ORIGINAL

IN THE OHIO SUPREME COURT

On Appeal from the Ohio Board of Tax Appeals

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

NOTICE OF SUPPLEMENTAL AUTHORITY BY
APPELLEE/CROSS-APPELLANT
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TAX COMMISSIONER OF OHIO

ATTORNEY GENERAL OF OHIO
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	:	
Appellee.		

Pursuant to §8 of Rule IX of the Rules of Practice of the Supreme Court, the Appellee, Richard A. Levin, Tax Commissioner of Ohio, hereby gives notice of supplemental authority that may be relied upon at oral argument in this matter scheduled for May 25, 2010. As supplemental authority the Court is referred to *Charbot v. DeCourcy, Jr.* (Nov. 18, 1981), Hamilton App. No. C-800804, unreported, 1981 Ohio App. Lexis 13788 (copy is attached as Exhibit A) and *Associated Industries of Missouri v. State Tax Commission of Missouri* (1987), 722 S.W.2d 916.

Respectfully submitted,

RICHARD CORDRAY
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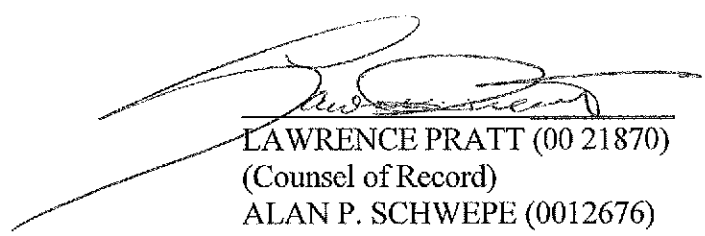

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the forgoing Notice of Supplemental Authority was served by regular U.S. mail, postage prepaid, this 18th day of May, 2010 upon the following:

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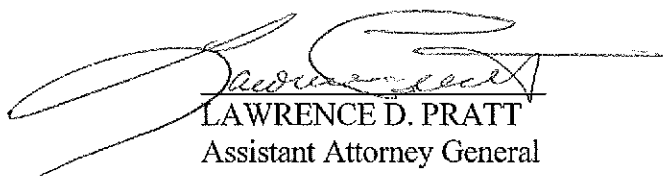

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Assistant Attorney General

LEXSEE 1981 OHIO APP. LEXIS 13788

GERARD J. CHABOT and DORIS T. CHABOT, Plaintiffs-Appellants, vs. JOSEPH L. DeCOURCY, JR. and WAYNE F. WILKE and ROBERT KINNEY, Defendants-Appellees.

NO. C-800804

COURT OF APPEALS, FIRST APPELLATE DISTRICT, HAMILTON COUNTY, OHIO

1981 Ohio App. LEXIS 13788

November 18, 1981

COUNSEL: [*1] Messrs. Holbrock, Jonson, Bressler & Houser, Timothy R. Evans, of counsel, 315 Monument Avenue, Hamilton, Ohio 45011, for Plaintiffs-Appellants,

Messrs. Simon L. Leis, Jr. and Robert W. Worth, 420 Hamilton County Court House, Court and Main Streets, Cincinnati, Ohio 45202, for Joseph L. DeCourcy, Jr. and Wayne F. Wilke, Defendants-Appellees,

Mr. William J. Brown and Mr. James C. Sauer, State Office Tower, 30 East Broad Street, Columbus, Ohio 43215, for Defendants-Appellees.

JUDGES: BLACK, P. J., and SHANNON, J., CONCUR.

OPINION BY: PALMER, J

OPINION

OPINION

This matter was commenced by the filing of plaintiffs-appellants' class action complaint against defendants-appellees, alleging appellants' status as residential property owners within the City of Cincinnati, and asserting, *inter alia,* that *R.C. 319.301*, as applied by appellees in determining tax reduction factors applicable to the district, unfairly and imporperly discriminated against residential property owners within the Cincinnati taxing district, resulting in proportionately lower tax relief for residential property compared to industrial and commercial property within the district, and as compared [*2] to residential property in other districts, thus resulting in a violation of both the Ohio Constitution and the *Fourteenth Amendment of the United States Constitution.* Following the taking of various depositions, motions for summary judgment were filed by both parties. The trial court granted that of appellees, and this appeal was timely taken therefrom, raising a single assignment of error on appeal: that the trial court erred in overruling appellants' motion for summary judgment and in granting summary judgment in favor of appellees. We disagree and affirm.

