IN THE SUPREME COURT OF OHIO

Kenneth Adams, et al.,	)	
	)	**Case No. 2016-0256**
Appellants,	)	
	)	**On Appeal from the Ohio Board of**
v.	)	**Tax Appeals, Case No. 2015-1090**
	)	
Joseph W. Testa, Tax Commissioner of Ohio,	)	
	)	
Appellee	)	

REPLY BRIEF OF APPELLANTS KENNETH ALLAN ADAMS, TRUSTEE, ON BEHALF OF KENNETH A. ADAMS REVOCABLE LIVING TRUST; SAMUEL AUSTIN BEAL AND CAROLYN SUE BEAL, TRUSTEES, ON BEHALF OF BEAL FAMILY TRUST; ROGER EUGENE BECK AND SUZANNE POWERS BECK; RODNEY KENT CLINGER; DAVID NOEL COLDWELL; DANIEL FRANCIS COLDWELL, BONNIE JO WISEMAN, LARRY DALE COLDWELL, DAVID NOEL COLDWELL, AND SUSANNE BETH LYLE (THE TRUSTEE), ON BEHALF OF THEMSELVES AND THE V. LOUISE COLDWELL FAMILY TRUST; JEROME CHRISTOPHER CUNNINGHAM AND SUANN MARIE CUNNINGHAM, TRUSTEES, ON BEHALF OF THE JEROME AND SUANN CUNNINGHAM REVOCABLE TRUST; JEROME CHRISTOPHER CUNNINGHAM, TRUSTEE, ON BEHALF OF THE FLORENCE IRENE CUNNINGHAM LIVING TRUST; SYLVESTER JAMES EWERS, JR.; EWERS FAMILY FARM LLC; STEPHEN LEE FISHER AND TAMARA LOUISE FISHER; DONALD ROY GRAHAM, JR.; FRANK CONRAD GRAUER AND SHARON A. GRAUER; ROBERT BOYD GRAY AND CAROLYN MARIE GRAY; LLOYD NEIL GROGG AND PHYLLIS LAURA GROGG, TRUSTEES, ON BEHALF OF GROGG FAMILY PRESERVATION TRUST; HAMMAN NOBLE BOYCE FARMS, LLC; DAN EUGENE HERSHNER, TRUSTEE, ON BEHALF OF HERSHNER KEYSTONE INHERITANCE TRUST; WILLIAM BRUCE HOUK AND SANDRA LEE HOUK; DONALD EUGENE LINN AND MARCELLA ROSE LINN, TRUSTEES, ON BEHALF OF THE LINN FAMILY LIVING TRUST; RAYMOND DALE LINN AND JUDITH ZIMMER LINN; LOGAN FARMS, INC.; FRANK LUPPINO; BERT A. RAYL AND MARLENE R. RAYL, TRUSTEES, ON BEHALF OF BERT A. RAYL AND MARLENE R. RAYL LIVING TRUST; SCIOTO LAND COMPANY, LLC AKA BOWMORE, LLC; MARC EDWARD STADLER AND SHARY RISTING STADLER; STADLER VALLEY VIEW FARM, LLC; JAMES EARL THARP AND LISA ANN SHOCK THARP; JACOB RAYMOND WILLIAMS AND CAROLYN JEAN WILLIAMS, TRUSTEES, ON BEHALF OF JACOB R. AND CAROLYN J. WILLIAMS REVOCABLE TRUST

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INTRODUCTION

The General Assembly has found that "agriculture is an essential and indispensable part of the commerce and industry of the state and is of vital importance to the creation and preservation of jobs and employment opportunities." R.C. 902.02. Unless Ohio stems the conversion of farms into residential and commercial projects, agriculture will be irreparably diminished. That is why Ohio's voters so enthusiastically amended the Ohio Constitution to assess agricultural land according to its Current Agricultural Use Valuation ("CAUV").

As stated in the Commissioner's brief (at 2),[1] CAUV is based on the income earned by farmland rather than the higher sales price it would attract if sold for more lucrative uses. The Commissioner notes (at 1-2) that CAUV valuations have been assessed at 38%, 52%, and 54% of the land's market values in 2013, 2014, and 2015, respectively, and that CAUV levels were lowest in 2005. These values illustrate the critical need for CAUV, since they are based on the relatively low income earned by farmland compared to development and other more profitable uses that otherwise would swallow up the state's farmland if agriculture is taxed out of business.

Although the Commissioner has made some overdue adjustments to the CAUV formula, his treatment of woodland values is a conspicuous exception. An article cited by the Commissioner notes that "[w]oodland values have increased more dramatically than cropland values." (Comm. Appx. A52) This is not surprising, since the woodland income may not match the increases in crop prices that raise the CAUV for all agricultural land including woodland. An accurate clearing cost is essential to make the preservation of woodland affordable.[2]

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[1] These parenthetical references identify the pages in the Commissioner's Merit Brief containing the arguments to which Appellants are responding.

[2] The Commissioner states (at 1) that "[s]ome" persons think clearing costs are an "evergreen" reduction, since they are deducted every year. While debating the formula's math exceeds the scope of this appeal, this statement reflects a misunderstanding of the formula's function.

ARGUMENT

Introduction

The Commissioner and the BTA have systematically eliminated, or are trying to eliminate, every recourse available to the taxpayer for testing the accuracy of the CAUV land values set by the Commissioner, as shown by the following sequence of events:

1. *Rose v. Shelby County Bd. of Revision*, BTA No. 1994-M-562, 1995 WL 270135 (May 5, 1995). The BTA held that individual taxpayers cannot contest the Commissioner's CAUV values in appeals to the Boards of Revision from the county auditors' appraisals.

2. *Vance v. State of Ohio*, Ashtabula C.P. Case No. 2015CV0363 (now transferred to Franklin C.P.). The Commissioner argues that taxpayers cannot file lawsuits to overturn CAUV entries, but that they can challenge CAUV values by filing BTA appeals under R.C. 5703.14 to appeal the CAUV rules into which the CAUV entries are incorporated by reference.

3. *Adams v. Testa*, BTA No. 2015-2244, 2016 WL 2907657 (Mar. 31, 2016), on appeal to this Court as Case No. 2016-0510. The Commissioner moved to dismiss Appellants' appeals of the CAUV rules, eschewing his position in *Vance* that the CAUV entries are incorporated into the rules by reference. The BTA granted the motion.

4. *Adams v. Testa*, BTA No. 2015-1090, on appeal to this Court as Case No. 2016-0256 (the instant case). The Commissioner moved to dismiss on the grounds that R.C. 5717.02 does not authorize appeals of CAUV entries, and the BTA dismissed the appeal.

The Commissioner alleges (at 21) that a taxpayer aggrieved by a county auditor's inaccurate property classification or computational error can appeal to the county Board of Revision. But this would not address CAUV values, which are set by the Commissioner and not by the county auditor. While the owners of non-agricultural property can appeal the auditors'

valuation of their properties, the agricultural landowner has no such right because the Commissioner's CAUV values are binding on the auditors.

The Commissioner's and BTA's continued changes in position over which tribunal and which claims can be used to contest CAUV values is a shell game. Now the Commissioner contends (at 22) that taxpayers can contest CAUV entries by filing mandamus actions in the courts. In *Vance*, he admits that mandamus can be used only if no administrative appeal is available, citing *Ohio Acad. of Nursing Homes v. ODJFS*, 2007-Ohio-2620, ¶¶ 25-26, 114 Ohio St.3d 14, 19–20, 867 N.E.2d 400, 405 and other cases. (Supp. 103-104) At the same time, he argues in *Vance* that R.C. 5703.14 provides the proper appeal route (Supp. 99-103), which would foreclose mandamus. Mandamus is also unavailable if R.C. 5717.02 provides an appeal.

