OPINION NO. 2009-020

Syllabus:

2009-020

Although the court in *Wetland Resource Center, L.L.C. v. Marion County Auditor*, 157 Ohio App. 3d 203, 2004-Ohio-2470, 809 N.E.2d 1202 (Marion County), reached a contrary result, we conclude that land used as a wetland mitigation bank is not "devoted exclusively to agricultural use" within the meaning of Ohio Const. art. II, § 36 and R.C. 5713.30(A)(1) and, therefore, does not qualify for reduced tax valuation under the "current agricultural use value" (CAUV) program.

To: Thomas L. Sartini, Ashtabula County Prosecuting Attorney, Jefferson, Ohio
By: Richard Cordray, Ohio Attorney General, May 22, 2009

We have received your request for an opinion concerning the taxation of real property and the determination whether particular property is included as "[l]and devoted exclusively to agricultural use" under R.C. 5713.30(A). Your question is "[w]hether the compensation a wetland mitigation bank receives by selling wetland credits to developers qualifies as 'payments or other compensation under a land retirement or conservation program under an agreement with an agency of the federal government' within the meaning of R.C. 5713.30(A)(1)."

In the situation with which you are concerned, a company purchased farm land that qualified for reduced tax valuation under the "current agricultural use value" (CAUV) program.[1] The company created a wetland mitigation bank and received federal authority to sell credits to approved permittees.[2] The company filed an application with the Ashtabula County Auditor to continue the valuation of the land under the CAUV program, and the application was denied.

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[1] Under Ohio Const. art. XII, § 2, land generally must "be taxed by uniform rule according to value." An exception for agricultural land is authorized under Ohio Const. art. II, § 36. The CAUV program permits real property devoted exclusively to agricultural use to be assessed for tax purposes at its value for agricultural use, rather than at the value (known as "highest and best use") determined by considering other possible uses, including commercial development. R.C. 5713.30-.99; R.C. 5715.01; 16 Ohio Admin. Code 5703-25-30 to -25-36. The agricultural value is generally less than the property's value for its highest and best use, thereby effecting a reduction of taxes. *See Bd. of Educ. v. Bd. of Revision*, 57 Ohio St. 2d 62, 386 N.E.2d 1113 (1979); 1984 Op. Att'y Gen. No. 84-017. The taxpayer has the burden of asking for, and establishing entitlement to, reduced tax valuation under the CAUV program, and the county auditor makes annual determinations about CAUV eligibility. R.C. 5713.31-.38; *see Hardy v. Delaware County Bd. of Revision*, 106 Ohio St. 3d 359, 2005-Ohio-5319, 835 N.E.2d 348.

[2] Various federal statutes and regulations provide for the protection of wetlands, consisting generally of areas that support vegetation typically adapted for life in sat-

The determination whether particular land is devoted exclusively to agricultural use is made under the definition set forth in R.C. 5713.30(A). The portion of the definition that is addressed in your question appears in divisions (A)(1) and (A)(2). Division (A)(1) defines "*[l]and devoted exclusively to agricultural use*" to include "[t]racts, 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 [R.C. 5713.31], and through the last day of May of such year, . . . *were devoted to and qualified for payments or other compensation under a land retirement or conservation program under an agreement with an agency of the federal government.*" R.C. 5713.30(A)(1) (emphasis added). Division (A)(2) contains essentially the same language but applies it to tracts, lots, or parcels of land totaling less than ten acres. The question at issue is whether the reference to tracts, lots, or parcels of land that "were devoted to and qualified for payments or other compensation under a land retirement or conservation program under an agreement with an agency of the federal government" includes land that, under federal law, is used as a wetland mitigation bank that sells wetland credits to developers.

The Ashtabula County Auditor takes the position that the compensation a wetland mitigation bank receives by selling wetland credits to permittees does not qualify as "payments or other compensation under a land retirement or conservation program under an agreement with an agency of the federal government" within the meaning of R.C. 5713.30(A)(1). This position is consistent with that taken by the Ohio Tax Commissioner and his staff. *See* R.C. 5715.01(B) (directing a county auditor to assess real property for taxation in accordance with state statutes and rules of the Tax Commissioner); *see also* Ohio Const. art. XII, § 2; R.C. 5713.01.