We think it useful, in setting out the factual basis for the instant cause, to quote the following extract from the brief of appellee, Commissioner of Tax Equalization, since much or most of the factual allegations said to be supportive of appellants' claim, are conceded or are assumed therein, as they will be here:

he appellee believes, however, that the complaint and answers filed by the parties reveal that the pertinent facts of this case were not in dispute, and could be assumed for purposes of the motion for summary judgment. As *R.C. 319.301* was then applied, [1] a reduction factor is computed on a district-wide basis [*3] for each levy in that district, without regard to the class of property. Therefore, since the average increase in the value of property may vary from district to district, there is no guarantee that a house in one district will have the same composite tax reduction factor as a comparable house in another district. The average increase in the taxable value of property in a district and thus the reduction factor for that district may be different from that of another

district, even though certain parcels of property within the different districts are similar and have experienced similar appreciations in value as a result of a reappraisal or valuation update.

1 Subsequent to the filing of the instant action, the Ohio Constitution and *R.C. 319.301* have both been amended to provide for the computation of reduction factors on a class basis. *Article XII, Section 2a, Ohio Constitution,* effective November 4, 1980, and 1980 H.B. 1238, effective December 19, 1980, codified in *R.C. 5713.041* and amended *R.C. 319.301*. These changes, in brief, provide for separate determinations, for the reduction purposes, of residential / agriculatural real property on the one hand, and all other lands and improvements on the other. Much of which appellants' complain is thus completely answered or considerably attenuated under present constitutional and statutory procedures.

[*4] .

The appellants in this case are residents of the City of Cincinnati taxing district. Within that district residential property has generally increased in value more than industrial or commercial property. The average increase in the true value of real property in the taxing district may, therefore, be less than in another district comprised mostly of residential property all of which has appreciated in value. The net effect of this is that the reduction factor for the City of Cincinnati is lower than for some of the surrounding districts, which are primarily residential. (Brief of Appellees, at3-4).

Appellants make, essentially, two claims with respect to the foregoing. First, appellants argue that *R.C. 319.301* (as it then provided) did not by its terms permit the determination on a districtwide basis of the percentage factor used in computing the tax reduction to be applied, but rather required either that a separate reduction factor should be calculated for each class of property within a district (appellants suggest separate clauses for residential, commercial, and industrial property) or, alternately, that the reduction factor be calculated on a parcel-by-parcel basis [*5] within the district. As its second argument, appellants advance the thesis that if the statute instead requires or permits the procedure adopted by the appellee Commissioner of Tax Equalization, then *R.C. 319.301*, as applied, violates Article II, Section 26 and *Article XII, Section 2, of the Ohio Constitution,* and the Equal Protection and *Due Process clauses of the Fourteenth Amendment to the United States Constitution.*

As to the first of these arguments, we find no persuasive evidence that *R.C. 319.301* [2] required, by the terms, an intradistrict classification of property for purposes of applying a separate reduction factor to each classification so established, nor do we find authority for a parcel-by-parcel determination. Indeed, our reading of the statute compels us to conclude that the procedures adopted by the appellee Commissioner were those precisely contemplated by the statute: that is, to determine and to certify the percentage by which the entire revenue derived from a district's tax must be reduced in order to result in the same amount as was prodeced by " . . . all real property in the district . . . " in the preceding year, in order that such percentage [*6] of reduction might be uniformly applied to all taxable property within the district. It is clear, therefore, that the trial court did not err in determining that the procedures adopted by the Commissioner in implementing *R.C. 319.301* were those required by the statute.

2 *R.C. 319.301*, in its pre-1980 form, provided in pertinent part:

As used in this section, "real property" includes real property owned by a public utility.

(A) With respect to each tax authorized to be leived by each taxing district, except taxes levied at whatever rate is required to produce a specified amount of tax money, or an amount to pay debt charges, taxes levied inside the ten-mill limitation and taxes authorized by the charter of a municipal corporation, the commissioner of tax equalization, annually, shall:

(1) Determine by what per cent the sums levied by such tax against real property would have to be reduced for the tax to levy the same number of dollars in the current year, exclusive of the sums levied against improvements added to the tax list since the preceding tax year, as were charged against all real property in the district by such tax in the preceding year subsequent to the reduction made under this division but before the reduction made under division (B) of this section. In the case of a tax levied for the first time and that is not a renewal of an existing tax, the commissioner shall determine by what per cent the sums that would otherwise be levied by such tax against real property would have to be reduced to equal the amount that would be levied if the full rate thereof were imposed against the total taxable value of real property in the district in the proceding tax year, plus the total taxable value of all improvements added to the tax list since the preceding tax year. A tax or portion of a tax that it designated a replacement levy under *section 3311.21 of the Revised Code* is not a renewal of an existing tax for purposes of this division.

