[Cite as *Wetland Preservation Ltd. v. Corlett,* 2012-Ohio-3884.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

WETLAND PRESERVATION LTD,	:	**O P I N I O N**
Appellee,	:	
- vs -	:	**CASE NO. 2011-A-0034**
ROGER A. CORLETT, CPA, et al.,	:	
Appellants.	:	

Administrative Appeal from the Ashtabula County Court of Common Pleas, Case No. 2009 CV 1027.

Judgment: Affirmed.

Kevin Hall, Hall & Hall, 355 East Center Street, Suite 101, Marion, OH 43302 (For Appellee).

Richard F. Hoffman, 101 E. Sandusky Street, Suite 320, Findlay, OH 45840 (For Appellants).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellants, Roger A. Corlett, the Ashtabula County Auditor, and the Ashtabula County Board of Revision ("the auditor"), appeal the judgment of the Ashtabula County Court of Common Pleas, finding that appellee, Wetland Preservation Ltd ("WPL"), qualifies for a reduced tax valuation under the "current agricultural use valuation" (CAUV) statute, R.C. 5713.30. The Ohio Farm Bureau Federation has also filed an amicus curiae brief in support of WPL's appeal. At issue is whether WPL's

wetland mitigation bank satisfies the definition of "land devoted exclusively to agricultural use" for purposes of the CAUV statute. For the reasons that follow, we affirm.

{¶2} The following statement of facts is derived from the hearing before the board of revision and is undisputed. David Trimble, a managing member of WPL, testified that in 1998, WPL purchased three parcels of farmland property in Ashtabula County, totaling approximately 200 acres. WPL intended to restore this land to its original state as wetlands; to convert the farmland into a wetland mitigation bank; and to participate in a federal conservation program designed to offset the destruction of wetlands.

{¶3} Mr. Trimble testified that in order to promote the federal policy of "no net loss" of wetlands and to prevent the further destruction of wetlands through development, the federal government has authorized the development of various federal conservation programs. A wetland mitigation bank is an example of one of these federal conservation programs.

{¶4} Mr. Trimble testified that a wetland mitigation bank is a vehicle by which privately owned land may be converted into wetlands under an agreement between the private landowner and various federal agencies comprising a Mitigation Bank Review Team. The federal agencies that are parties to the agreement are the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service, the U.S. Environmental Protection Agency, and the Natural Resources Conservation Service. Once the land receives governmental approval, a permit, referred to as a "Mitigation Bank Review Team Agreement," is issued to the landowner. The land then becomes a wetland mitigation

bank, and, in return for complying with the mitigation bank agreement, the owner of the bank is authorized to sell credits to approved private and governmental developers. Each credit from the wetland mitigation bank corresponds to a predetermined amount of wetland acreage. Developers can buy these credits and use them as offsets against wetlands that are unavoidably destroyed in their development activity. The number and availability of credits per wetland mitigation bank is regulated by the U.S. Army Corps of Engineers. The Corps also controls which wetland mitigation banks developers may buy credits from. The land in the wetland mitigation bank is required to be preserved as wetlands in perpetuity by a conservation easement. Despite this extensive federal regulation, the owner of the wetland mitigation bank and the purchaser of the credits are permitted to negotiate the price of each credit. Wetland mitigation banks help to offset the unavoidable environmental impact caused by the destruction of wetlands during construction and development.

{¶5} Mr. Trimble testified that WPL's wetland mitigation bank "is an integral part of agriculture," which is "trying to * * * preserve what farmland is there." He then provided examples of how WPL's wetland mitigation bank performs agricultural functions. He said WPL's wetland mitigation bank intersects runoff from adjacent farms, and cleans storm water runoff that is contaminated by silt, fertilizer, and other runoff pollutants.

{¶6} Mr. Trimble testified that in 1998, WPL applied for a Mitigation Bank Review Team Agreement. Its application was approved, and in 2000, it received a Mitigation Bank Review Team Agreement, which authorized it to sell credits to approved developers.

{¶7} Mr. Trimble testified that at the time of WPL's acquisition of its three parcels in 1998, the land had qualified for reduced tax valuation, i.e., the "current agricultural use value" (CAUV) by the county auditor for many years. CAUV permits land that is "devoted exclusively to agricultural use" to be valued for tax purposes at its current agricultural use, which generally results in lower taxes than valuing the land at its market value. In 1998, WPL filed an application with the county auditor, seeking to continue the valuation of its land under CAUV for tax year 1999. In its application, WPL stated that it was entitled to CAUV status pursuant to R.C. 5713.30(A)(1) because its property would be devoted to and qualified for compensation under a land conservation program under an agreement with a federal agency as a wetland mitigation bank. The auditor approved WPL's application.

