 295, paragraph one of the syllabus. This principle is carved out in the Ohio Constitution. Section 2, Article XII of the Ohio Constitution, known as the Uniformity Clause, provides in pertinent part “[w]ithout 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 [enumerated properties in the Section].” (Emphasis added). As the Court explained in *Swetland*:

The issue of the constitutional authority of the General Assembly to provide by law for real estate tax exemptions was considered in

the case of *Denison University v. Bd. of Tax Appeals* (1965), 2 Ohio St. 2d 17, a case involving a real estate tax exemption for buildings connected with a public college, in which this court held, in paragraph three of the syllabus, that:

“By reason of the amendment of **Section 2 of Article XII of the Ohio Constitution** effective in 1931 the General Assembly now has a power to determine exemptions from taxation that is limited only by the provisions of Article I of the Ohio Constitution.... [Citations omitted.]”

In arriving at the decision in *Denison*, Chief Justice Taft stated, at page 27:

“It is significant that the word ‘all’ does not now appear before the words ‘land and improvements thereon.’ The presence of the word ‘all’ before ‘property’ in the 1851 version of this constitutional provision was always given by this court as the reason why the General Assembly had no power to provide for any exemptions from taxation not specifically authorized by Section 2 of Article XII. ... The removal of the specific requirement that ‘all’ real or personal property be taxed fortifies our conclusion that the people intended, as they stated, to return to the General Assembly as part of its legislative power ‘the general power ... to determine ... exemptions’ from taxation subject only to the limitations set forth in Article I of the Ohio Constitution, the so-called Bill of Rights....”

In cases decided subsequent to *Denison, supra*, this court reaffirmed the holding of that case. See, e.g., *Graf v. Warren* (1967), 10 Ohio St. 2d 32, 37; *Cleveland State Univ. v. Perk* (1971), 26 Ohio St. 2d 1, 5-6; *Cleveland v. Perk* (1972), 29 Ohio St. 2d 161, 164; *Dayton v. Cloud* (1972), 30 Ohio St. 2d 295.

*Swetland*, at 26-27. See also *Denison University v. Bd. of Tax Appeals* (1965), 2 Ohio St. 2d 17.

Based firmly on this long-established principle, the *Swetland* court declared constitutional under the Uniformity Clause one of the legislatively created partial exemptions detailed above - that applicable only to “homesteads”. There are several others, and the ten percent (10%) rollback is one of them. Insofar as Appellants present the constitutional issues precisely identical to the ones the *Swetland* Court addressed, the *Swetland* decision is controlling herein as to the ability of the legislature to create partial exemptions. The Court has held that a

tax exemption is constitutional as long as a uniform tax rate is applied **within a class** validly set by the General Assembly. In this matter, there is uniformity of rate within the legislatively created classes. Thus, there is no violation of the uniformity requirement of Article XII, Section 2 of the Ohio Constitution.

### **Seventh Proposition of Law**

***Ohio Adm. Code 5703-25-18 and 5703-25-10 do not violate Article I, Section 2 of the Ohio Constitution since the ten percent (10%) rollback is rationally based and comports with equal protection.***

“The General Assembly has plenary power to determine exemptions from taxation, **limited only by the provisions of Article I of the Constitution of Ohio....**” *Dayton*, 30 Ohio St. 2d at paragraph one of the syllabus (emphasis added). “A classification must not be arbitrary, artificial, or evasive, but there must be real and substantial distinction in the nature of the class or classes upon which the law operates.” *Swetland*, 62 Ohio St. 2d at 28. “That a statute may discriminate in favor of a certain class does not render it arbitrary if the discrimination is founded upon a reasonable distinction, or difference in state policy.” *Allied Stores of Ohio, Inc. v. Bowers* (1959), 358 U.S. 522, 528.

A regularly enacted statute or administrative regulation is “presumed to be constitutional and is therefore entitled to the benefit of every presumption in favor of its constitutionality.” *Roosevelt Properties Co., supra*, at 13. Further, “the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.” *Madden v. Kentucky* (1940), 309 U.S. 83, 88. “The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it,” *Id.*, and the standard of proof is that of “beyond reasonable doubt.” *Roosevelt Properties*, at 13.