(2) Certify the per cent determined in division (A)(1) of this section to the auditor of each county in which the district has territory; and the auditor, after complying with *section 319.30 of the Revised Code*, shall reduce the sum to be levied by such tax against each parcel of real property in the district by the per cent so certified. Certification shall be made by the first day of September except in the case of a tax levied for the first time, in which case certification shall be made within fifteen days of the date the county auditor submits the information necessary to make the required determination . . .

(E) If the commissioner is unable to certify a tax reduction factor for a taxing district located in more than one county by the last day of November because information required under division (D) of this section is unavailable, he may compute and certify an estimated tax reduction factor for that district. The estimated factor shall be based upon an estimate of the unavailable information. Upon receipt of the actual information for a taxing distirct that received an estimated tax reduction factor, the commissioner shall compute the actual tax reduction factor and use that factor to compute the taxes that should have been charged and payable against each parcel of property for the year for which the estimated factor resulted in an overpayment orunderpayment in taxes shall be added to or substracted from the amount due on each parcel in the ensuing tax year.

[*7] As to the constitutional arguments of appellants, these proceed, initially, on the theory that the Ohio Constitution [3] " . . . prohibits the averaging of reduction factor[s] district by district." (Brief of Appellants, at 12.) As authority for this proposition, we are cited to a series of cases beginning with *Zanesville v. Richards* (1855), *5 Ohio St. 589*, and continuing through the several *Park Investment* cases, [4] and their numerous progeny. What is, however, immediately apparent with respect to these authorities, is that they deal with an entirely different problem than that presented by the instant appeal, *viz*, with the constitutional necessity of taxing" . . . by uniform rule according to value." *Article XII, section 2, Ohio Constitution.* The interest thus constitutionally expressed is an interest in uniformity in the basis upon which the tax is levied, not upon the tax itself. The value of the property upon which a tax operates must, it is perfectly clear, be determined by a uniform rule throughout the state, with the single exception of land devoted exclusively to agricultural use. *Article II, Section 36, Ohio Constitution.* The amount [*8] of tax to be leived against real property, so uniformly valued, may, it is equally clear, vary from district to district, [5] depending, largely, upon the tolerance of the voting taxpayers of the particular district. *R.C. 5705.01 et seq.*

3 *Article II, Section 26, of the Ohio Constitution* provides as follows:

All laws, of a general nature, shall have a uniform operation throughtout the state; nor shall any act, except as relates to public schools, be passed, to take effect upon the approval of any other authority than the general assembly, except, as otherwise provided in this Constitution.

Article XII, Section 2, of the Ohio Constitution reads in part as follows:

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 reduction in value of the homestead of permanently and totally disabled residents and residents 65 years of age and older . . . .

4 *State, ex rel. Park Investment Co., v. Board of Tax Appeals* (1964), *175 Ohio St. 410, 195 N.E.2D 908*; *State, ex rel, Park Investment Co., v. Board of Tax Appeals* (1968), *16 Ohio St. 2d 85, 242 N.E.2D 887*, *State, Ex rel, Park Investment Co., v. Board of Tax Appeals* (1971), *26 Ohio St. 2d 161, 270 N.E.2D 342*; *State, ex rel. Park Investment Co., v. Board of Tax Appeals* (1972), *32 Ohio St. 2d 28, 289 N.E. 2d 579*. For a further review of associated authority, *See Lunkenheimer Co. v. Board of Revision* (1974), *41 Ohio App. 2d 27, 322 N.E.2D 133*.

5 Although, obviously, the amount of tax levied upon such uniform base may not vary within the taxing district (*i.e.*, the legislatively established class) without the possibility of running afoul of the equal protection provision of Article I of the Ohio Constitution. *See State, ex rel. Swetland, v. Kinney,* (1980), *62 Ohio St. 2d 23, 402 N.E.2D 542*.

[*9] As was stated by the majority in the recent case of *State, ex rel. Swetland, v. Kinney* (1980), *62 Ohio St. 2d 23, 26, 402 N.E.2D 542, 545*:

Certainly no serious issue may be taken with the fact that all of these cases held steadfastly to the constitutional requirement that "land and improvements thereon shall be fixed by uniform rule according to value". We hasten to add that the majority herein take no issue with, and affirm, the basic law enunciated in those cases to the effect that the Constitution mandates that real estate be taxed by way of a uniform rule both as to mode of valuation, as well as percentage of value constituting the base of the tax. However, none of the *park Investment* cases or their progeny discussed the issue of the constitutional authority of the General Assembly to provide for a lower tax rate for certain types of real estate by way of exemption or, as in this instance, partial exemption of real estate taxes.