{¶8} Thereafter, each year between 2000 and 2007, WPL applied for CAUV status for its property, stating in each application that its land was included in a wetland mitigation bank, and each year the auditor approved its request.

{¶9} Then, after operating its wetland mitigation bank for nine years, the auditor suddenly decided that WPL's parcels no longer qualified for CAUV status, and denied WPL's application for CAUV status for tax year 2008.

{¶10} On March 10, 2009, WPL filed a complaint against the valuation of its property with the county board of revision. The board of revision held a hearing on the matter. WPL presented Mr. Trimble as its witness along with many exhibits. The auditor presented no evidence contradicting any of the evidence submitted by WPL. Mr. Trimble's testimony was therefore undisputed. Following the hearing, the board of revision denied WPL's request for CAUV status with respect to each of its three parcels.

{¶11} WPL appealed the ruling of the board of revision to the trial court. The case was submitted to the court on the transcript of the hearing before the board of revision and the briefs of the parties. The trial court issued its decision in a detailed, nine-page judgment entry, dated April 21, 2011. In its entry, the court reversed the decision of the board of revision, finding that WPL's wetland mitigation bank satisfies the statutory definition of "land devoted exclusively to agricultural use." As a result, the court found that WPL's property was entitled to CAUV status. The auditor now appeals the trial court's judgment, asserting the following for his sole assignment of error:

{¶12} "The Common Pleas Court erred in finding Wetland Mitigation Banks are included in the definition of 'land devoted exclusively to agricultural use' found in R.C. 5713.30 as such a finding expands said definition beyond the constitutional limits of Ohio Cons. art [sic] II Section 36."

{¶13} R.C. 5717.05 provides for an appeal of a decision of a board of revision directly to the court of common pleas. The standard of review is substantially different than in most administrative appeals. *Concord Plaza General P'ship v. Lake County Auditor*, 11th Dist. No. 90-L-15-113, 1991 Ohio App. LEXIS 5984, *14 (Dec. 13, 1991). In determining an appeal from a county board of revision, a common pleas court does not merely review the judgment and decide whether it is supported by competent, credible evidence. *Id*. Instead, the trial court must render its own decision on the merits. *Id*.

{¶14} In *Black v. Board of Revision*, 16 Ohio St.3d 11 (1985), the Supreme Court of Ohio explained the trial court's standard of review on an appeal pursuant to R.C. 5717.05, as follows:

{¶15} While R.C. 5717.05 requires more than a mere review of the decisions of the board of revision by the trial court, that review may be properly limited to a comprehensive consideration of existing evidence and, in the court's discretion, to an examination of additional evidence. The court should consider all such evidence and determine the taxable value through its independent judgment. In effect, R.C. 5717.05 contemplates a decision de novo. * * * *Selig v. Bd. of Revision* (1967), 12 Ohio App. 2d 157, 165. *Black*, *supra*, at 14.

{¶16} Accordingly, a trial court's analysis of the evidence should be thorough and comprehensive. This review ensures that a court's final determination is not a mere rubber stamping of the board of revision's determination, but rather an independent investigation and complete reevaluation of a board of revision's value determination. *Park Ridge Co. v. Franklin Cty. Bd. of Revision*, 29 Ohio St.3d 12 (1987). A de novo review is required, and the trial court is required to reach its decision without any deference to the administrative ruling of the board of revision. *Teamster Hous., Inc. v. McCormack*, 8th Dist. No. 69583, 1996 Ohio App. LEXIS 1880, *9 (May 9, 1996).

{¶17} On appeal from the court of common pleas to the appellate court, "[t]he judgment of the trial court shall not be disturbed absent a showing of abuse of discretion." *Black*, *supra*, at paragraph one of the syllabus. This court has recently stated that the term "abuse of discretion" is one of art, connoting judgment exercised by a court, which does not comport with reason or the record. *Gaul v. Gaul*, 11th Dist. No. 2009-A-0011, 2010-Ohio-2156, ¶24, citing *State v. Ferranto* (1925), 112 Ohio St. 667,

676-678. The Second Appellate District has also recently adopted this definition of the abuse of discretion standard in *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, ¶65, citing Black's Law Dictionary (4 Ed.Rev.1968) 25 ("A discretion exercised to an end or purpose not justified by and clearly against reason and evidence").

{¶18} In 1973, the Ohio Constitution was amended, at Article II, Section 36, to provide: "Laws may be passed to encourage * * * agriculture * * *. * * * [L]aws may be passed to provide that land devoted exclusively to agricultural use be valued for real property tax purposes at the current value such land has for such agricultural use." As a result of this amendment, the Ohio Constitution authorized the legislature to enact laws that permit land devoted exclusively to agricultural use to be taxed at its current agricultural value.