In contrast, the Third District Court of Appeals, in *Wetland Resource Center, L.L.C. v. Marion County Auditor*, found that compensation a wetland mitigation bank receives by selling wetland credits to developers does qualify as "payments or other compensation under a land retirement or conservation program under an agreement with an agency of the federal government" within the meaning of R.C. 5713.30(A)(1), holding that "privately paid, but governmentally authorized, compensation" fits within that statutory language. *Wetland Resource Center, L.L.C. v. Marion County Auditor*, 157 Ohio App. 3d 203, 2004-Ohio-2470, 809 N.E.2d 1202, at ¶12 (Marion County). The court stated, in part:

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urated soil conditions, such as swamps, marshes, and bogs. 40 C.F.R. §§ 230.1(t), .41 (2008); *see, e.g.*, 16 U.S.C.A. §§ 3801(a)(18), 3921 (West 2000 & Supp. 2007). Wetland mitigation banks have been developed to provide alternative wetland areas "to offset unavoidable impacts to waters of the United States" authorized through the issuance of permits by the Department of the Army (DA). 40 C.F.R. § 230.91(a) (2008); *see also* 33 U.S.C.A. §§ 1251, 1344 (West 2001); 33 C.F.R. § 320.2 (2007); 40 C.F.R. §§ 230.93-.98 (2008). A wetland mitigation bank sells compensatory mitigation credits to DA permittees, who use them to compensate for impacts on wetlands. The Army Corps of Engineers regulates the number and availability of credits in each wetland mitigation bank and decides which DA permittees may purchase from a particular bank. 40 C.F.R. §§ 230.92, .93, .98 (West 2008).

{¶13} *CAUV is a tax exception allowing land to be taxed at its agricultural use rather than its highest and best use. Statutes relating to exception from taxation are to be strictly construed.* Because the reduction in taxes depends on legislative grace, the statute must clearly express the exception . . . .

{¶14} R.C. 5713.30(A)(1) requires that the conservation program qualify for payments or other compensation ''under an agreement with an agency of the federal government.'' ''Under'' is defined as ''[s]ubject to the authority, rule, or control of: *under a dictatorship;* or Subject to the supervision, instruction, or influence of: *under parental guidance.*'' The American Heritage Dictionary of the English Language, Fourth Edition (2000). It is clear from this definition that a payment that is supervised, controlled, or influenced by an agreement with an agency of the federal government can be ''under'' that agreement without also being directly ''from'' a federal agency.

{¶15} WRC receives its compensation with the authority, control, and supervision of the Mitigation Bank Review Team, which consists of representatives from numerous federal agencies. *Without the approval of the Review Team, WRC would not be authorized to sell wetland credits. Instead it would merely be the owner of a large tract of mostly unproductive wetlands.* Not only must the wetlands be approved by the government prior to the sale of any credits, but the federal agencies also limit the total number of credits WRC's bank is permitted to sell. Furthermore, developers must get governmental consent in order to purchase credits from the wetland bank to offset the destroyed wetlands. The government also controls which wetland mitigation banks the developers may buy credits from.

{¶16} While the actual price of each wetland credit is not set by the federal agencies, the right to sell and buy the credits is closely monitored and controlled by the agencies. The fact that the government allows a small free market aspect to enter the selling of wetland credits does not change the fact that credits are created, sold, and distributed under the government's supervision and control. *The right to receive any compensation at all from the selling of wetland credits arises under the agreement between the private landowner and agencies of the federal government.*

{¶17} *Under the facts of the matter presented to us herein, we hold that the compensation WRC receives by selling wetland credits to developers qualifies as ''payments or other compensation under a land retirement or conservation program under an agreement with an agency of the federal government'' within the meaning of R.C. 5713.30(A)(1).*

Wetland Resource Center, L.L.C. v. Marion County Auditor (citations omitted; emphasis added).

Although the analysis in *Wetland Resource Center* appears on its face to

comport with R.C. 5713.30, your opinion request asks whether we agree with its conclusion that land used as a wetland mitigation bank under a federal program qualifies for valuation under CAUV. Having examined the question, it is our opinion that land used as a wetland mitigation bank is not "devoted exclusively to agricultural use" within the meaning of Ohio Const. art. II, § 36 and R.C. 5713.30 and, therefore, cannot be included in the CAUV program.