The Commissioner represents (at 21) that the BTA is ill-equipped to review the CAUV land values. He warns (at 21) that BTA appeals will "mangle the statutory process" and "grind county assessments to a halt." However, the BTA was created for the express purpose of reviewing tax decisions. Indeed, the Commissioner has extolled the expediency of BTA review for CAUV values in *Vance*, stating that BTA review "is the most efficient and desirable remedy available" and "is an efficient procedure that guarantees uniform application of the law." (Supp. 101, 102) In *Vance*, the Commissioner is complaining that allowing challenges to CAUV values in the various courts "could result in anything but a uniform application of the CAUV program." (Supp. 103) The Commissioner's recommendation herein that CAUV values be challenged by mandamus in the courts could result in numerous cases across the state contesting the same CAUV error while a single BTA decision would otherwise be dispositive of the issue.

The Commissioner argues that "[i]t is telling that, as the amicus [the Ohio Farm Bureau Federation] states, "[p]ractically, this is an appeal in name only.'" However, the Commissioner

takes this statement grossly out of context. The Ohio Farm Bureau was stating the unfortunate fact that farmers' appeals of their CAUV land values to the Boards of Revision are appeals in name only, because the Boards are precluded from reviewing CAUV values. Amicus Br. at 7. The Ohio Farm Bureau was not referring to Appellants' BTA appeal.

The Commissioner's conflicting positions across tribunals and his legal maneuvers in the appeal below caused what the Commissioner disparaging refers (at 12) as "a dizzying series of filings by appellants" below. While this case was pending before the BTA, the Commissioner filed his motion to dismiss *Vance* contending that a R.C. 5703.14 rules appeal to the BTA is the only justiciable means to challenge CAUV values. This led to Appellants' amendment of their notice of appeal to add such an appeal. The Commissioner (at 12) falsely states that Appellants filed this amendment instead of responding to the Commissioner's Motion to Dismiss. However, as noted in Appellants' Motion for Partial Reconsideration, the Attorney Examiner decided the motion before Appellants' response was due. (Nov. 13, 2015, p. 1) The BTA's premature ruling cut off Appellants' opportunity to respond, necessitated the motion for reconsideration, and resulted in another BTA ruling. In response to the amendment, the Commissioner contended that the amendment of the existing notice of appeal did not properly invoke BTA jurisdiction over the rules appeal under R.C. 5703.14. (Memo. Contra Motion for Reconsideration (Nov. 25, 2015), p. 2) While the BTA disagreed with the Commissioner's position (Appx. 7-8), Appellants filed a separate rules appeal as a precaution. The Commissioner then asked Appellants to voluntarily dismiss their R.C. 5703.14 claims in this case in favor of litigating them solely in the separate appeal. (Motion to File 2nd Amd. Notice of Appeal (Dec. 16, 2015), p. 2) Since only the R.C. 5717.02 claims were left in this case, the BTA issued a final decision dismissing the appeal.

Thus, the Commissioner and the BTA are entirely responsible for the multiple decisions and complicated record below.

Proposition of Law No. 1: An Owner Of Agricultural Land That Will Be Appraised Based On The CAUV Land Values Set By An Administrative Journal Entry Issued By The Tax Commissioner May Appeal The Entry To The Board Of Tax Appeals Under R.C. 5717.02.

A. Annual CAUV Journal Entries Are "Valuations, Determinations, Findings, Computations, [And] Orders."

The Commissioner does not contest this argument of Appellants.

B. Annual CAUV Entries Are Issued By The Tax Commissioner.

The Commissioner does not contest this argument of Appellants.

C. The 2015 CAUV Journal Entry Is A "Final Determination."

The Commissioner asserts (at 16-17) that not all orders can be appealed to the BTA, but only "final determinations" of an order, citing *Turner Const. Co. v. Lindley*, 61 Ohio St.2d 124, 126, 399 N.E.2d 1231, 1233 (1980). That statement is correct, so far as it goes. But then the Commissioner jumps to the conclusion (at 18-19) that an appealable final determination occurs only after the Commissioner has issued a determination, an individual taxpayer has requested an adjudication to contest the determination, the Commissioner has conducted an adjudicatory proceeding to consider the taxpayer's challenge, and the Commissioner has issued a second decision to end the adjudication.

Such an elaborate and restrictive limitation of the statute's scope is not supported by the language of R.C. 5717.02. The Commissioner identifies no wording in R.C. 5717.02 that limits "final determinations" to Commissioner decisions on taxpayer adjudicatory requests for administrative review. Nor has the Commissioner identified any statutory language providing that the only reviewable commissioner actions are those in which initial determinations were followed by final determinations. Instead, the Commissioner argues (at 16-19) that the Court

should ignore the ordinary meaning of "final determination" in R.C. 5717.02, because it supposedly is a term of art.

In support of this proposition, the Commissioner argues that the Court's opinions treat "final determinations" as a term of art. But the Court's decisions do not support his conclusion. The Court has explained the meaning of "final determination" in *Turner Construction*, and its interpretation is very different than the Commissioner's. Therein, the Court noted that R.C. 5717.02 at one time authorized appeals from all orders and then was amended to allow appeals only of final determinations of orders (as well as other types of Commissioner decisions). In *Turner Construction*, the Court explained the reason for this amendment:

> These amendments express a clear legislative intent to require finality in those appeals filed with the BTA from, inter alia, tax orders of the commissioner.

61 Ohio St.2d at 127 (emphasis added). Thus, the Court explained that the legislature intended to foreclose BTA reviews of non-final, preliminary decisions. In that case, the Commissioner's decision was not final, because the order "declares that the determination of the subject application relative to the reassessment will be held in abeyance pending further administrative proceedings." Id. Accordingly, the Commissioner's order in *Turner Construction* was not a final determination, because the order was not finished.

Consistent with *Turner Construction*, the Court in an opinion not cited by the Commissioner held that a notice of intent to levy a tax assessment in the future is not a final determination, because it is still subject to modification. *Lang, Fisher & Stashower Advert., Inc. v. Collins*, 46 Ohio St.2d 285, 286, 347 N.E.2d 538, 539 (1976).

The Commissioner misconstrues several other Court decisions to support his argument that only "contested adjudicative action[s]" can produce appealable final determinations. In one such case, the Court stated:

> R.C. 5717.02 specifically provides that in order for a tax assessment to be appealable, it must represent the Tax Commissioner's final determination thereof. Stated differently, the statute provides for an appeal from a final determination of the commissioner, not from an assessment per se. This interpretation is consonant with the fact that a preliminary assessment may be modified by the commissioner at any time within the period prescribed by R.C. 5711.25, subject to certain exceptions stated therein.

Michelin Tire Corp. v. Kosydar, 38 Ohio St.2d 254, 255-56, 313 N.E.2d 394, 395 (1974) (emphasis added). Thus, in *Michelin Tire*, the challenged action was not a final determination, because it was still subject to the Commissioner's modification. For the same reason, the taxpayer could not appeal the preliminary tax assessments in *Evilsizor v. Tracy*, 73 Ohio St.3d 297, 299, 652 N.E.2d 979, 981. The taxpayer could only appeal final tax assessments, not the preliminary assessments that were subject to modification. Id.

The Commissioner equates the CAUV entry with the tax department's approval of an auditor's tax abstract that was found not to be an appealable final determination in *Cooke v. Kinney*, 65 Ohio St.2d 7, 417 N.E.2d 106 (1981). However, *Cooke* presented a different scenario in two important respects. First, the taxpayer in *Cooke* was aggrieved by a decision made by the county auditor, in which the tax department merely acquiesced. Id. at 8-9. Consequently, the proper remedy was to challenge the auditor's decision. Id. In the instant case, the Commissioner made the contested decision, not the auditors, and he made it binding on the county auditors. So the proper remedy is to appeal the Commissioner's decision. Second, the taxpayer in *Cook*e had the opportunity to appeal the county auditor's decision to the Board of Revision. Id. at 9. In the instant case, the taxpayers have no such recourse, since the BTA has already determined that the Commissioner's CAUV values cannot be challenged in the Boards of Revision.

The Commissioner's position also is not helped by *Makowski v. Limbach*, 62 Ohio St.3d 412, 415, 583 N.E.2d 1302 (1992). In that case, the Commissioner made no decision at all. She

simply made mathematical calculations to add up the income tax collections for each county to determine how much money would go to their library funds. Id. at 1304. Consequently, the Court determined that this function was a ministerial function that was not subject to appeal. As explained later in this brief, the CAUV entry was not ministerial.