{¶19} Thereafter, pursuant to the foregoing amendment to the Ohio Constitution, in 1974, the General Assembly enacted the "current agricultural use valuation" ("CAUV") statute, at R.C. 5713.30, et seq., which, in general, provides owners of "land devoted exclusively to agricultural use" with a reduced valuation of their land for real property tax purposes. CAUV is a tax exception allowing land to be taxed at its "current agricultural use value," rather than its highest and best use, which, in general, is its market value.

{¶20} R.C. 5713.30(A)(1)-(4) defines "land devoted exclusively to agricultural use," in pertinent part, as follows:

> **{¶21}** (1) Tracts, lots, or parcels of land totaling not less than ten acres that, during the three calendar years prior to the year in which application is filed under section 5713.31 of the Revised Code, and through the last day of May of such year, * * * *were devoted to and*

*qualified for payments or other compensation under a land * * * conservation program under an agreement with an agency of the federal government*;

{¶22} * * *

{¶23} (4) * * *

{¶24} "Land devoted exclusively to agricultural use" includes tracts, lots, or parcels of land or portions thereof that are used for conservation practices, provided that the tracts, lots, or parcels of land or portions thereof *comprise twenty-five per cent or less* of the total of the tracts, lots, or parcels of land * * * together with the tracts, lots, or parcels of land or portions thereof that are used for conservation practices." (Emphasis added.)

{¶25} Thus, R.C. 5713.30(A) provides two alternative definitions of "land devoted exclusively to agricultural use" with respect to lands used for conservation purposes. Under R.C. 5713.30(A)(1), wetlands are agricultural *if the land qualifies for payment under a land conservation program under an agreement with a federal agency.* Under this definition, CAUV applies, regardless of the percentage of the landowner's property used for conservation purposes. In contrast, under R.C. 5713.30(A)(4), wetlands are agricultural if the landowner devotes 25 per cent or less of his total land to conservation purposes. The primary distinction between these alternative definitions of agriculture is whether the land qualifies for payment under a land conservation program under an agreement with a federal agency. If it does, then the 25 per cent limit does not apply; if it does not, then the 25 per cent limit applies.

{¶26} The auditor argues that WPL's wetlands do not qualify for CAUV status because they do not meet the requirement of R.C. 5713.30(A)(4) that wetlands must be limited to 25 per cent or less of the landowner's total property. However, in making this argument, the auditor ignores the alternative definition of "land devoted exclusively to agricultural use" under R.C. 5713.30(A)(1). This alternative definition does not require that wetlands be limited to 25 per cent or less of the landowner's property, as long as the property is qualified for payment under a land conservation program under an agreement with a federal agency.

{¶27} The auditor concedes that R.C. 5713.30, as written, is a valid and constitutional enactment of the General Assembly. However, he argues that in granting WPL's wetland mitigation bank CAUV status, the trial court erred in "interpreting" the term "agriculture" in R.C. 5713.30(A)(1) too broadly. The auditor argues the term "agriculture" in the Ohio Constitution was meant to refer only to traditional farming applications, such as producing crops and raising livestock, which, he argues, do not include conservation programs, such as wetlands. He argues that the trial court's interpretation of the term "agriculture" in R.C. 5713.30(A)(1) to include WPL's wetland mitigation bank results in a conflict between this statute and the Ohio Constitution, rendering the statute unconstitutional. As a result, he argues the trial court's finding that WPL's wetland mitigation bank qualifies for CAUV pursuant to R.C. 5713.30(A)(1) must be reversed to save the constitutionality of that statute.

{¶28} The dissent misconstrues the auditor's argument. The dissent contends that the auditor asserts an as-applied constitutional challenge to R.C. 5713.30(A)(1). However, the auditor does *not* assert an as-applied or, for that matter, any constitutional

challenge to the statute. In fact, the auditor expressly states that he is "not arguing R.C. 5713.30 is unconstitutional." To the contrary, he argues the statute must be "interpreted" to exclude WPL's wetland mitigation bank from its operation. This does not constitute an as-applied constitutional challenge. We note that because the dissent states the only issue is "whether the statute is constitutional as applied," and *there is no constitutional challenge before us*, the dissent's opinion is unnecessary.

{¶29} The auditor's argument fails for several reasons.

{¶30} First, the auditor fails to reference any pertinent authority in support of his argument that the phrase "land devoted exclusively to agricultural use" in the Ohio Constitution was meant to be limited to traditional farming applications and not to include conservation programs, such as wetland mitigation banks. The auditor's failure to reference pertinent authority violates App.R. 16(A)(7). For this reason alone, the auditor's assignment of error lacks merit.

{¶31} We note that in the trial court, the auditor relied on an opinion of the Ohio Attorney General, No. 2009-020, which he had solicited to support his position in this matter. However, on appeal to this court, the auditor does not even cite it. As a result, the auditor has abandoned his former reliance on this opinion for purposes of this appeal without citing any other pertinent authority in support.