**A. The definition of real property that is not intended primarily for use in a business activity, as incorporated into R.C. 319.302 (and Ohio Adm. Code 5703-25-18) is consistent with the historical classification of residential property.**

The definition employed by the General Assembly in R.C. 319.302 to define real property that is not intended primarily for use in a business activity is not new. It is consistent with a distinction employed by rule to differentiate residential and commercial real estate that dates back over thirty years, except for a brief four year period in the early '80s during which the dividing line went up to include family dwellings with four units for residential property and was then brought back down to ones with three units. Supp. 0012 (43); Supp. 0026(98); Supp. 0032 (122:21–123:1). See Ohio Adm. Code 5705-3-06, eff. 11-1-77; Ohio Adm. Code 5703-25-10, eff. 12-15-05. The purpose of these rules, as set out in former Ohio Adm. Code 5705-3-06, was the identification and reporting of real property in “each of the major general groups of real property.” Those major groups included “Commercial” defined in former Ohio Adm. Code 5703-3-06 (A)(4) as “[t]he land and improvements to land which are used or occupied for general commercial purposes and where production of income is a factor to be considered in arriving at true value (**apartment houses**, hotels, motels, theaters, office buildings, warehouses, retail and wholesale stores, bank buildings, commercial garages, commercial parking lots, shopping centers, trailers, etc.); and “Residential”, defined in former Ohio Adm. Code 5703-3-06 (A)(5) as [t]he land and improvements to the land used and **occupied as a dwelling by one, two or three families**. (Emphasis added.) This rule eventually became Ohio Adm. Code 5703-25-10 in 2003.

The same distinction was employed to differentiate between “residential/agricultural” and all other property in implementing the tax reduction factor authorized by the constitutional amendment of November 4, 1980, Article XII, Section 2a of the Ohio Constitution, codified in

R.C. 5713.041 and incorporated into then Ohio Adm. Code 5703-3-06 and now Ohio Adm. Code 5703-25-10. Supp. 0012 (44); Supp. 0031 (121); Supp. 0033 (126).

These distinctions have remained true to this day. It, thus, made perfect sense for the General Assembly to carry on the same distinction in adopting the ten percent (10%) rollback amendment of 2005. It made equal sense for the Commissioner, in enacting Ohio Adm. Code 5703-25-18, to reference the existing classifications already codified in Ohio Adm. Code 5703-25-10 as the guide to the county auditor in determining what property was not intended primarily for use in a business activity under the statute. Supp. 0032 (122-123).

**B. The classification of real property not intended primarily for use in a business activity, as incorporated into r.c. 319.302 (and ohio adm. code 5703-25-18) is rationally based.**

The record reflects numerous reasons for differentiating between dwellings of three or fewer family units and dwellings with larger housing capacity in typing the real property as either residential or commercial.

**1. Dwellings of three or fewer units are significantly more likely to be used primarily as a residence by the owners and dwellings with larger housing capacity are significantly more likely to be used primarily for business purposes**

Single family dwellings, duplexes and triplexes are naturally different from bigger multiplex apartments in terms of a structure and size of a building and the primary usage of property for income-generating, as opposed to pure residential, purposes. Supp. 0028 (108:3-5); Supp. 0032 (115:25 - 116:2); Supp. 0032 (122:6-8); S. Supp. 0002. The statistical data of owner occupancy rate marks a clear class-dividing line between dwellings with a single to three units (residential property coded 510, 520, and 530) and ones with four units or up (commercial property coded 401, 402, and 403). According to the testimony of Mr. Anthony Frissora, the Deputy Auditor in the Franklin County Auditor's Office at the hearing before the BTA, the

historical trend is that the owner occupancy rate significantly drops once passing the class line. In support of this proposition, in tax year 2007, the said rate was eight-one percent (81%) for the land use 510s, twenty-four percent (24%) for the 520s, eighteen percent (18%) for the 530s vis-à-vis one percent for the 401s and zero percent (0%) for both 402s and 403s. Supp. 0028 (106:4 – 107:4); S. Supp. 20. Mr. Fisher, an owner of multiplex apartments, and one of Appellants, admitted to this difference at the hearing:

Q. You agree, do you not, that it is more likely that property that is owned and occupied by -- by the owner of the property is more likely to fall within the group of one, two, and three family homes, than it's likely that they fall within the group of four or more --

A. Yes, I can agree to that.

Q. -- units. And I think you testified during your deposition that the bigger the unit got, the more there were other reasons why someone wouldn't occupy it because they didn't want to be close to their tenants?

