Bill Analysis

Peter A. Cooper *Legislative Service Commission*

Sub. S.B. 180

124th General Assembly
(As Reported by H. Ways and Means)

Sens. **Armbruster, Harris, Fingerhut, Spada, Ryan, Roberts, Amstutz, Austria, Blessing, Brady, Carnes, Coughlin, DiDonato, Finan, Randy Gardner, Robert Gardner, Goodman, Hagan, Herington, Hottinger, Jacobson, Mead, Mumper, Nein, Oelslager, White, Prentiss, Mallory, Espy, Wachtmann**

Reps. **Olman, Widowfield, Niehaus, Carano, Brown, Latta, Gilb, DeBose**

BILL SUMMARY

- Establishes an Ohio Venture Capital (OVC) Program to make loans to and invest in seed and venture capital partnerships and provide security against losses incurred by OVC Program lenders and investors.

- Creates an Ohio Venture Capital Authority (Authority) to oversee the OVC Program.

- Directs the Authority to establish a lending and investment policy and requires it to designate one or two private, for-profit investment funds to serve as the OVC Program's administrator and carry out that policy.

- Provides that the Authority may grant to lenders to the OVC Program nonrefundable, transferable tax credits against the premium tax on domestic or foreign insurance companies or the corporation franchise or personal income tax to provide security against losses incurred by the lenders.

- Prohibits the Authority from granting more than $20 million in tax credits in any one fiscal year, and from granting a credit that may be claimed during the first four years of the OVC Program or after July 1, 2026.

- Prohibits municipal corporations from taxing S corporation shareholders' distributive shares except to the extent the distributive shares represent compensation for personal services performed by the shareholder for the S corporation.

- Permits the Tax Commissioner to notify county auditors, and county auditors to notify subdivisions, of property tax exemption applications filed for pollution control property.

- Permits commercial property owners, whose tax valuation complaints have been dismissed because an attorney did not file the complaint, to file a new complaint.

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CONTENT AND OPERATION

Ohio Venture Capital Program and Authority

(R.C. 150.01(B) and 150.02)

The bill establishes the Ohio Venture Capital Program (the "OVC Program"), and creates the Ohio Venture Capital Authority (the "Authority") to oversee the OVC Program. The bill specifies that the exercise by the Authority of its powers is an essential state governmental function and that the Authority is subject to all laws generally applicable to state agencies and public officials, with certain exceptions, discussed below under "***Laws governing the authority***."

Authority membership, terms of office, and operation

(R.C. 150.02)

Under the bill, the Authority consists of nine members. Seven of the members are to be appointed from the general public by the Governor, with the advice and consent of the Senate. These appointees must have experience in banking, investment, commercial law, or industry that is relevant to the purposes of the OVC Program. The Tax Commissioner and the Director of Development, or their designees, are the other two members, serving in an ex officio capacity; they are nonvoting members.

The seven members initially appointed by the Governor are to serve staggered terms, with one term ending on January 31, 2004, two terms ending on January 31, 2005, two terms ending on January 31, 2006, and two terms ending on January 31, 2007. Subsequent appointees will serve terms of four years. All appointed Authority members are eligible for reappointment.

Appointed members may be removed by the Governor for misfeasance, malfeasance, willful neglect of duty, or other cause, following notice and a public hearing (unless waived in writing). A vacancy on the Authority must be filled in the same manner as the original appointment, except that a person appointed to fill a vacancy will serve only for the remainder of the previous member's term.

A majority of the Authority constitutes a quorum, and the affirmative vote of a majority of the members present is necessary to take action. No vacancy in the Authority membership impairs the rights of a quorum to exercise all rights and perform all Authority duties.

Authority members must serve without compensation, but must be reimbursed for their reasonable and necessary expenses incurred in the conduct of

Authority business. The bill requires the Department of Development to provide office space and technical assistance as the Authority requires.

Laws governing the authority

(R.C. 149.43, 150.03, 150.06, and 150.09)

In most respects, the Authority and its members are made subject to all laws governing public agencies and public officers. Rules of the Authority are to be adopted in accordance with the Administrative Procedure Act, which generally requires public notice of, and public hearings on, proposed rules, and subjects those rules to review by the Joint Committee on Agency Rule Review.

The Authority is exempted wholly or partly from some laws that generally govern state agencies. The bill exempts the Authority from the operation of the State Agency Sunset Law, which causes covered state agencies to expire four years after their creation or renewal, unless renewed in a specified manner by the General Assembly (R.C. 101.83, not in the bill). It also provides that the designation of OVC Program administrators and the written agreement (discussed below) between the Authority and the administrators do not constitute a purchase of services by a state agency that otherwise would be subject to the requirements of state law governing government purchasing and competitive bidding.

The Authority is generally subject to the Open Meetings Law, but the bill permits the Authority to hold executive sessions under different circumstances than those generally applicable to public bodies under the existing Open Meetings Law. Specifically, if a majority of a quorum of the Authority agrees, by a roll call vote, to hold an executive (i.e., closed) session at a regular or special Authority meeting, the Authority may hold the session (1) to present, discuss, or review "confidential" proprietary information under certain circumstances or (2) to prepare for, conduct, or review negotiating sessions with a private, for-profit investment fund for the purpose of selecting it as a program administrator and entering into an agreement with it.

Records held by the Authority are public records, and thereby subject to public access and inspection, unless the records consist of proprietary information or are otherwise excluded from the public under the law governing public records (R.C. 149.43).