{¶32} Second, while the auditor does not challenge the constitutionality of R.C. 5713.30(A)(1), we note that it does not conflict with any provision of the Ohio Constitution and is therefore constitutional. Statutes enjoy a strong presumption of constitutionality. "An enactment of the General Assembly is presumed to be constitutional, and before a court may declare it unconstitutional it must appear beyond

a reasonable doubt that the legislation and constitutional provisions are clearly incompatible." *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142 (1955), at paragraph one of the syllabus. "A regularly enacted statute of Ohio is presumed to be constitutional and is therefore entitled to the benefit of every presumption in favor of its constitutionality." *Id*. at 147. "That presumption of validity of such legislative enactment cannot be overcome unless it appear[s] that there is a clear conflict between the legislation in question and some particular provision or provisions of the Constitution." *Xenia v. Schmidt*, 101 Ohio St. 437 (1920), at paragraph two of the syllabus; *State ex rel. Durbin v. Smith* 102 Ohio St. 591, 600 (1921); *Dickman*, *supra*. Accordingly, there is a strong presumption that R.C. 5713.30(A)(1) is constitutional.

{¶33} Thus, in order for the definition of "agriculture" at R.C. 5713.30(A)(1) to be unconstitutional, it must appear, beyond a reasonable doubt, that a clear conflict exists between the definition of "agriculture" in the statute and some particular provision of the Ohio Constitution. However, the auditor concedes that the Ohio Constitution does not define "agriculture." Moreover, pursuant to Article II, Section 36 of the Ohio Constitution, the General Assembly defined "agriculture" at R.C. 5713.30(A)(1) to include land that qualifies for payment in a conservation program under an agreement with a federal agency, such as wetland mitigation banks. Since the Ohio Constitution does not define the term "agriculture" and the statute defines it to include wetland mitigation banks, there is no clear conflict between R.C. 5713.30(A)(1) and the Ohio Constitution. As a result, R.C. 5713.30(A)(1) is constitutional.

{¶34} Third, the auditor has failed to demonstrate that the pertinent provisions of R.C. 5713.30(A)(1) are subject to interpretation. The auditor contends that the term

"land devoted exclusively to agricultural use," defined at R.C. 5713.30(A)(1), must be interpreted to comply with the traditional meaning of the term "agriculture" as contemplated in the Ohio Constitution. However, the auditor is incorrect because we cannot interpret a statute, even to avoid an alleged conflict with a constitutional provision, *unless the statute is ambiguous*. *Chambers v. Owens-Ames-Kimball Co*., 146 Ohio St. 559, 566 (1946); *Wilson v. Kennedy*, 151 Ohio St. 485, 492 (1949). An ambiguity exists if the language is susceptible to more than one reasonable interpretation. *State v. Swidas*, 11th Dist. No. 2009-L-104, 2010-Ohio-6436, ¶17.

{¶35} The Supreme Court of Ohio has held that "'if the meaning of a statute is clear on its face, then it must be applied as it is written.'" *Hartmann v. Duffey*, 95 Ohio St.3d 456, 2002-Ohio-2486, ¶8, quoting *Lake Hosp. Sys., Inc. v. Ohio Ins. Guar. Assn*., 69 Ohio St.3d 521, 524 (1994). "Thus, if the statute is unambiguous and definite, there is no need for further interpretation." *Id*. "'To construe or interpret what is already plain is not interpretation but legislation, which is not the function of the courts.'" *Lake Hosp. Sys., Inc*., *supra*, quoting *Iddings v. Jefferson Cty. School Dist. Bd. of Edn*., 155 Ohio St. 287, 290 (1951). "Where the language of a statute is plain and unambiguous * * *, there is no occasion for resorting to rules of statutory interpretation." *Sears v. Weimer*, 143 Ohio St. 312 (1944), paragraph five of the syllabus.

{¶36} As noted above, Ohio Constitution, Article II, Section 36 provides that "laws may be passed to provide that land devoted exclusively to agricultural use be valued for real property tax purposes at the current value such land has for such agricultural use." Upon the authority of this section, the General Assembly defined the phrase "land devoted exclusively to agricultural use" in R.C. 5713.30(A)(1) to include

lands that are "devoted to and qualified for payments or other compensation under a land * * * conservation program under an agreement with an agency of the federal government." The auditor argues this definition is ambiguous, and the trial court should have interpreted it by excluding parcels that are in a land conservation program. However, the auditor has not even attempted to demonstrate that the pertinent language in this statute is susceptible to more than one reasonable interpretation. To the contrary, the express language of the statute clearly and unambiguously defines "land devoted exclusively to agricultural use" to include land that qualifies for payment under a land conservation program under an agreement with a federal agency. We perceive nothing in this language suggesting it is ambiguous. Moreover, the Ohio Supreme Court has stated that "the wording of [R.C. 5713.30(A)(1)] is straightforward and its meaning is clear." *Board of Education v. Board of Revision*, 57 Ohio St.2d 62, 68 (1979).