The Commissioner contends (at 19) that the statute's reference to a "'final determination' of, say, a 'final tax assessment'" illustrates that the statute's reference to a "final determination" must mean something more than the simple fact that the Commissioner's action is final. But the Court has previously observed that R.C. 5717.02 contains superfluous language, stating:

> Some confusion is presented by the language of this statute in that it also refers to final determinations "of any preliminary * * * assessments * * *." However, we hold that the intent and meaning of this enactment are that final determinations of the Tax Commissioner are the only determinations that are appealable to the BTA.

French v. Limbach, 59 Ohio St.3d 153, 154, 571 N.E.2d 717, 718 (1991). Despite the inconsistency in some of the statute's words, the Court ruled that a final determination is an action that is not preliminary, just as it has in every other case in which it has construed that term. In *French*, the Court found that a "preliminary assessment certificate" is not a final determination, because it is subject to the Commissioner's modification. Id. at 154–55.

The Commissioner also argues (at 25) that CAUV entries are not final determinations because they do not involve the "adjudication" of an individual taxpayer's claims, citing *Ohio Boys Town, Inc. v. Brown*, 69 Ohio St. 2d 1, 429 N.E.2d 1171 (1982). However, *Ohio Boys Town* construed the appeal rights offered by R.C. 119.06, which are expressly limited to "adjudications" as defined by R.C. 119.01(D). Id. at 4-5. The absence of such a limitation in R.C. 5717.02 is additional evidence that this statute does not apply just to adjudications.

Notably, none of the Court's opinions cited by the Commissioner have announced that final determinations under R.C. 5717.02 are limited to the Commissioner's decisions on taxpayer

adjudicatory requests in which initial determinations were followed by final determinations. Instead, the Court's decisions interpret the term "final determinations" consistently with the term's dictionary meaning. That is, the statute authorizes the appeal of final tax decisions, but not preliminary determinations that the Commissioner intends to revisit.

Moreover, the 2015 CAUV Entry was recorded in the Commissioner's journal which, by statute, is "a record of all final determinations of the commissioner." R.C. 5703.05(L). The Commissioner's journalizing of this entry is an admission that this entry is a final determination. The Commissioner's litigation posture is inconsistent with his own journal.

Furthermore, as Appellants' Merit Brief explains (at 14-15), the Commissioner's CAUV entries are the final product of an administrative process that includes a proposed entry, a public hearing, and a final entry that is journalized as a "final determination" under R.C. 5703.05(L). The Commissioner (at 19) states that this point "mudd[ies] the waters," but he does not rebut it. The Commissioner identifies no other steps remaining in the process for finalizing the CAUV entries. In contrast to the preliminary Commissioner actions found not to be final determinations in the Court's opinions, the CAUV entries are not subject to modification but instead are binding on the county auditors. And, as the BTA itself has determined, an individual taxpayer does not have the option to contest the Commissioner's CAUV values at the Boards of Revision. *Rose*, 1995 WL 270135, at *3. The Commissioner's CAUV entries are the final determinations of the taxpayers' property values that are appealable under R.C. 5717.02.

D. R.C. 5717.02 Provides The Appellants With Statutory Standing To Appeal The 2015 CAUV Order.

The Commissioner contends that R.C. 5717.02 authorizes appeals only by persons who are entitled to notice of the Commissioner's action, citing *Avon Lake City Sch. Dist. v. Limbach*,

35 Ohio St.3d 118, 518 N.E.2d 1190 (1988). The Commissioner's argument mischaracterizes both R.C. 5717.02 and the holding in *Avon Lake City*.

R.C. 5717.02 authorizes appeals by taxpayers whether or not they are entitled to notice. This fact is evident in the statute's language:

> Except as otherwise provided by law, appeals from final determinations by the tax commissioner of any preliminary, amended, or final tax assessments, reassessments, valuations, determinations, findings, computations, or orders made by the commissioner may be taken to the board of tax appeals by the taxpayer, by the person to whom notice of the tax assessment, reassessment, valuation, determination, finding, computation, or order by the commissioner is required by law to be given, by the director of budget and management if the revenues affected by that decision would accrue primarily to the state treasury, or by the county auditors of the counties to the undivided general tax funds of which the revenues affected by that decision would primarily accrue.

Emphasis added. While R.C. 5717.02 authorizes appeals by persons who are entitled to notice, it also authorizes appeals by three categories of persons whether or not they are entitled to notice: the Director of Budget and Management, the county auditors, and taxpayers.

The appealing party in *Avon Lake City* was not a taxpayer, but a school district. A school district is not a taxpayer, the Director of Budget and Management, or a county auditor, so it can appeal only if it is a "person to whom notice . . . is required by law to be given." The Court specifically distinguished between school districts, which can appeal only if they are entitled to notice, and taxpayers, who need no notice to exercise their right of appeal:

> Someone other than a taxpayer is, then, permitted to file for reassessment as the employer is a person to whom notice of assessment is required by law to be given.

35 Ohio St.3d at 120 (emphasis added). Contrary to the Commissioner's representation, *Avon Lake City* supports rather than undercuts the Appellants' standing to file this appeal. In fact, the glaring omission of notice as a prerequisite for taxpayer appeals demonstrates that R.C. 5717.02 is not available only to taxpayers to whom an order is specifically addressed.

Paragraph 15 of Appellants' Notice of Appeal demonstrates that each Appellant owns woodlands that are or will be subject to unfairly high appraisals as a consequence of the Commissioner's lowball land clearing cost. (2nd Amd. Notice of Appeal, pp. 11-14 (Supp. 11-14)) These injuries, along with the statutory standing provided in R.C. 5717.02, provide Appellants with the standing necessary to assert this appeal.

E. R.C. 5717.02 Authorizes Appeals Of All Final Tax Decisions, Not Just Decisions Issued To Individual Taxpayers Following Internal Agency Adjudications.

The Commissioner reiterates his oft-repeated mantra that the BTA's jurisdiction is limited to the functions prescribed by statute. However, it is equally true that the BTA may not shirk its duty to hear appeals authorized by R.C. 5717.02. A tribunal may not create exceptions to a statute's coverage that are not provided by the statute itself. *Crowl v. DeLuca*, 29 Ohio St.2d 53, 62, 278 N.E.2d 352, 358 (1972); *Eggleston v. Harrison*, 61 Ohio St. 397, 404, 55 N.E. 993, 996 (1900). Yet the Commissioner urges the Court to create a new exception to R.C. 5717.02 by arguing that an appeal is available only for adjudicatory actions affecting an individual taxpayer and not for actions harming numerous taxpayers.

The Commissioner argues (at 20) that a CAUV entry is not a final determination, because the entry does not "adjudicate an individual protest by a given taxpayer." The Commissioner cites three statutes in Ohio's tax code that authorize such an adjudicatory process within the tax department prior to appeal to the BTA: R.C. 5703.60(A) (petition for reassessment); R.C. 5703.70(C) (refund claim); and R.C. 5715.26 (adjustment of real estate valuation). Based on these three examples of individual taxpayer actions that <u>can</u> be appealed under R.C. 5717.02, the Commissioner jumps to the conclusion that <u>only</u> individual adjudicatory proceedings can be appealed. But the statute contains no such words of limitation.

The Commissioner chides the Ohio Farm Bureau (at 25, fn. 19) for its "lack of understanding of administrative law, whereby a government agency first reviews an act or decision – and then exhausts its adjudication and review process" – before appellate tribunals such as the BTA review them. However, it is the Commissioner's position that is fundamentally inconsistent with administrative law, since it is common for the legislature to authorize administrative appeals without providing for prior adjudications inside the agency. E.g., see R.C. 3745.05(A) (providing for a de novo hearing at the Environmental Review Appeals Commission for Ohio EPA decisions that were not subject to adjudications at Ohio EPA). Similarly, R.C. 5717.02 authorizes appeals whether or not an internal adjudication has occurred.