In adopting this position, we do not intend to modify the significance or effect of the *Wetland Resource Center* case. The Ohio Attorney General has consistently acknowledged the respect that is due the judiciary. We do not propose any action that would interfere with appropriate judicial procedure or with the precedential value afforded to any case. *See, e.g., State ex rel. Finley v. Pfeiffer*, 163 Ohio St. 149, 126 N.E.2d 57 (1955) (syllabus, paragraph 1) ("[t]he legislative, executive and judicial branches of government are separate and distinct and neither may impinge upon the authority or rights of the others; such branches are of equal importance; and each in exercising its prerogatives and authority must have regard for the prerogatives and authority of the others").[3]

Argument in Support of Excluding Wetland Mitigation Banks from CAUV: Construing R.C. 5713.30(A) in Light of Ohio Const. art. II, § 36

The Ohio Tax Commissioner takes the position that compensation received by a wetland mitigation bank for wetland credits sold to developers does not qualify as "payments or other compensation under a land retirement or conservation program under an agreement with an agency of the federal government" within the meaning of R.C. 5713.30(A)(1).[4] In support of this position, it may be argued that

[3] The *Wetland Resource Center* case was decided by the Third District Court of Appeals and is not controlling law in Ashtabula County (which is in the Eleventh District), though it may be considered by courts in Ashtabula County and elsewhere in Ohio for its persuasive value. *See* Ohio Const. art. IV, § 3; R.C. 2501.01; Ohio Sup. Ct. R. Rep. Ops. 4(B); 2001 Op. Att'y Gen. No. 2001-010, at 2-59. The Ohio Supreme Court has not addressed the application of R.C. 5713.30(A)(1) or (A)(2) to land that is established as a wetland mitigation bank under federal law, so there is currently no judicial interpretation that is controlling throughout Ohio. *See* Ohio Const. art. IV, §§ 2, 3; *cf. Hardy v. Delaware County Bd. of Revision* at ¶11 (owners did not present sufficient evidence to establish that the federal program under which payments were allegedly received was one of the programs under which land qualified for CAUV).

[4] It is our understanding that the question whether a federal program is a "land retirement or conservation program" for purposes of R.C. 5713.30 is considered on a case-by-case basis. *See, e.g., Hardy v. Delaware County Bd. of Revision*; *Ohio Holding Co. v. Franklin County Bd. of Revision*, No. 95APH02-155, 1995 Ohio App. LEXIS 4575 (Franklin County Oct. 17, 1995); *Augustine v. Geauga County Bd. of Revision*, No. 2003-A-1354, 2004 Ohio Tax LEXIS 1066 (BTA July 16, 2004). Our research has disclosed no Ohio statutes, rules, or written guidelines that

the provisions of R.C. 5713.30(A) offering CAUV participation to land qualified for payments under a federal program apply only when the payments are made by the federal government and cannot apply when the payments are made by a private person. This argument requires a more restrictive reading of "under" than that set forth in *Wetland Resource Center*—a reading that construes the statutory language as requiring that for compensation to be "under a land retirement or conservation program under an agreement with an agency of the federal government," the compensation must be prescribed by the agreement and provided by the federal government as one of the contracting parties. This position is supported by the argument that although it is the federal program that makes interests in wetlands salable, the purchase by a permittee is a transaction between the wetland mitigation bank and the permittee and, ultimately, is not subject to the authority, rule, or control of the federal agency, as the definition of "under" would require.

The source of the compensation, however, is not the point upon which the Tax Commissioner bases his strongest objection to the *Wetland Resource Center* decision. Rather, that objection is based upon the constitutional provision under which the CAUV program was created. Ohio Const. art. II, § 36 permits an exception under which land that is "devoted exclusively to agricultural use" may be taxed at its agricultural use value, rather than at its highest and best use. *See* note 1, *supra.*

It is a basic principle of Ohio law that statutory exceptions to and exclusions from real property taxes must be construed strictly to limit the instances in which an exception or exclusion is granted to those clearly intended by the General Assembly. *Wetland Resource Center, L.L.C. v. Marion County Auditor* at ¶13; 1977 Op. Att'y Gen. No. 77-020, at 2-67 to 2-68. The rule of strict construction preserves equality in the burden of taxation and promotes the policy that all property should bear its proportionate share of the cost of government. *Akron Home Med. Servs., Inc. v. Lindley*, 25 Ohio St. 3d 107, 108, 495 N.E.2d 417 (1986).

The primary goal in construing a statute is to determine and give effect to the legislative intent. The portions of R.C. 5713.30(A)(1) and(A)(2) pertaining to federal programs were enacted in 1974 as part of the initial CAUV program. *See* 1974 Ohio Laws, Part II, 341, 344-45 (Am. Sub. S.B. 423, eff. Jul. 26, 1974). At that time, there were no wetland mitigation banks, so the General Assembly had no reason to consider whether a wetland mitigation bank program would be included in its language.[5] Our question is whether the current wetland mitigation bank

classify particular federal programs as federal land retirement or conservation programs for purposes of R.C. 5713.30. In contrast, some other states have administrative rules that specify the federal programs that qualify as agricultural uses. *See, e.g.,* Wis. Admin. Code Tax § 18.05 (2009).