{¶37} Because the auditor does not assert a constitutional challenge to R.C. 5713.30(A)(1), the statute is not ambiguous; and WPL's wetland mitigation bank meets the statutory definition of "land devoted exclusively to agricultural use," the trial court did not abuse its discretion in applying the statute as written to WPL's wetland mitigation bank.

{¶38} Fourth, the auditor's argument violates persuasive case law authority. The Third Appellate District addressed virtually the same issue now before us in *Wetland Resource Center, LLC v. Marion County Auditor*, 157 Ohio App.3d 203, 2004-Ohio-2470 (3d Dist.). In that case, the landowner, WRC, created a wetlands mitigation bank in compliance with federal requirements and received authorization to sell credits

to developers. WRC then filed an application with the auditor, seeking to continue the valuation of its land under CAUV. The application was denied on the grounds that the use of the land as a wetland mitigation bank did not meet the statutory definition of "land devoted exclusively to agricultural use." The board of revision upheld the auditor's decision. The trial court reversed the auditor's decision. The auditor and the board of revision appealed. The appellate court affirmed the trial court's decision, noting that WRC has an agreement with a consortium of federal agencies to participate in a valid conservation program as a wetland mitigation bank. The court held that "the compensation WRC receives by selling wetland credits to developers qualifies as 'payments or other compensation under an agreement with an agency of the federal government' within the meaning of R.C. 5713.30(A)(1)." *Id.* at 208. The court further held that a wetland mitigation bank qualifies as "land devoted exclusively to agricultural use" and is therefore entitled to CAUV status. *Id*.

{¶39} We find the reasoning of the Third District to be persuasive. In light of the fact that *Wetland Resource Center*, *LLC* is the only Ohio appellate case to have previously addressed the issue before us, it is noteworthy that the auditor makes no attempt to distinguish it or to argue that the Third District erred in its holding.

{¶40} The dissent maintains that *Wetland Resource Center, LLC* is not persuasive authority here because the court in that case did not address the identical issue presented here. However, the Third District held that a wetland mitigation bank qualifies as "land devoted exclusively to agricultural use," and that its owner qualifies for reduced tax valuation under R.C. 5713.30(A)(1). *Id*. at ¶1. Thus, contrary to the dissent, *Wetland Resource Center* provides compelling authority for our holding.

{¶41} In summary, the Ohio Constitution authorized the General Assembly to pass laws to provide that land devoted exclusively to agricultural use be valued according to its current agricultural use. On this authority, the legislature enacted R.C. 5713.30(A)(1), which defines "land devoted exclusively to agricultural use" to include (1) land that qualifies for payments (2) under a land conservation program (3) under an agreement with a federal agency. This statutory definition does not conflict with any provision of the Ohio Constitution, and the statute is therefore constitutional. Further, the statutory definition is plain and unambiguous, and the trial court was therefore not required, or permitted, to interpret it by excluding from the definition of agriculture land that is in a land conservation program. Finally, since WPL's wetland mitigation bank meets each requirement of the statutory definition, it is entitled to CAUV status. We therefore hold the trial court did not abuse its discretion in affirming the decision of the board of revision.

{¶42} By contending we should interpret R.C. 5713.30(A)(1), the auditor and the dissent ignore the well-established law that, unless a statute is ambiguous, it is not subject to interpretation *for any reason.* The language of the statute clearly and unambiguously expresses the legislature's intent to include land qualified to receive payments under a federal conservation program, such as WPL's wetland mitigation bank, in its definition of "land devoted exclusively to agricultural use," and we are bound to follow that intent. *State v. Hairston*, 101 Ohio St.3d 308, 2004-Ohio-969, ¶12.

{¶43} For the reasons stated in this opinion, appellants' assignment of error is overruled. It is the judgment and order of this court that the judgment of the Ashtabula County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J., concurs in judgment only,

THOMAS R. WRIGHT, J., dissents with a Dissenting Opinion.

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THOMAS R. WRIGHT, J., dissents with a Dissenting Opinion.

{¶44} Being unable to agree with the lead opinion, I respectfully dissent.

{¶45} I take no exception that wetland mitigation banks qualify for tax relief under the statute at issue or that the statute is unambiguous. The question before us, however, is whether the statute is constitutional as applied.