The actions addressed by R.C. 5703.60(A), R.C. 5703.70(C), and R.C. 5715.26 are just a few of the types of Commissioner actions that are subject to appeal under R.C. 5717.02. R.C. 5717.02 authorizes appeals of <u>all</u> tax assessments, reassessments, valuations, determinations, findings, computations, or orders that are final. R.C. 5717.02 contains no language prohibiting the appeal of final tax actions that are not issued directly to individual taxpayers. Instead, the statute provides that "any" final decision can be appealed. The Board must apply R.C. 5717.02 as written, not create an unlegislated exception to its appeal rights.

The Commissioner also contends (at 20) that individual CAUV landowners cannot appeal CAUV values because they are not set parcel-by-parcel. However, while the CAUV values are based on soil type, the Commissioner's CAUV entries require the county auditors to apply these values directly to the landowners' parcels containing those soil types. So the auditors are mandated to apply the CAUV values parcel-by-parcel, and the landowners are precluded from contesting them at the Boards of Revision. Consequently, appeals of the CAUV values to the BTA are the only logical way to contest inaccurate land values.

The Commissioner argues (at 21) that CAUV decisions are "an executive branch function" and thus the BTA cannot review them. If that logic were true, no Commissioner decisions would be subject to BTA review. The Commissioner is in the executive branch, so all of his actions are a function of the executive branch.

As explained in Appellants' Merit Brief (at 11-13), CAUV entries are "valuations, determinations, findings, [and] computations" as envisioned by R.C. 5717.02. Once they are final, they are subject to appeal.

F. CAUV Entries Are Not Ministerial Actions Immune From Appeal.

The Commissioner admits (at 22) that "[d]eveloping CAUV values involves substantial discretion." Also see Pages 19-22 of Appellants' Merit Brief, which describe this process' complexity. This process is dissimilar to the rote mathematics performed in *Makowski*. Setting the CAUV values "involved judgment and deliberation" and "[d]iscretion was involved in the conducting of the investigation, interpreting the data, and assessing the impact of the collected data," just like the process found to be non-ministerial in *Ohio Boys Town*. 69 Ohio St.2d at 5.

The Commissioner suggests (at 23-25) that the Court should look only at the contents of the CAUV journal entry to determine whether it is ministerial, not its attached CAUV Table. This argument is so patently meritless that the Commissioner did not bother to raise it below. See his Motion to Dismiss (Oct. 30, 2015) and his Memo. Contra Motion for Reconsideration (Nov. 25, 2015). Thus, he has waived that argument and cannot raise it here. *State ex rel. Zollner v. Indus. Comm.*, 66 Ohio St.3d 276, 278, 611 N.E.2d 830, 832 (1993).

Moreover, this argument is contradicted by the entry's announcement that the Commissioner "hereby adopts and prescribes [CAUV] . . . Table 15-06-0132. . . ." (Supp. 22) The entry states that "[t]his table, which . . . is hereby incorporated by reference to this entry, is

to be used by the county auditor. . . ." (Id.) Accordingly, the CAUV Table is part of the journal entry, and the entry orders the county auditors to use the land values set forth in the Table.

The Commissioner argues (at 24-25) that a CAUV entry is ministerial because the law requires the Commissioner to issue it, relying on *Rowland v. Lindley*, 58 Ohio St.2d 15, 387 N.E.2d 1367 (1979). But the appellant in *Rowland* appealed a BTA order that merely copied the Court's specific mandate. Id. at 15-16. The BTA had no discretion to vary from the terms of the Court's mandate. The Commissioner's establishment of CAUV values is decidedly different.

Proposition of Law No. 2: An Administrative Journal Entry Issued By The Tax Commissioner To Set CAUV Values Is A Standard Of General Application That Must Be Promulgated As A Rule In Compliance With The Rulemaking Procedures Of R.C. 119.03 and R.C. 119.04.

The Commissioner contends (at 35-36) that Appellants did not claim below that R.C. 5717.02 authorized the BTA to review the Commissioner's failure to promulgate the 2015 entry in accordance with R.C. Chapter 119. To the contrary, Appellants' Second Amended Notice of Appeal devoted two pages and an entire assignment of error to this issue. (2nd Amd. Notice of Appeal (Dec. 16, 2015), pp. 18-19, ¶¶ 31-35) (Supp. 18-19))

Notwithstanding his protest to the contrary (at 31), the Commissioner still has not contested Appellants' observation that the 2015 CAUV Entry is an enforceable standard of general application. To do so, he would have to argue that the CAUV land values have no enforceable effect across the state, while his own entry demands that the county auditors enforce these values. (Supp. 22) Thus, the entry is a "standard, having a general and uniform operation, adopted, promulgated, and enforced by any agency under the authority of the laws governing such agency, and includes any appendix to a rule," just as described in R.C. 119.01(C).

Instead, the Commissioner claims (at 30-31) that CAUV entries are not rules but rather the execution of an already-existing rule, simply because Ohio Adm.Code 5703-25-31(D)

requires the Commissioner to issue the CAUV entries. Like the Commissioner, Ohio EPA argued that its action was merely "fulfilling already existing legal obligations" in *Fairfield Cty. Bd. of Commrs. v. Nally*, 2015-Ohio-991, ¶¶ 27-28, 143 Ohio St.3d 93, 99-100. However, the Court found that Ohio EPA's action was a rule, because "it prescribes a legal standard that did not previously exist." *Id.* at ¶ 29.

Similarly, a CAUV entry establishes standards that are not contained in Ohio Adm.Code 5703-25-30 through 5703-25-36. These rules contain no agricultural land values. The county auditors would not be able to set land values using the verbiage of these rules. The land values are found exclusively in the CAUV tables incorporated into the CAUV entries. So the CAUV entries set legal standards that do not exist in the CAUV rules, rather than constituting mere enforcement of these rules. And these CAUV tables are legally binding on the county auditors.

The Commissioner's citation to R.C. 5715.01(B) strengthens Appellants' position. As the Commissioner states (at 30), this statute provides that the current agricultural use value of land is what the Commissioner "by rule establishes." But the Commissioner has not listed the CAUV values in Ohio Adm.Code 5703-25-30 through OAC 5703-25-36. These rules only set up the general procedure that the Commissioner will use to establish land values. The actual land values are contained in the CAUV entries, which contrary to R.C. 5715.01(B) are not adopted by rule.

The Commissioner contends (at 32-33) that the CAUV Table is a mere calculation using a math formula provided by the rules. But Appellant's Merit Brief (at 18-22) and the Commissioner's brief (at 22) explain in detail that the Commissioner's establishment of CAUV values is a complex process characterized by discretionary decisions. The Commissioner does far more than plug established numbers into a rigid mathematical formula set forth in the CAUV

rules. See Pages 18-22 of Appellants' Merit Brief. The Commissioner argues (at 33) that the CAUV entry does not "change how to weight the various factors considered when calculating CAUV (e.g., crop prices, crop yields, production costs, capitalization rate, cropping patterns)." However, that is exactly what the Commissioner does when he sets the CAUV values. For example, he has to decide what is "typical or potential" net income based on "normal or typical" management practices, yields, cropping or land use patterns, prices, costs and conditions in the area. Ohio Adm.Code 5703-25-33(B). To establish the "cropping and land use patterns" employed in these formulations, he must define what is the "typical sequence or distribution of major field crops and uses." Ohio Adm.Code 5703-25-30(B)(1) (emphasis added). See Pages 18-22 of Appellants' Merit Brief for more examples of discretionary judgments in the process.

The Commissioner asserts (at 33-34) that CAUV entries should not be classified as rules in consideration of public policy, because the auditors will be left without CAUV values if he cannot hold a hearing and navigate the JCARR process in a year. But he provides no timeframes for these tasks, and his complaint that he cannot finish rulemaking in a year is not credible.

Nevertheless, the General Assembly establishes public policy, not the Court. But if the Court considers public policy here, it should consider its statement in *Fairfield Cty. Commrs.* that rulemaking procedures ensure that all stakeholders "have an opportunity to express their views on the wisdom of the proposal and to contest its legality if they so desire." 2015-Ohio-991, ¶ 30. Rulemaking can only improve the product of the Commissioner's CAUV deliberations, resulting in more responsible decisions and fewer legal actions for the Courts.