A. To the problems.

Q. Correct. But that is less likely to be a problem the smaller the unit it is?

A. The less residents you have, the less problems you have.

Supp. 0020 (77:18 – 78:10).

As to dwellings larger than three units, Mr. Fisher's testimony made it clear that the main purpose in ownership of properties of this size is not to provide a home but instead to make money. In fact, he personally earns more than \$500,000 per year on his forty properties. Supp. 0017 (63-64, 69); Supp.2d. 58 (57), 67 – 68 (68-69), 91 (92).

**2. Because of the differences in use, dwellings of three or fewer units have historically received different tax treatment than properties with larger housing capacity**

Properties used primarily for business purposes have historically been given different tax treatment than those used as one's home. Apartment owners may be subject to franchise taxes, personal property taxes and commercial activities tax in addition to real property taxes.

Homeowners are not. Apartment owners can deduct the expenses of maintaining their properties. Homeowners cannot. Homeowners have traditionally received the benefit of other partial real property exemptions. Commercial property owners have not. Supp. 0012 (42); Supp. 0018 (66-67); Supp. 0041 (160).

**3. Because of the differences in use, dwellings of three or fewer units are appraised entirely differently than properties with larger housing capacity**

Reflecting these structural and usage differences, the appraisal method also differs between residential and commercial property. As Mr. Frissora testified, “[o]bviously, the larger structures are going to have to require more expertise from our appraisers than we would with the 520s and the 530s.” Supp. 0030 (116:4-8). More fundamentally, “[o]n a residential property, there is normally no income being produced that are owner occupied, so with residentials, [appraisers are] usually looking at market approach, which are sales of similar-type properties within their own neighborhoods.” Supp. 0028 (108:2-10). In comparison, “[w]ith the commercial property, [appraisers] look a lot at the income they produce” because the sale price data for commercial property is not as frequently available as for residential property and because the income produced by commercial property affects the sale price. Supp. 0028 (108:19-20; 109:1-8).

**4. Dwellings of three or fewer units experience significantly higher appreciation and therefore disproportionate tax burden than dwellings with larger housing capacity**

It is undisputed that without tax relief, residential property owners will unfairly bear a heavier tax burden than commercial property owners do, as “[r]esidential properties tend to appreciate at a higher rate and commercial tend to appreciate at a much more honest rate.” Supp. 0031 (119:21 – 121:19). As one means of offsetting this disparity, the state started calculating a percentage credit used to reduce an effective tax rate, known as tax reduction factor, in 1976.

Supp. 0031 (119:22 – 121:19). Subsequently, in 1980, the electorate enacted Article XII, Section 2a of the Ohio Constitution to incorporate the tax reduction factor into the Constitution.

*Id.* In “Argument for the Proposed Amendment,” the electorate stated:

Issue I will alter Ohio’s Constitution to create two classes of property: 1) residential and agricultural property, and 2) all other property (to include commercial and industrial property). Creating these classes, *most importantly*, will permit residential and agricultural tax relief to increase proportionately to inflationary increases in residential and agricultural real estate....

When general property tax relief is granted uniformly to all property without respect to what inflation has meant to rising residential and agricultural tax bills, the residential property taxpayer ends up, unfairly, shouldering a greater share of the property tax burdens than does business. Issue I will correct this ....

(Emphasis in original).

But the appreciation differences that prompted the tax reduction factor continue to persist. In fact, they have grown more disparate. Supp. 0036 (138); S. Supp. 0001. A triennial appraisal data prepared by the Franklin County Auditor’s Office shows that the appreciation rate of residential property in Franklin County has constantly been at least twice the rate of commercial property over the sample period since 1999. Supp. 2d 1. (Trial Exhibit G). (15.69% versus 8.09% in update tax year 1999; 12.23% versus 6.78% in reappraisal tax year 2002; 21.38% versus 7.70% in update tax year 2005). This result is consistent with the state-wide data compiled in Trial Exhibit H, according to which the median sales price of residential properties – 510, 520, and 530 all alike – accelerated at around seventy-nine percent (79%) over the last 15 years whereas 401s increased only by forty-nine percent (49%) in value and 402s by thirty-eight percent (38%). Supp. 0042 (164:14 – 165:4) (interpreting Trial Exhibit H). This trend is also manifested within the data contained in Trial Exhibit G, “Summary Data Sheet on Properties in Franklin County Owned by D&S Properties and/or David L. Fisher.” Supp. 2d \_\_\_\_\_. Trial Exhibit