[5] Federal law has included provisions pertaining to the protection of wetlands at least since 1971. *See* 16 U.S.C.A. § 1301 (West 2000) (authorizing the Secretary of Agriculture "to formulate and carry out a continuous program to prevent the serious loss of wetlands, and to preserve, restore, and improve such lands, which

program is the type of program intended by the General Assembly and whether it reasonably comes within the language of R.C. 5713.30(A)(1) and (A)(2).[6]

An examination of Ohio Const. art. II, § 36 indicates that if R.C. 5713.30 is construed strictly against the exception, land used as a wetland mitigation bank is excluded from "land devoted exclusively to agricultural use." In implementing the CAUV program, the 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, 330 N.E.2d 896 (1975).

Ohio Const. art. II, § 36 states initially that laws may be passed "to encourage forestry and agriculture." It authorizes the General Assembly to enact laws that exempt forest land from taxation and permit agricultural land to be taxed at its agricultural value. The fact that forestry is treated differently than agriculture in Ohio Const. art. II, § 36 indicates that not all conservation of natural resources will qualify as an agricultural use. *See* 1977 Op. Att'y Gen. No. 77-020.

Further, Ohio Const. art. II, § 36 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." The express reference to swamp lands in this provision grants the General Assembly authority to pass laws protecting wetlands. The failure to include a similar reference in the tax exemption and tax exception portion of art. II, § 36 indicates that there was no intent to authorize any sort of tax break for swamp lands or other natural resources, apart from forests and agricultural lands. While the General Assembly is authorized by Ohio Const. art. II, § 36 to pass laws

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program shall begin on July 1, 1971"). However, the general use of wetland mitigation banks occurred after 1990. *See* Regulatory Guidance Letters Issued by the Corps of Engineers, 58 Fed. Reg. 47,719, at 47,721 (Sept. 10, 1993) (memorandum of August 23, 1993 from the Office of Wetland, Oceans, and Watersheds, U.S. EPA, and the Office of the Assistant Secretary of the Army (Civil Works) "provides general guidelines for the establishment and use of wetland mitigation banks in the Clean Water Act Section 404 regulatory program," as interim guidance pending completion of the Army Corps of Engineers' comprehensive two-year review and evaluation of wetland mitigation banking under the Water Resources Development Act of 1990, to assist in the development of a national policy on this issue); *see also* 33 U.S.C.A. §§ 1251, 1344 (West 2001).

[6] Representatives of the Tax Commissioner have informed us that the sort of federal land retirement or conservation programs that have been included under CAUV include programs to prevent soil erosion or to leave farmland fallow, but do not include all federal programs related to farm activities or to conservation. *See* note 4, *supra.*

protecting wetlands and other natural resources, it is authorized to grant tax exemptions or exceptions only for forestry and agriculture uses.

To assure compliance with Ohio Const. art. II, § 36, the language of R.C. 5713.30(A)(1) and (A)(2) that authorizes CAUV valuation for lands that "were devoted to and qualified for payments or other compensation under a land retirement or conservation program under an agreement with an agency of the federal government" must be read to apply only to "land retirement or conservation programs" under which land is devoted to agricultural use. This construction encompasses within CAUV only those federal land retirement or conservation programs that are agricultural in nature.

Argument in Support of Excluding Wetland Mitigation Banks from CAUV: Determining Whether a Wetland Mitigation Bank Is an Agricultural Use

Once it is established that the references in R.C. 5713.30(A) to federal programs must be limited to programs that are agricultural in nature, it must be determined whether a wetland mitigation bank fits this description. An analysis of Ohio law indicates that a wetland is not, in itself, an agricultural use of land. Wetlands may be included under CAUV only in limited circumstances and in limited amounts. The term "[c]onservation practices" is defined as "practices *used to abate soil erosion as required in the management of the farming operation*, and include, but are not limited to, the installation, construction, development, planting, or use of grass waterways, terraces, diversions, filter strips, field borders, windbreaks, riparian buffers, *wetlands*, ponds, and cover crops *for that purpose*." R.C. 5713.30(E) (emphasis added). Conservation practices, including wetlands, qualify as "[l]and devoted exclusively to agricultural use" only if they constitute twenty-five per cent or less of lands that otherwise meet the agricultural use requirements. R.C. 5713.30(A). The definition of "[c]onservation practices" thus indicates a legislative intent that, to be considered "devoted exclusively to agricultural use," land used for conservation purposes must have a clear relationship to agriculture. Accordingly, there is a question whether the use of lands as wetlands apart from a clear connection with farming may be considered an agricultural use under Ohio law.[7]