Reply to Appellee's Proposition of Law No. 3: Because Only The BTA Decision Of February 1, 2016 Was A Final Appealable Order, Appellants' Appeal Was Timely.

The Commissioner claims (at 37-38) that Appellants' Notice of Appeal to the Court was filed within 30 days of only the BTA's Decision and Order of February 1, 2016 and that the

Court cannot review BTA orders issued earlier in the BTA appeal. He further argues that only the earlier BTA orders, not the February 1, 2016 decision, addressed the issues raised by Appellants' appeal to the Court. Both statements are mistaken.

The language of the February 1, 2016 Decision and Order expressly rules that the BTA has no jurisdiction under R.C. 5717.02. (Appx. 16) This decision incorporates by reference the interim order issued by BTA's attorney examiner on December 22, 2015, which also holds that the CAUV entry is not a final determination subject to appeal under R.C. 5717.02. (Id.) The December 22, 2015 interim order affirmed in the February 2016 decision, in turn, incorporates by reference the findings in the BTA's interlocutory orders of November 9, 2015, December 9, 2015, and December 11, 2015. (Appx. 13-14) Accordingly, the February 1, 2016 decision does contain the rulings that Appellants have appealed.

Moreover, the Court has emphasized that only final BTA orders are appealable to the Court. *Southside Cmty. Dev. Corp. v. Levin*, 2007-Ohio-6665, ¶ 5, 116 Ohio St.3d 1209, 1210, 878 N.E.2d 1048, 1049. In determining whether an order is final and appealable, the courts balance two competing factors: (1) the desire to avoid needless or delaying piecemeal appeals that clog court calendars and impede the prompt administration of justice; and (2) whether the losing party below urgently needs immediate appellate review because an appeal at the case's conclusion is unavailable or impractical. *Ferrell v. Standard Oil Co. of Ohio*, 11 Ohio St.3d 169, 170, 464 N.E.2d 550, 551 (1984).

A BTA decision is a final order appealable under R.C. 5717.04 only if it is an "order that affects a substantial right made in a special proceeding" under R.C. 2505.02(B)(2). *Southside*, 2007-Ohio-6665, ¶ 5; *Cleveland Clinic Found. v. Levin*, 2008-Ohio-6197, ¶ 5, 120 Ohio St.3d 1210, 1211, 898 N.E.2d 589, 590. An order affects a substantial right if an immediate appeal is

necessary to avoid the foreclosure of effective relief in the future. *Bell v. Mt. Sinai Med. Ctr.*, 67 Ohio St.3d 60, 63, 616 N.E.2d 181, 184 (1993) holding modified on other grounds by *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 635 N.E.2d 331 (1994). There are two prongs of the test for determining whether an interlocutory BTA order is appealable: the existence and substantiality of the right and the efficacy of a later appeal. *Megaland GP, L.L.C. v. Franklin Cty. Bd. of Revision,* 2015-Ohio-4918, ¶ 17, 145 Ohio St.3d 84, 87, 47 N.E.3d 117, 120, citing *Cleveland Clinic Found. v. Levin*, 2008-Ohio-6197, ¶¶ 6-7. Thus, in *Megaland*, the interim BTA order affected a substantial right and was immediately appealable, but only because the appellant otherwise would have lost its right to appeal altogether. 2015-Ohio-4918, ¶ 18.

No such situation is present in the instant appeal. Because an appeal of the February 2016 Decision and Order will adequately address Appellants' issues, the earlier interlocutory orders did not affect a substantial right and thus were not appealable, final orders. A brief recounting of the earlier orders discloses their non-final nature.

The BTA's attorney examiner issued the interim decision of November 9, 2015 pursuant to Ohio Adm.Code 5717-1-10(A) (now numbered as 5717-1-11). A copy of this rule is attached hereto at Appx. 63. At that time, the rule provided that "[t]he board may delegate to its attorney examiners, with respect to all appeals, the authority to issue interim procedural orders on all motions or other pleadings <u>which do not terminate the appeals</u>. . . ." Emphasis added.

The attorney examiner's interim procedural order responded to the Commissioner's Motion to Dismiss and was issued pursuant to Ohio Adm.Code 5717-1-10. See the order's signature block. (Appx. 8) Although the order opined that Appellants could not challenge the 2015 CAUV Entry under R.C. 5717.02 and found that the entry itself is not a rule, it denied the Commissioner's Motion to Dismiss on the grounds that the appeal could continue under R.C.

5703.14. (Id.) The attorney examiner's order did not dismiss the appeal, nor did it recommend that the Board dismiss the appeal. (Id.)

As authorized by Ohio Adm.Code 5717-1-10, Appellants moved that the Board reconsider the finding in the examiner attorney's interim order that R.C. 5717.02 could not be used as a grounds for the appeal. (Appts. Motion for Partial Reconsideration (Nov. 13, 2015)) The Board's order of December 9, 2015 denied the motion, but did no more. (Appx. 9-10) It did not dismiss the appeal, nor did it dismiss any claim in the appeal. (Id.) In fact, the word "dismiss" appears nowhere in its decision. Instead, the Board states that the appeal would continue to proceed under R.C. 5703.14. (Id., p. 1 (Appx. 9)) Therefore, the order of December 9, 2015 was not a final order, but only a non-appealable interlocutory order.

The fact that the December 9 order was entered into the Board's journal did not signify that the order was a final appealable order. All Board actions, interim or final, are journalized. See R.C. 5703.02(C), which requires the journal to "keep a record of all of the proceedings and the vote of each of its members upon every action taken by it." Emphasis added.

The Attorney Examiner issued the interim orders of December 11 and 22, 2015. These orders were not binding under Ohio Adm.Code 5717-1-10 until approved by the Board on February 1, 2016.

In contrast, the Board's Decision and Order of February 1, 2016 directs that the appeal "be dismissed." (Appx. 17) While the BTA's entry of December 9, 2015 was entitled as an "Order" to denote its interim nature, the entry of February 1, 2016 is labeled as a "Decision and Order" to indicate its finality. Consequently, only the latter action was a final, appealable order.

Requiring BTA litigants to appeal the Board's interlocutory orders in order to avoid untimely appeals, as suggested by the Commissioner, will result in needless and delaying

piecemeal appeals that will clog the Court's calendar. Adhering to the Commissioner's position would have required Appellants to file two appeals in this case instead of one. This inefficient procedure is not supported by statute or case law.

The Court has stated that "it should be emphasized that our disposition herein reflects a basic tenet of Ohio jurisprudence that cases should be determined on their merits and not on mere procedural technicalities." *Barksdale v. Van's Auto Sales, Inc.*, 38 Ohio St.3d 127, 128, 527 N.E.2d 284, 285 (1988) (declining to dismiss an appeal where the notice of appeal mistakenly stated that it was appealing the lower court's denial of a motion for judgment n.o.v. instead of the underlying judgment on the merits). In this case, the procedural events that complicated the appeal deadline resulted from the Commissioner's own conduct (see the introduction to the propositions of law at Pages 2-4 above). Dismissing this appeal under these circumstances is neither equitable nor consistent with the Court's definition of a final order. It would only further delay relief from high property taxes for landowners whose petitions for judicial review have been thwarted at every turn by the Commissioner's legal maneuvers.

CONCLUSION

Appellants request that the Court reverse the BTA and grant the relief described in the conclusion to Appellants' Merit Brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on August 9, 2016, a copy of the foregoing Reply Brief was served by electronic mail on Daniel Fausey (Daniel.Fausey@ohioattorneygeneral.gov) and Daniel Kim (Daniel.Kim@ohioattorneygeneral.gov), Assistant Attorneys General, Ohio Attorney General's Office, 30 East Broad Street, 25th Floor, Columbus, OH 43215.

s/ Jack A. Van Kley
Jack A. Van Kley
Counsel for Appellants

APPENDIX TO REPLY BRIEF

TABLE OF CONTENTS FOR THE APPENDIX*

ADMINISTRATIVE RULES

STATUTES

CERTIFICATE OF SERVICE

* This Appendix contains the statutes and rule that are cited for the first time in Appellants' Reply Brief and thus were not included in the Appendix to the Merit Brief. Appendix pages are numbered consecutively from the pages of the Appendix for the Merit Brief.