The *Swetland* case involved the constitutionality of a statute partially exempting a homestead from real estate taxation. Relying, in part, upon *Denison University v. Board of Tax Appeals* (1965), *2 Ohio St. 2d 17, 205 N.E.2D* [*10] *896*, and its successors, and in part upon the *Park Investment* Cases,*supra* at n.4, the majority found no impediment to the legislation in either Article XII, Section 2, or in the equal protection clause contained in *Article I, Section 2, of the Ohio Constitution.*

The "uniform rule" requirement of Section 2, Article XII, operates to assure uniformity in valuation of real property, and uniformity in the percentage of fair market value which constitutes assessed value . . . . It also operates to require that in the taxation of real property the taxpayers shall be afforded equal protection of the laws under the Constitution. Such equal protection would require, first, that if there be established classifications of real estate taxpayers, any such classification must have a rational basis. Second, the equal protection provision would dictate that any legislatively established classes be taxed at a uniform rate.

Swetland, supra at 29, 402 N.E.2D 546 (citations omitted). Finding in *Dennison, supra*, and in *Dayton v. Cloud* (1972), *30 Ohio St. 2d 295, 285 N.E.2D 45*, and similar cases, constitutional authority in the General Assembly to create classifications [*11] for partial exemptions of certain types of real property, the *swetland* court discovered no constitutional impediment in the homestead exemption.

In the instant case, it is quite clear that the first two tests for constitutionality announced in *Swetland* have been met: there is uniformity in the valuation of real property and uniformity in the percentage of fair market value which constitutes assessed value. The *Park Investment* criteria are undisturbed by *R.C. 319.301*; indeed, the issue of valuation is not involved at all.

As to the third *Swetland* test, addressed to the issue of equal protection, and requiring a rational classification together with uniform rate of taxation within the legislatively established class, the case seems equally clear. The legislatively establihsed classification here is the taxing district, subdivision, or taxing unit. *R.C. 5705.01 et seq.* We know of no reason, have been cited to no authority, and decline to rule that this historic method of classification for local taxation purposes is not a rational classification. Further, the taxing authority of each such subdivision may then levy taxes, subject to certain [*12] limitations, on property within the subdivision to pay current operating expenses, make improvements, and for other purposes. *R.C. 5705.03.* Within the classification, *i.e.,* the taxing subdivision (and absent other legislatively established classifications within the district, such as the homestead classification), the rate of taxation must be uniform upon all property located therein. This is the general statutory schema and is further precisely the instant case under *R.C. 319.301*, where a Uniform tax reduction percentage is applied, under qualifying conditions, to all property within the district, in order to allow the taxing authority to continue to receive the same amount of tax revenues as has been authorized, without the windfall which would otherwise result from a protracted period of inflation of property values. This, we conclude, is all that Article XII, Section 2 and the Equal Protection clauses of Article I of the Ohio Constitution and the *Fourteenth Amendmant of the United States Constitution* require. If the several taxing districts levy differing rates of tax upon property within their respective districts, or if differing percentages of tax reductions [*13] are required from district to district, as is indeed the case, this degree of non-uniformity is both contemplated and without constitutional consequence.

It may be conceded that *R.C. 319.301* as it existed at the time appellant's action commenced, worked to some degree to the disadvantage of residential property owners residing in a mixed taxing district, such as Cincinnati, compared with residential owners in a more rapidly-inflating wholly residential district. Doubtless, this was the consideration compelling the 1980 addition of Section 2a of Article XII, and the enabling legislation, establishing classifications of property within a taxing district. [6] But it is not every disadvantage that rises to the level of a constitutional violation. So here, where we find no merit in the assignment of error, and affirm the judgment below.

6 It may be noted that if appellants' arguments were to be held correct, this constitutional amendment and the subsequent legislation would be, in effect, redundant, since the only constitutionally permissible legislation applying a tax reduction factor would have had to have been ap-

pliedto classifications of property within a taxing district, or on a parcel-by-parcel basis. The presumption against any such constitutional redundancy ought to be strong indeed

[*14] . PLEASE NOTE

The Court has placed of record its own entry in this case on the date of the release of this decision.