There is also a question whether the creation of, or sale of interests in, wet-

[7] *See also* 7A Ohio Admin. Code 3745-1-54(B)(2)(b) (the functions of a wetland may include ground water exchange, nutrient removal or transformation, sediment or contaminant retention, water storage, sediment stabilization, shoreline stabilization, maintenance of biodiversity, recreation, education and research, and habitat for threatened or endangered species); 16 Ohio Admin. Code 5703-25-33(F), -25-34(G) (Ohio Department of Taxation's rules governing the major land capability classes of agricultural land include several classes of land for permanent vegetation only—among them Class V, which has frequent flooding or is permanently wet and includes farm ponds, and Class VIII, which is not suited for cultivation, pasture, or forests but is recommended for wildlife and recreation).

lands may be considered an agricultural use. Even though wetlands are protected under federal conservation provisions, a wetlands mitigation bank, by nature and definition, is intended to serve development, rather than conservation. A wetlands mitigation bank constitutes a commodity to be sold to permittees to allow them to proceed with projects that impair or destroy wetlands. It may be acknowledged that wetland mitigation bank lands are environmentally beneficial and serve conservation purposes, but it must also be recognized that the bank is engaged in the sale of the rights to claim the benefits of the wetlands.

The reason for excepting agricultural land from taxation at its value for highest and best use was to grant the farmer a tax benefit that would make it economically feasible to farm the land, rather than requiring the payment of taxes at a level that required commercial development. *Bd. of Educ. v. Bd. of Revision*, 57 Ohio St. 2d 62, 66 n.4, 386 N.E.2d 1113 (1979). The tax benefit to the farmer was intended to be at the expense of the government—that is, the public—which would receive less in real property taxes in exchange for making it possible for agriculture to continue to prosper in Ohio. Participation in a federal program was allowed when compensation under a federal land retirement or conservation program took the place of proceeds earned by farming the land.

To allow CAUV valuation of wetland mitigation banks would also grant a tax benefit at the expense of the government. In this case, however, the benefit would accrue either to the landowner or to the permittee who purchases the wetland mitigation bank credits and, thus, would be part of a commercial operation, rather than an agricultural use. The loser in this situation is the public, which is forfeiting real property taxes to benefit commercial development. In contrast, if CAUV valuation is denied to a wetland mitigation bank, the wetland mitigation bank land will be taxed according to its commercial value to permittees.

Conclusions

Under *Wetlands Resource Center*, the language of R.C. 5713.30(A)(1) and (A)(2) authorizing CAUV valuation for lands that "were devoted to and qualified for payments or other compensation under a land retirement or conservation program under an agreement with an agency of the federal government" is read according to its plain terms to apply to any federal conservation program. Notwithstanding this case, however, it is our conclusion that land used as a wetland mitigation bank is not "devoted exclusively to agricultural use" within the meaning of Ohio Const. art. II, § 36 and R.C. 5713.30(A)(1) and, therefore, does not qualify for reduced tax valuation under the CAUV program. This conclusion is consistent with the Tax Commissioner's current interpretation of R.C. 5713.30(A).

Our examination of Ohio Const. art. II, § 36 and R.C. 5713.30(A) indicates that the language of R.C. 5713.30 does not clearly limit the application of the CAUV program to agricultural uses described in Ohio Const. art. II, § 36. This situation might be remedied by a statutory amendment that focuses upon the constitutionally-required connection with agriculture and makes the language of R.C. 5713.30 more clearly consistent with Ohio Const. art. II, § 36. The Tax Commissioner also could seek to clarify the law's application by adopting administrative rules that provide

such guidance and perhaps identify specifically the particular federal programs that constitute federal land retirement or conservation programs for purposes of R.C. 5713.30. *See* note 4, *supra.* Another alternative would be for the Tax Commissioner to pursue the matter in the courts, with the goal of obtaining a decision on this issue by the Ohio Supreme Court.

For the reasons set forth above, you are advised that although the court in *Wetland Resource Center, L.L.C. v. Marion County Auditor*, 157 Ohio App. 3d 203, 2004-Ohio-2470, 809 N.E.2d 1202 (Marion County), reached a contrary result, we conclude that land used as a wetland mitigation bank is not "devoted exclusively to agricultural use" within the meaning of Ohio Const. art. II, § 36 and R.C. 5713.30(A)(1) and, therefore, does not qualify for reduced tax valuation under the CAUV program.