5717-1-10 Interim procedural orders.

(A) The board may delegate to its attorney examiners, with respect to all appeals, the authority to issue interim procedural orders on all motions or other pleadings which do not terminate the appeals and may include, but not be limited to, motions to consolidate, to compel discovery, and for sanctions. Said orders have the same force and effect as any order issued by the board. A party may, by written motion, seek the reconsideration by the board of the interim order. A motion for reconsideration shall not be the basis for continuance of a matter scheduled for hearing.

(B) On motion of the parties or at the board's request, the parties to a hearing may be required to appear at a prehearing conference and provide prehearing statements for purposes of issue identification, scheduling of discovery, or other prehearing matters to be identified prior to such conference.

R.C. 119.032 review dates: 01/23/2013 and 03/01/2017
Promulgated Under: 5703.14
Statutory Authority: 5703.02, 5703.14
Rule Amplifies: 5703.02
Prior Effective Dates: 3/24/1989, 3/1/1996

119.06 Adjudication order of agency valid and effective - hearings - periodic registration of licenses.

No adjudication order of an agency shall be valid unless the agency is specifically authorized by law to make such order.

No adjudication order shall be valid unless an opportunity for a hearing is afforded in accordance with sections 119.01 to 119.13 of the Revised Code. Such opportunity for a hearing shall be given before making the adjudication order except in those situations where this section provides otherwise.

The following adjudication orders shall be effective without a hearing:

(A) Orders revoking a license in cases where an agency is required by statute to revoke a license pursuant to the judgment of a court;

(B) Orders suspending a license where a statute specifically permits the suspension of a license without a hearing;

(C) Orders or decisions of an authority within an agency if the rules of the agency or the statutes pertaining to such agency specifically give a right of appeal to a higher authority within such agency, to another agency, or to the board of tax appeals, and also give the appellant a right to a hearing on such appeal.

When a statute permits the suspension of a license without a prior hearing, any agency issuing an order pursuant to such statute shall afford the person to whom the order is issued a hearing upon request.

Whenever an agency claims that a person is required by statute to obtain a license, it shall afford a hearing upon the request of a person who claims that the law does not impose such a requirement.

Every agency shall afford a hearing upon the request of any person who has been refused admission to an examination where such examination is a prerequisite to the issuance of a license unless a hearing was held prior to such refusal.

Unless a hearing was held prior to the refusal to issue the license, every agency shall afford a hearing upon the request of a person whose application for a license has been rejected and to whom the agency has refused to issue a license, whether it is a renewal or a new license, except that the following are not required to afford a hearing to a person to whom a new license has been refused because the person failed a licensing examination: the state medical board, state chiropractic board, architects board, Ohio landscape architects board, and any section of the Ohio occupational therapy, physical therapy, and athletic trainers board.

When periodic registration of licenses is required by law, the agency shall afford a hearing upon the request of any licensee whose registration has been denied, unless a hearing was held prior to such denial.

When periodic registration of licenses or renewal of licenses is required by law, a licensee who has filed an application for registration or renewal within the time and in the manner provided by statute or rule of the agency shall not be required to discontinue a licensed business or profession merely because of the failure of the agency to act on the licensee's application. Action of an agency rejecting any such application shall not be effective prior to fifteen days after notice of the rejection is mailed to the licensee.

Amended by 130th General Assembly File No. 48, SB 68, §1, eff. 12/19/2013.

Effective Date: 04-10-2001

902.02 Finding of importance of agriculture.

It is hereby found and determined that agriculture is an essential and indispensable part of the commerce and industry of the state and is of vital importance to the creation and preservation of jobs and employment opportunities and to the improvement of the economic welfare of the people of the state, that agriculture creates, promotes, and is a part of the continuous exchange of goods and services in the state economy, that there exists in this state an inadequate supply of agricultural credit and loan financing at affordable interest rates consistent with the needs of many agricultural borrowers which makes it difficult for persons to undertake to engage in agriculture or for persons engaged in agriculture to continue operations at present levels, decreases employment, and has an adverse effect upon the economic welfare of the people of the state. It is further found and determined that this chapter is enacted pursuant to, and the authority granted by this chapter is consistent with and will effect the purposes of, Section 13 of Article VIII, Ohio Constitution, that agriculture is part of and is directly related to industry, commerce, distribution, and research under Section 13 of Article VIII, Ohio Constitution, and that it is in the public interest and a proper public purpose under Section 13 of Article VIII, Ohio Constitution, for the state or any county or municipal corporation of the state, to acquire, construct, enlarge, improve, or equip, and to sell, lease or exchange, or otherwise dispose of property, structures, equipment, and facilities for agricultural purposes, and to make loans and borrow money and issue bonds or other obligations to provide moneys for the acquisition, construction, enlargement, improvement, or equipment of such property, structures, equipment, and facilities, all as provided in this chapter, and that such activities will contribute to the creation or preservation of jobs or employment opportunities or the improvement of the economic welfare of the people of the state. This chapter, being necessary for the welfare of the state and its people, shall be liberally construed to effect its purposes.

Effective Date: 01-11-1985

2505.02 Final orders.

(A) As used in this section:

(1) "Substantial right" means a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.

(2) "Special proceeding" means an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity.

(3) "Provisional remedy" means a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, suppression of evidence, a prima-facie showing pursuant to section 2307.85 or 2307.86 of the Revised Code, a prima-facie showing pursuant to section 2307.92 of the Revised Code, or a finding made pursuant to division (A)(3) of section 2307.93 of the Revised Code.

(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

(3) An order that vacates or sets aside a judgment or grants a new trial;

(4) An order that grants or denies a provisional remedy and to which both of the following apply:

(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

(5) An order that determines that an action may or may not be maintained as a class action;

(6) An order determining the constitutionality of any changes to the Revised Code made by Am. Sub. S.B. 281 of the 124th general assembly, including the amendment of sections 1751.67, 2117.06, 2305.11, 2305.15, 2305.234, 2317.02, 2317.54, 2323.56, 2711.21, 2711.22, 2711.23, 2711.24, 2743.02, 2743.43, 2919.16, 3923.63, 3923.64, 4705.15, and 5111.018 (renumbered as 5164.07 by H.B. 59 of the 130th general assembly), and the enactment of sections 2305.113, 2323.41, 2323.43, and 2323.55 of the Revised Code or any changes made by Sub. S.B. 80 of the 125th general assembly, including the amendment of sections 2125.02, 2305.10, 2305.131, 2315.18, 2315.19, and 2315.21 of the Revised Code;

(7) An order in an appropriation proceeding that may be appealed pursuant to division (B)(3) of section 163.09 of the Revised Code.

(C) When a court issues an order that vacates or sets aside a judgment or grants a new trial, the court, upon the request of either party, shall state in the order the grounds upon which the new trial is granted or the judgment vacated or set aside.

(D) This section applies to and governs any action, including an appeal, that is pending in any court on July 22, 1998, and all claims filed or actions commenced on or after July 22, 1998, notwithstanding any provision of any prior statute or rule of law of this state.

Amended by 130th General Assembly File No. 25, HB 59, §101.01, eff. 9/29/2013.

Effective Date: 07-22-1998; 09-01-2004; 09-02-2004; 09-13-2004; 12-30-2004; 04-07-2005; 2007 SB7 10-10-2007

3745.05 Hearings.

(A) In hearing the appeal, if an adjudication hearing was conducted by the director of environmental protection in accordance with sections 119.09 and 119.10 of the Revised Code or conducted by a board of health, the environmental review appeals commission is confined to the record as certified to it by the director or the board of health, as applicable. The commission may grant a request for the admission of additional evidence when satisfied that such additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the director or the board, as applicable. If no adjudication hearing was conducted in accordance with sections 119.09 and 119.10 of the Revised Code or conducted by a board of health, the commission shall conduct a hearing de novo on the appeal.