G shows that commercial properties owned by D&S and/or Mr. Fisher appreciated 21.7% compared to the counterpart residential properties' 35.4% over the sample period since 1999. As a result of the disparate appreciation rate, the effective tax rate for Class 1 real property in year 2006 was set significantly lower at 52.70 mills than the one for Class 2 at 63.36 mills. Supp. 0035 (137:1 – 4). This differential “demonstrates an even more dramatic fashion that residential real property is appreciating at a much higher rate than commercial property has, because back in 1993, we had a four mill differential, and we can see that that number has grown.” Supp. 0035 (137:6-11).

**5. The court has recognized the classification scheme utilized in the ten percent (10%) rollback comports with the equal protection clause**

Equally significant, the Court, in *Roosevelt Properties Co.*, has recognized a very similar tax classification as compliant with equal protection. In that action, the classification utilized to implement the tax reduction factor was challenged on the very same grounds as that made by Appellants in the instant case. Recognizing a very real difference between dwellings used primarily as one's residence and dwellings utilized primarily to make money, the Court first noted that:

Finally, the Equal Protection Clause “\* \* \* imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation.” *Allied Stores of Ohio, Inc. v. Bowers* (1959), 358 U.S. 522, 526. “That a statute may discriminate in favor of a certain class does not render it arbitrary if the discrimination is founded upon a reasonable distinction, or difference in state policy.” *Id. at 528.*

*Roosevelt Properties Co.*, 12 Ohio St. 3d at 13. It then went on at 14-15 to analyze the reasonableness of a classification distinction between smaller and larger dwellings even though people live in both:

Similarly, we perceive no fatal constitutional defect in the classification which applies the reduction factor to homeowners

whose property also includes up to three additional dwelling units. We reject appellants' contentions that owner-occupied dwellings of four units or less are indistinguishable from large multiunit apartment complexes. As recently recognized by the Supreme Court of Minnesota in *Hegenes v. State* (1983), 328 N.W. 2d 719, 722:

“\* \* \* The fact that apartment units may all be put to the same use does not necessarily mean that they are all similarly situated for tax purposes. As the Tax Court points out, with respect to consumption of governmental services such as fire and police protection and in regard to the possible impact from the repeal of the limited-value tax statute, the small and large properties are not similarly situated. Or, to put it another way, the distinctions between the two classes are genuine, not fanciful \* \* \*.

“\* \* \* [T]here are manifest differences between a duplex and a large multiunit complex, and the fact that these differences diminish when comparing triplexes to four-unit properties goes to where the line should be drawn. For constitutional purposes, the line drawn need not be perfect. As Justice Holmes observed:

“When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark.’ *Louisville Gas & Electric Co. v. Coleman*, 277 U.S. 32, 41 \* \* \* (1928) (Holmes, J., dissenting).

“While this is a close case, we conclude that the line drawn by the legislature between apartment buildings of four or more and three or less units is not ‘wide of any reasonable mark’ and is based on distinctions which are genuine and have a rational basis.”

*Id.* at 13-14. Adopting the rationale of the Minnesota Supreme Court, the Court concluded:

Similarly, in the instant cause a rational basis exists for the classification extending a tax reduction factor to owner-occupied dwellings based upon a maximum number of dwelling units located on the property. The policy of Section 2a, Article XII, and *R.C. 5713.041* is clear; that is, the state intended to provide tax

relief to small property homeowners, as well as agricultural landowners, whose property values were appreciating more rapidly than other properties primarily utilized in business or commercial settings. By necessary implication, a legal distinction had to be drawn between these various classes of property.