{¶46} The lead opinion takes the position that the auditor presents no constitutional challenge and that, instead, the auditor simply asks this court to construe an unambiguous statute. A review of appellant's brief, however, demonstrates that the auditor takes issue with the constitutionality of the statute. The auditor's assignment of error asserts that the trial court's conclusion that wetland mitigation banks constitute "land devoted exclusively to agricultural use" expands the definition beyond the constitutional limits of Article II, Section 36. On page four of its brief, appellant expressly argues that in determining whether a statute exceeds constitutional limits, a court must construe the terms of the constitution according to their plain and ordinary use. Appellant further argues that the plain language of the constitution sets limits upon property that may be exempted or otherwise afforded tax relief.

{¶47} Immediately thereafter, appellant cites the language of Ohio Constitution, Article II, Section 36 in its entirety. After citing the applicable constitutional limitation in its entirety, appellant argues that while the legislature is permitted to pass laws

promoting wetlands, it is constitutionally authorized to grant tax relief only to forestry or agricultural uses. Moreover, riddled throughout his brief is the argument that wetlands do not constitute "agricultural use" according to its plain and ordinary meaning and that, therefore, constitutional limits have been exceeded.

{¶48} In its amicus curiae brief, appellant's adversary, the Ohio Farm Bureau Federation, in arguing against appellant's position, recognizes that "* * * appellants are essentially making an as applied constitutional challenge to R.C. 5713.30 * * *."

{¶49} While I cede that at times appellant is less than direct, vacillates, and *also* argues that the statute is ambiguous, he has advanced an as applied constitutional challenge. For whatever reasons, the lead opinion does not agree. As the constitutionality of R.C. 5713.30 is squarely before this court, I address the issue.

{¶50} The provision of the Ohio Constitution enabling the creation of the CAUV program is found in Article II, Section 36, and states that:

{¶51} "[L]aws may be passed to encourage forestry and agriculture, and to that end areas devoted exclusively to forestry may be exempted, in whole or in part, from taxation. * * * laws may be passed to provide that land devoted exclusively to agricultural use be valued for real property tax purposes at the current value such land has for such agricultural use."

{¶52} In sum, this provision authorizes the General Assembly to enact laws that exempt forest land from taxation and permits agricultural land to be taxed at its agricultural use value. Further, this provision specifically authorizes the passage of laws "to provide for the conservation of the natural resources of the state, including

streams, lakes, submerged and swamp lands * * * and the formation of drainage and conservation districts." *Id*.

{¶53} As an introductory matter, a basic principle of statutory construction must be recognized. The principles governing the construction of statutes also apply to the construction of constitutional provisions. *Smith v. Leis*, 106 Ohio St.3d 309, 2005-Ohio-5125, ¶57. The doctrine of "strict constructionism" holds that judges should interpret documents, including the Ohio Constitution, according to their literal terms, without looking to other sources to ascertain the meaning. *See* Black's Law Dictionary 356 (9th Ed. 2009).

{¶54} Applying the rule of strict construction regarding tax exceptions to the case at bar:

{¶55} "[T]he General Assembly was authorized to define and specify which activities were reasonably included as agricultural uses, but it could not constitutionally expand the agricultural exception authorized by Ohio Const. art. II, §36 to include land that was not 'devoted exclusively to agricultural use.' To preserve the constitutionality of R.C. 5713.30(A), its provisions must be read in a manner that includes within the definition of '[l]and devoted exclusively to agricultural use' only land that reasonably comes within the language of Ohio Const. art. II, §36. R.C. 1.47; *State v. Sinito*, 43 Ohio St.2d 98, 101 ***." 2009 Ohio Atty. Gen. Ops. No. 2009-020, at *15-16.

{¶56} With that parameter in mind, we must determine the meaning of the constitutional provision. The first step in doing so is to look at the language of the provision itself. *State ex rel. King v. Summit Cty. Council*, 99 Ohio St.3d 172, 2003-Ohio-3050, ¶35. As the lead opinion correctly states, the terms "agriculture" and

"agricultural use" are not defined in the Ohio Constitution. "Words used in the Constitution that are not defined therein must be taken in their usual, normal, or customary meaning." *State ex rel. Taft v. Franklin Cty. Court of Common Pleas,* 81 Ohio St.3d 480, 481 (1998). The Ohio Supreme Court has dictated that courts should resort to dictionary definitions to determine the meaning of constitutional language when such terms are not specifically defined by the Constitution. *See State ex rel. Saxbe v. Brand*, 176 Ohio St. 44 (1964). The usual, normal, or customary meaning of "agriculture" as defined in the 1973 and 1974 editions of Merriam-Webster Dictionary at the time the constitutional provision at issue was enacted is "the science or art of cultivating the soil, producing crops, and raising livestock and in varying degrees the preparation of these products for man's use and their disposal (as by marketing): FARMING." That definition remains substantially the same today: "the science, art, or practice of cultivating the soil, producing crops, and raising livestock and in varying degrees the preparation and marketing of the resulting products: FARMING." Merriam-Webster Online Dictionary (2012). Furthermore, the current Black's Law Dictionary 80 (9th Ed. 2009) defines "agriculture" as "[t]he science or art of cultivating soil, harvesting crops, and raising livestock."