For the purpose of conducting a de novo hearing, or where the commission has granted a request for the admission of additional evidence, the commission may require the attendance of witnesses and the production of written or printed materials.

When conducting a de novo hearing, or when a request for the admission of additional evidence has been granted, the commission may, and at the request of any party it shall, issue subpoenas for witnesses or for books, papers, correspondence, memoranda, agreements, or other documents or records relevant or material to the inquiry directed to the sheriff of the counties where the witnesses or documents or records are found, which subpoenas shall be served and returned in the same manner as those allowed by the court of common pleas in criminal cases.

(B) The fees of sheriffs shall be the same as those allowed by the court of common pleas in criminal cases. Witnesses shall be paid the fees and mileage provided for under section 119.094 of the Revised Code. The fee and mileage expenses incurred at the request of the appellant shall be paid in advance by the appellant, and the remainder of the expenses shall be paid out of funds appropriated for the expenses of the commission.

(C) In case of disobedience or neglect of any subpoena served on any person, or the refusal of any witness to testify to any matter regarding which the witness may be lawfully interrogated, the court of common pleas of the county in which the disobedience, neglect, or refusal occurs, or any judge thereof, on application of the commission or any member thereof, may compel obedience by attachment proceedings for contempt as in the case of disobedience of the requirements of a subpoena issued from the court or a refusal to testify therein.

(D) A witness at any hearing shall testify under oath or affirmation, which any member of the commission may administer. A witness, if the witness requests, shall be permitted to be accompanied, represented, and advised by an attorney, whose participation in the hearing shall be limited to the protection of the rights of the witness, and who may not examine or cross-examine witnesses. A witness shall be advised of the right to counsel before the witness is interrogated.

(E) A record of the testimony and other evidence submitted shall be taken by an official court reporter. The record shall include all of the testimony and other evidence and the rulings on the admissibility thereof presented at the hearing. The commission shall pass upon the admissibility of evidence, but any party may at the time object to the admission of any evidence and except to the rulings of the commission thereon, and if the commission refuses to admit evidence the party offering same may make a proffer thereof, and such proffer shall be made a part of the record of such hearing.

Any party may request the record of the hearing. Promptly after receiving such a request, the commission shall prepare and provide the record of the hearing to the party who requested it. The commission may charge a fee to the party who requested the record that does not exceed the cost to the commission for preparing and transcribing or transmitting it.

(F) If, upon completion of the hearing, the commission finds that the action appealed from was lawful and reasonable, it shall make a written order affirming the action, or if the commission finds that the action was unreasonable or unlawful, it shall make a written order vacating or modifying the action appealed from.

The commission shall issue a written order affirming, vacating, or modifying an action pursuant to the following schedule:

(1) For an appeal that was filed with the commission before April 15, 2008, the commission shall issue a written order not later than December 15, 2009.

(2) For all other appeals that have been filed with the commission as of October 15, 2009, the commission shall issue a written order not later than July 15, 2010.

(3) For an appeal that is filed with the commission after October 15, 2009, the commission shall issue a written order not later than twelve months after the filing of the appeal with the commission.

(G) Every order made by the commission shall contain a written finding by the commission of the facts upon which the order is based. Notice of the making of the order shall be given forthwith to each party to the appeal by mailing a certified copy thereof to each party by certified mail, with a statement of the time and method by which an appeal may be perfected.

(H) The order of the commission is final unless vacated or modified upon judicial review.

Amended by 129th General AssemblyFile No.127, HB 487, §101.01, eff. 9/10/2012.

Amended by 128th General AssemblyFile No.9, HB 1, §101.01, eff. 10/16/2009.

Effective Date: 12-02-1996; 12-22-2005; 2008 HB525 07-01-2009

5703.02 Board of tax appeals - powers and duties.

There is hereby created the board of tax appeals, which shall exercise the following powers and perform the following duties:

(A) Exercise the authority provided by law to hear and determine all appeals of questions of law and fact arising under the tax laws of this state in appeals from decisions, orders, determinations, or actions of any tax administrative agency established by the law of this state, including but not limited to appeals from:

(1) Actions of county budget commissions;

(2) Decisions of county boards of revision;

(3) Actions of any assessing officer or other public official under the tax laws of this state;

(4) Final determinations by the tax commissioner of any preliminary, amended, or final tax assessments, reassessments, valuations, determinations, findings, computations, or orders made by the tax commissioner;

(5) Adoption and promulgation of rules of the tax commissioner.

(B) Appoint a secretary of the board of tax appeals, who shall serve in the unclassified civil service at the pleasure of the board, and any other employees as are necessary in the exercise of the powers and the performance of the duties and functions that the board is by law authorized and required to exercise, and prescribe the duties of all employees, and to fix their compensation as provided by law;

(C) Maintain a journal, which shall be open to public inspection and in which the secretary shall keep a record of all of the proceedings and the vote of each of its members upon every action taken by it;

(D) Adopt and promulgate, in the manner provided by section 5703.14 of the Revised Code, and enforce all rules relating to the procedure of the board in hearing appeals it has the authority or duty to hear, and to the procedure of officers or employees whom the board may appoint; provided that section 5703.13 of the Revised Code shall apply to and govern the procedure of the board. Such rules shall include, but need not be limited to, the following:

(1) Rules governing the creation and implementation of a mediation program, including procedures for requesting, requiring participation in, objecting to, and conducting a mediation;

(2) Rules requiring the tax commissioner, county boards of revision, and local boards of tax review created under section 718.11 of the Revised Code to electronically file any transcript required to be filed with the board of tax appeals, and instructions and procedures for the electronic filing of such transcripts.

(3) Rules establishing procedures to control and manage appeals filed with the board. The procedures shall include, but not be limited to, the establishment of a case management schedule that shall include expected dates related to discovery deadlines, disclosure of evidence, pre-hearing motions, and the hearing, and other case management issues considered appropriate.

Amended by 130th General Assembly File No. TBD, HB 5, §1, eff. 3/23/2015, op. 1/1/2016.

Amended by 130th General Assembly File No. 37, HB 138, §1, eff. 10/11/2013 and 1/1/2015.

Effective Date: 03-17-1989

Related Legislative Provision: *See 130th General Assembly File No. 37, HB 138, §4.*

5703.60 Petition for reassessment.

(A) If a petition for reassessment has been properly filed under a law that specifies that this section applies, the tax commissioner shall proceed as follows:

(1) Except as provided in division (D) of this section, the commissioner may correct the assessment by issuing a corrected assessment. The corrected assessment may reduce or increase the previous assessment, as the commissioner finds proper. The commissioner shall send the corrected assessment by ordinary mail to the address to which the original assessment was sent, unless the petitioner notifies the commissioner of a different address. The commissioner's mailing of the corrected assessment is an assessment timely made and issued to the extent that the original assessment was timely made and issued, notwithstanding any time limitation otherwise imposed by law.

Within sixty days after the mailing of the corrected assessment, the petitioner may file a new petition for reassessment. The petition shall be filed in the same manner as provided by law for filing the original petition. If a new petition is properly filed within the sixty-day period, the commissioner shall proceed under division (A)(2) or (3) of this section. If a new petition is not properly filed within the sixty-day period, the corrected assessment becomes final, and the amount of the corrected assessment is due and payable from the person assessed.

The issuance of a corrected assessment under this division nullifies the petition for reassessment filed before such issuance, and that petition shall not be subject to further administrative review or appeal. The commissioner may issue to the person assessed only one corrected assessment under this division.

(2) The commissioner may cancel the assessment by issuing either a corrected assessment or a final determination. The commissioner may mail the cancellation in the same manner as a corrected assessment under division (A)(1) of this section. Cancellation of an assessment pursuant to this division is not subject to further administrative review or appeal.