Appellants are mistaken in their assertion that an owner-occupied duplex and a large multiple unit apartment complex are indistinguishable and, therefore, similarly situated for tax purposes. Clearly, the owner-occupied duplex retains characteristics of homeownership not otherwise attributable to a large multiunit apartment complex. We agree with the court in *Hegenes, supra*, that “the fact that these differences diminish when comparing triplexes to four-unit properties” or, as in this case when comparing four-unit properties to five-unit properties, becomes a question of line drawing. We conclude, however, that since the Equal Protection Clause does not impose an “iron rule of equality,” the line drawn in the subject cause is reasonable. Although the classification places a greater tax burden on those who are using their residential property primarily for income producing purposes, this is rational. The classification will withstand equal protection arguments on the basis of the state’s interest in reducing the tax burden on specified property owners to further economic policies.

Id. at 14-15. To same effect, see *Hegenes v. State* (Minn. 1983), 328 N.W.2d 719 (upholding a homestead classification of properties of three units or less when there was no exemption for properties with four or more units); *Ferland Corp. v. Bouchard* (June 3, 1999), R.I. Superior Ct. No. 98-4165, 1999 R.I. Super. LEXIS 49 (upholding homestead exemption for residential units of ten or less); and *Timberland Partners XXI, LLP v. Iowa Dept. of Rev.* (IA. 2008), 757 N.W.2d 172 (upholding rule classification that included as “residential”, single and two family dwellings and condominiums while all other apartments were classified as “commercial”). The same analysis applies to the instant case. As noted above, a sound rational basis exists for the distinctions set forth in R.C. 319.302 and mirrored in Ohio Adm. Code 5703-25-18 and Ohio Adm. Code 5703-25-10. The rules, therefore, also pass constitutional muster under Article I, Section 2 of the Ohio Constitution.

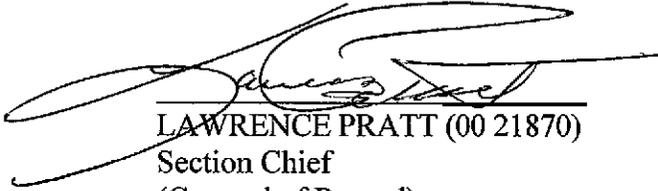
#### IV. CONCLUSION

This case presents fundamental jurisdiction issues that should have resulted in the dismissal of Appellants' Amended Application for rule review under R.C. 5703.14(C). As a quasi-legislative proceeding, R.C. 5703.14(C) is not the vehicle to challenge the constitutionality of the ten percent (10%) rollback of real property taxes for non-commercial real estate codified in R.C. 319.302(A)(1) and mirrored in Ohio Adm. Code 5703-25-18 and Ohio Adm. Code 5703-25-10. Moreover, until such time as the underlying statute would be ruled unconstitutional, any challenge to the rules is not ripe for review. In addition, since any alleged injury to Appellants is not caused by these rules, but by the statutory language the rules mirror, Appellants do not meet the standing requirements set forth in R.C. 5703.14(C).

The quasi-legislative nature of these proceedings should, in fact, result in the dismissal of the instant appeal and render the arguments addressed herein moot. In the event that the Court concludes otherwise, Appellants still cannot prevail. Ohio Adm. Code 5703-25-18 and Ohio Adm. Code 5703-25-10 are reasonable for purposes of R.C. 5703.14(C) since, as noted above, they mirror the language of R.C. 319.302(A)(1). The ten percent (10%) rollback is a partial exemption, long recognized by this Court as constitutional under the uniformity clause of the Ohio Constitution. The rules also pass muster under the equal protection clause as there are many reasons why the classification between residential and commercial properties is rationally based. Appellants have not shown beyond a reasonable doubt that the rules are unconstitutional. Accordingly, the Commissioner requests the Court to either dismiss this appeal or vacate the BTA decision and order that the Amended Application be dismissed or if the Court concludes jurisdiction has been present in both entities, find that the rules are reasonable and/or constitutional, and therefore valid.

Respectfully submitted,

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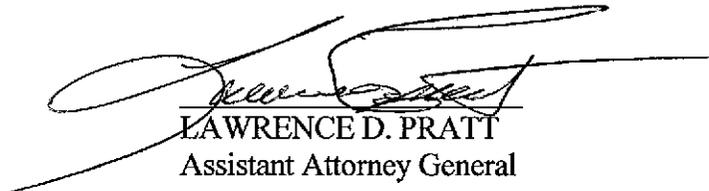
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the forgoing Merit Brief of the Appellee was served by regular U.S. mail, postage prepaid, this 1<sup>st</sup> day of May, 2009 upon the following:

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