{¶57} Further underscoring the dictionary definitions of "agriculture" is the stated purpose of the provision as it was published by the General Assembly and later interpreted by the Ohio Supreme Court. In 1973, Am. H.J.R. No. 13, 135 Ohio laws, Part I, 2043, was submitted to the voters as Issue I, and ultimately amended Ohio Constitution, Article II, Section 36 to include special consideration of agriculture. The supporting analysis to Am H.J.R. No. 13 in its final reading on February 21, 1973 stated

that its "PURPOSE" was "to enable the General Assembly to provide property tax relief to agricultural land owners."

{¶58} As the Ohio Supreme Court acknowledged in *Bd. Of Edn. v. Bd. Of Revision*, 57 Ohio St.2d 62, 66, n. 4 (1979):

{¶59} "[I]t is true that the intent of the constitutional amendment was to give relief to *farmers* whose land was slowly being engulfed by commercial land through the growth of towns and cities and who were being driven out of business by the soaring real property taxes attendant upon revaluation of their property under the 'highest and best use' rule." (Emphasis added).

{¶60} OAC Ann. 5703-25-30(B)(25) sets forth the definition of "Tracts, lots or parcel" for purposes of R.C. 5713.30 as:

{¶61} "[A]ll distinct portions or pieces of land (not necessarily contiguous) where the title is held by one owner, as listed on the tax list and duplicate of the county, which *are actively farmed* as a unit if together the total acreage meets the requirements of section 5713.30(A)(1) or (A)(2), or the Revised Code." (Emphasis added). Although not codified language, this definition bolsters, provides supplementary direction, and comports with the stated purpose of the constitutional provision.

{¶62} Furthermore, the definition of "exclusively" is self-evident and does not require thorough analysis. Nonetheless, we note that Merriam-Webster Online (2012) defines "exclusive" as "limiting or limited to possession, control, or use by a single individual or group." The term "exclusive" has also been recognized by the Ohio Supreme Court as meaning "primarily." *Maralgate, L.L.C. v. Greene Cty. Bd. of Revision*, 130 Ohio St.3d 316, 2011-Ohio-5448, ¶11.

{¶63} Reading the foregoing definitions of "agriculture" and "exclusively" together, it is evident that a CAUV participant is required to demonstrate that its land is being actively and primarily used in furtherance of cultivation for the production of crops and raising livestock. Viewing those terms within the framework of the governing principles of statutory construction as outlined above, the overarching question here is whether the WPL's wetland mitigation bank constitutes "agriculture" and "land devoted exclusively to agricultural use" under the plain language and purpose of Ohio Constitution, Article II, Section 36? As discussed below, WPL's use of its property does not reasonably fall within the meaning of "land devoted exclusively to agricultural use" when viewed under the lens of the language and purpose of Ohio Constitution, Article II, Section 36.

{¶64} Mr. Trimble testified on behalf of WPL that the properties at issue "have essentially had a hundred percent of the wetlands or streams restored on them and they're covered by a permanent conservation easement[.] * * * They're permanently conserved." He also testified that "mitigation bankers like myself, are compensated for preserving the environment and restoring the environment. That's the whole premise of the program is that we're compensated." Therefore, no part of WPL's property is dedicated to "agricultural use." It is clear that WPL's land is being used exclusively, or at the very least, primarily for *non*-agricultural purposes, i.e. wetlands, with the sole purpose of environmental preservation and conservation for compensation.

{¶65} WPL is explicitly in the business of selling wetland mitigation credits to developers who are impairing or destroying wetlands elsewhere. That activity does not comport with the definition of "agriculture" and "land devoted exclusively to agricultural

use" as contemplated by Ohio Constitution, Article II, Section 36, which envisions primarily soil cultivation, crop production, and raising livestock. Testimony in this case supports the proposition that conservation practices and programs are most certainly a critical *component* of agriculture. However, when viewed in light of the language of Ohio Constitution, Article, II, Section 36, they do not, standing alone, qualify as "agriculture."

{¶66} Furthermore, as previously noted, the language of Ohio Constitution, Article II, Section 36 does not put "conservation of the natural resources of the state" in the same category as "forestry" and "agriculture." While this constitutional provision authorizes a tax break for forests and agricultural lands, it does not include a similar reference in the tax relief portion for any other property apart from forests and agricultural land. The express language of Ohio Constitution, Article II, Section 36 clearly limits the legislature's tax relief authority to "forestry" and "agriculture." While WPL maintains that its use of the subject property as wetlands is critical to agriculture because it intersects runoff from adjacent property and prevents agricultural discharge from entering streams, that function does not qualify its property as exclusively or primarily "agricultural use." WPL's failure to use *any* of its property for agriculture prevents it necessarily from being categorized as "land devoted exclusively to agricultural use." Ohio Constitution, Article II, Section 36.