(3) If no corrected assessment or final determination is issued under division (A)(1) or (2) of this section, or if a new petition for reassessment is properly filed under division (A)(1) of this section, the commissioner shall review the assessment or corrected assessment petition that is still pending. If the petitioner requests a hearing, the commissioner shall assign a time and place for the hearing and notify the petitioner of such time and place, but the commissioner may continue the hearing from time to time as necessary. Upon completion of the review and hearing, if requested by the person assessed, the commissioner shall either cancel the assessment or corrected assessment by issuing a corrected assessment or final determination under division (A)(2) of this section, or issue a final determination that reduces, affirms, or increases the assessment or corrected assessment, as the commissioner finds proper. If a final determination is issued under this division, a copy of it shall be served on the petitioner in the manner provided by section 5703.37 of the Revised Code, and it is subject to appeal under section 5717.02 of the Revised Code. Only objections decided on the merits by the board of tax appeals or a court shall be given the effect of collateral estoppel or res judicata in considering an application for refund of amounts paid pursuant to the assessment or corrected assessment.

(B) Except as provided in division (D) of this section, in addition to the authority provided in division (A) of this section and division (H) of section 5703.05 of the Revised Code, the tax commissioner, on the commissioner's own motion, may issue a corrected assessment with regard to the assessment of any tax for which a properly filed petition for reassessment would be subject to division (A) of this section. A corrected assessment may be issued under this division only if the original assessment has not been certified to the attorney general for collection under section 131.02 of the Revised Code, or is not an appeal pursuant to section 5717.02 of the Revised Code. The corrected assessment shall not increase the amount of tax, penalty, or additional charge if the statute of limitations to issue a new assessment for such increase has expired. The corrected assessment shall be issued and reviewed in the same manner as a corrected assessment under division (A)(1) of this section.

(C) If the tax commissioner issues a corrected assessment or final determination under this section that reduces an assessment below the amount paid thereon, and the reduction is made at the written request of the party assessed, either through the filing of a proper petition for reassessment or otherwise, the commissioner shall

certify any overpayment as a refund due only to the extent a refund could have been timely claimed when the request was made. If the reduction is made on the commissioner's own motion, the commissioner shall certify any overpayment as a refund due only to the extent a refund could have been timely claimed at the time the reduction was made.

(D) The tax commissioner shall not issue a corrected assessment under division (A)(1) or (B) of this section after the party assessed has requested in writing that the commissioner not use that procedure.

(E) This section does not require the tax commissioner to issue a corrected assessment.

Effective Date: 09-06-2002

5703.70 Refund application procedures.

(A) On the filing of an application for refund under section 3734.905, 4307.05, 4307.07, 5726.30, 5727.28, 5727.91, 5728.061, 5733.12, 5735.122, 5735.13, 5735.14, 5735.141, 5735.142, 5735.18, 5736.08, 5739.07, 5739.071, 5739.104, 5741.10, 5743.05, 5743.53, 5749.08, 5751.08, or 5753.06 of the Revised Code, or an application for compensation under section 5739.061 of the Revised Code, if the tax commissioner determines that the amount of the refund or compensation to which the applicant is entitled is less than the amount claimed in the application, the commissioner shall give the applicant written notice by ordinary mail of the amount. The notice shall be sent to the address shown on the application unless the applicant notifies the commissioner of a different address. The applicant shall have sixty days from the date the commissioner mails the notice to provide additional information to the commissioner or request a hearing, or both.

(B) If the applicant neither requests a hearing nor provides additional information to the tax commissioner within the time prescribed by division (A) of this section, the commissioner shall take no further action, and the refund or compensation amount denied becomes final.

(C)

(1) If the applicant requests a hearing within the time prescribed by division (A) of this section, the tax commissioner shall assign a time and place for the hearing and notify the applicant of such time and place, but the commissioner may continue the hearing from time to time as necessary. After the hearing, the commissioner may make such adjustments to the refund or compensation as the commissioner finds proper, and shall issue a final determination thereon.

(2) If the applicant does not request a hearing, but provides additional information, within the time prescribed by division (A) of this section, the commissioner shall review the information, make such adjustments to the refund or compensation as the commissioner finds proper, and issue a final determination thereon.

(3) The commissioner shall serve a copy of the final determination made under division (C)(1) or (2) of this section on the applicant in the manner provided in section 5703.37 of the Revised Code, and the decision is final, subject to appeal under section 5717.02 of the Revised Code.

(D) The tax commissioner shall certify to the director of budget and management and treasurer of state for payment from the tax refund fund created by section 5703.052 of the Revised Code, the amount of the refund to be refunded under division (B) or (C) of this section. The commissioner also shall certify to the director and treasurer of state for payment from the general revenue fund the amount of compensation to be paid under division (B) or (C) of this section.

Amended by 130th General Assembly File No. 25, HB 59, §101.01, eff. 9/29/2013.

Amended by 129th General AssemblyFile No.186, HB 510, §1, eff. 3/27/2013.

Amended by 128th General AssemblyFile No.38, HB 519, §1, eff. 9/10/2010.

Effective Date: 09-06-2002; 04-29-2005; 06-30-2005; 2008 HB429 01-01-2010

5715.26 County auditor to adjust valuation and transmit adjusted abstract.

(A)

(1) Upon receiving the statement required by section 5715.25 of the Revised Code, the county auditor shall forthwith add to or deduct from each tract, lot, or parcel of real property or class of real property the required percentage or amount of the valuation thereof, adding or deducting any sum less than five dollars so that the value of any separate tract, lot, or parcel of real property shall be ten dollars or some multiple thereof.

(2) After making the additions or deductions required by this section, the auditor shall transmit to the tax commissioner the appropriate adjusted abstract of the real property of each taxing district in the auditor's county in which an adjustment was required.

(3) If the commissioner increases or decreases the aggregate value of the real property or any class thereof in any county or taxing district thereof and does not receive within ninety days thereafter an adjusted abstract conforming to its statement for such county or taxing district therein, the commissioner shall withhold from such county or taxing district therein fifty per cent of its share in the distribution of state revenues to local governments pursuant to sections 5747.50 to 5747.55 of the Revised Code and shall direct the department of education to withhold therefrom fifty per cent of state revenues to school districts pursuant to Chapter 3317. of the Revised Code. The commissioner shall withhold the distribution of such funds until such county auditor has complied with this division, and the department shall withhold the distribution of such funds until the commissioner has notified the department that such county auditor has complied with this division.

(B)

(1) If the commissioner's determination is appealed under section 5715.251 of the Revised Code, the county auditor, treasurer, and all other officers shall forthwith proceed with the levy and collection of the current year's taxes in the manner prescribed by law. The taxes shall be determined and collected as if the commissioner had determined under section 5715.24 of the Revised Code that the real property and the various classes thereof in the county as shown in the auditor's abstract were assessed for taxation and the true and agricultural use values were recorded on the agricultural land tax list as required by law.

(2) If as a result of the appeal to the board it is finally determined either that all real property and the various classes thereof have not been assessed as required by law or that the values set forth in the agricultural land tax list do not correctly reflect the true and agricultural use values of the lands contained therein, the county auditor shall forthwith add to or deduct from each tract, lot, or parcel of real property or class of real property the required percentage or amount of the valuation in accordance with the order of the board or judgment of the court to which the board's order was appealed, and the taxes on each tract, lot, or parcel and the percentages required by section 319.301 of the Revised Code shall be recomputed using the valuation as finally determined. The order or judgment making the final determination shall prescribe the time and manner for collecting, crediting, or refunding the resultant increases or decreases in taxes.

Amended by 129th General AssemblyFile No.28, HB 153, §101.01, eff. 6/30/2011.

Amended by 128th General AssemblyFile No.9, HB 1, §101.01, eff. 7/17/2009.

Effective Date: 01-01-1986

CERTIFICATE OF SERVICE

I hereby certify that, on August 9, 2016, a copy of the foregoing Appendix to the Appellants' Reply Brief was served by electronic mail on Daniel Fausey (Daniel.Fausey@ohioattorneygeneral.gov) and Daniel Kim (Daniel.Kim@ohioattorneygeneral.gov), Assistant Attorneys General, Ohio Attorney General's Office, 30 East Broad Street, 25th Floor, Columbus, OH 43215.

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