{¶67} "Where it is claimed that a statute is unconstitutional as applied, the challenger must present clear and convincing evidence of a presently existing set of facts that makes the statute unconstitutional when applied to those facts." *State v. Henderson*, 11th Dist. No. 2010-P-0046, 2012-Ohio-1268, ¶12. Contrarily, "[t]o mount a

successful facial challenge, the party challenging the statute must demonstrate that there is no set of facts under which the statute would be valid, i.e., that the law is unconstitutional in all of its applications." *Id.* The auditor, for the reasons stated, has asserted a valid "as applied" constitutional challenge.

{¶68} Finally, the lead opinion relies on the Third Appellate District case, *Wetland Resource Center, LLC v. Marion County Auditor*, 157 Ohio App.3d 203, 2004-Ohio-2470 (3rd Dist.), as persuasive case law authority in support of its conclusion. Contrary to the lead opinion's contention, *Wetland Resource, LLC* does not address "virtually the same issue now before us." As stated clearly in the *Wetland Resource, LLC* opinion, the specific issue before the Third Appellate District was "whether privately paid, but governmentally authorized, compensation fits within the statutory meaning of 'payments or other compensation under a land retirement or conservation program under an agreement with an agency of the federal government' as used in R.C. 5713.30(A)." *Id*. at ¶12. The Third District's analysis focused solely on the *source* of the payment or compensation rather than the *use* of the land as a wetland mitigation bank. Specifically, the Third District examined the definition of the term "under" in order to determine whether a payment that is supervised, controlled, or influenced by an agreement with a federal agency can be "under" that agreement without also being directly "from" the federal agency. *Id.* at ¶14. The Third District's subsequent conclusion that the landowner's wetland qualified as "land used exclusively for agricultural use" was based on the singular determination that the landowner's right to receive any compensation from selling of wetland credits to developers arises "under"

the agreement between the private landowner and federal agency within the meaning of R.C. 5713.30(A)(1). *Id*. at ¶16.

{¶69} To be specific, the *Wetland Resource, LLC* decision never addressed the question that looms in this case. There is no discussion or analysis in *Wetland Resource, LLC* of whether the landowner's actual *use* of the land as a wetland mitigation bank qualified as "land devoted exclusively to agricultural use" when construed strictly against the language of Ohio Constitution, Article II, Section 36 and the limits that provision placed upon the General Assembly in enacting the CAUV legislation. The resolution of that particular issue was apparently not contested by the parties or simply presumed. Consequently, W*etland Resource Center, LLC* cannot be considered persuasive authority in support of the WPL's position that it deserves CAUV status based on the categorization of its land as a wetland mitigation bank.

{¶70} WPL's land is being used primarily for conservation, which is not a use that qualifies for constitutionally permitted tax relief. Simply because WPL's use of its land is of benefit to surrounding lands primarily or exclusively devoted to "agricultural use" does not qualify it for CAUV tax relief.

{¶71} It is interesting to note that while the lead opinion concludes there is no constitutional issue before us, a significant amount of that opinion addresses constitutional issues. Seemingly, this constitutes gratuitous obiter dictum in light of the opinion's threshold conclusion that no constitutional issue is before us. Nevertheless, I write further to address a mischaracterization of the arguments presented by the auditor as well an erroneous legal conclusion.

{¶72} At one point, the lead opinion states that the auditor has violated App.R. 16(A)(7) by failing to reference pertinent authority in support of his argument that the phrase, "land devoted exclusively to agricultural use," in the Ohio Constitution was meant to be limited to traditional farming applications and not to include conservation programs. In fact, the auditor did cite authority to support his proposition. On page four of his brief, the auditor expressly argues that when courts review statutes to determine if constitutional limits have been exceeded, undefined terms in the constitution are to be given their plain and ordinary meaning. Thereafter, the auditor cites a dictionary definition of agriculture. To this extent, authority is provided.

{¶73} Rather than applying this unchallenged proposition and define agricultural according to its plain and ordinary meaning, the lead opinion states that, because "agriculture" is not defined in the Ohio Constitution, no clear conflict was created when the legislature statutorily defined the term to include wetlands. Simply stated, that is not the proper rule for determining whether a statute is constitutional. Under the lead opinion's approach, any undefined term in the Constitution could simply be defined by the legislature and no conflict would exist. This approach does not follow time honored law of giving undefined terms in the Constitution their plain and ordinary meaning. Moreover, given that very few terms in the Constitution are defined, the lead opinion's approach would eliminate any constraint on the legislature, thereby vitiating the Constitution's very purpose.

{¶74} For the foregoing reasons, I respectfully dissent.