The bill grants immunity to the state, the Governor, and the members of the Authority from liability for damages in a civil action for any loss incurred as a result of investments made under the program.

Investment policy

(R.C. 150.03)

Within 90 days after the bill's effective date, the Authority must establish, and subsequently may modify, a written lending and investment policy for the OVC Program. The policy must meet all of the following requirements:

(1) It is consistent with the OVC Program's purposes.

(2) It permits only private investments to be made in private, for-profit seed and venture capital partnerships, including funds of funds (partnerships organized to invest in other partnerships), that invest in seed and early-stage companies or in established companies that are developing new methods or technologies, and that "demonstrate the potential to generate high levels of successful lending and investment performance."

(3) It requires program administrators to invest at least 75% of money from the program fund in Ohio-based venture capital funds (i.e., funds that have their principal offices in Ohio where a majority of the staff are employed, and where at least one "investment professional" is employed who has five or more years of experience in venture capital investment).

(4) It prohibits each program administrator from investing program fund money (i.e., investments secured under the OVC Program) in any single venture capital fund (or any fund under the same management) if the investment would cause the total investment of program fund moneys in that fund to exceed either of the following: (a) $10 million or (b) 50% of the capital invested in the fund (if the fund is an Ohio-based fund) or 20% of the capital invested in the fund (in the case of any non-Ohio-based fund).

(5) It prohibits a program administrator from committing program fund money to a fund until at least an equal amount is committed from other investors.

(6) It specifies the general conditions that a private, for-profit investment fund must meet to be designated as a program administrator, including, "as a significant selection standard," direct experience managing "external or nonproprietary capital in private equity fund of funds formats."

(7) It includes lending and investment standards and general limitations on allowable loans and investments that (a) minimize the need for the Authority to grant tax credits under the bill, (b) ensure compliance of the OVC Program administrator with all applicable state and federal laws, (c) ensure the safety and soundness of loans and investments made under the OVC Program, and (d) are

reasonable and necessary in the Authority's judgment to achieve the OVC Program's purposes.

(8) It specifies the criteria the Authority must consider when making the determination of whether moneys in the Ohio Venture Capital Fund may be expended without adversely affecting the OVC Program's continued viability.

(9) It prohibits direct investments other than investments in venture capital funds (except for temporary investments in investment grade securities or in interest bearing accounts while investment in venture capital funds is pending).

(10) It "encourages" investment in venture capital funds that invest primarily in "Ohio-based enterprises" (i.e., companies that employ at least one individual in Ohio that is in the seed or early stage of development and requires initial investment, or that is established but is developing new methods or technologies).

Security against losses

(R.C. 150.04 and 150.08)

The Authority's lending and investment policy also must specify the terms and conditions under which the Authority may grant tax credits (see "***Tax credits***," below) to provide security against losses on loans or investments under the OVC Program. (By authorizing the use of state money to provide security against losses, the bill may conflict with Article VIII, §4, Ohio Constitution, which states that "[t]he credit of the state shall not, in any manner, be given or loaned to, or in aid of, any individual association or corporation whatever. . . .")

The bill places restrictions on the Authority's provision of security against losses incurred by lenders or investors under the OVC Program. The Authority first must use moneys available in the Ohio Venture Capital Fund (OVCF) to the extent that the use of those moneys does not "adversely affect" the OVC Program's continued viability, as determined by the Authority under the criteria in its lending and investment policy. The OVCF is to be comprised of the 90% share of net investment profits paid by OVC Program administrators to the Authority under OVC Program administrators agreement, plus all interest earned on OVCF moneys.

If the moneys in the OVCF are insufficient for the Authority to provide security against a loss due to an "adverse effect" determination, the Authority may provide security against the loss by granting tax credits to lenders and investors (see below).

Money to the credit of the OVC Fund must be used to provide security against lenders' losses before tax credits may be granted. But if the amount to the credit of the Fund is greater than the amount reasonably necessary to secure losses, the General Assembly may appropriate the excess for the purpose of providing scholarships or student financial assistance to students enrolled in mathematics, engineering, or the physical or natural sciences at an institution of higher education.

<u>Selection of OVC Program administrators by written agreement</u>

(R.C. 150.05)

Under the bill, the Authority may select, as OVC Program administrators, one or two private, for-profit investment funds to carry out the lending and investment policy of the OVC Program. Each selected fund is required to be incorporated or organized as a for-profit corporation, limited liability company, partnership, limited partnership, or limited partnership association and capitalized in accordance with any state or federal laws applicable to the issuance or sale of securities.

Before selecting program administrators, the Authority must solicit requests for proposals ("RFPs") by publishing notice of the RFPs in newspapers of general circulation in Ohio. Publication must be made once per week for two consecutive weeks, and must contain a description of the program administrator agreement. The RFP must include instructions regarding how proposals may be submitted; instructions regarding how applicants are to communicate with the Authority; a description of the evaluation criteria; a description of the performance criteria that will apply to selected program administrators; and a description of any documents that may be incorporated by reference into RFPs. From among the applicants the authority considers to be qualified as program administrators, the Authority must select at least three for further review. From these three, the Authority may select up to two to serve as the program administrators. The Authority is required to enter into an agreement with each selected program administrator that provides for all of the following:

(1) Specification that investing by the OVC Program administrator will be budgeted to guarantee that no tax credits will be granted during the first four years of the OVC Program;

(2) A requirement that investment by the OVC Program administrator will comply with the Authority's investment policy in effect at the time that a loan or investment is made, and a prohibition against the administrator engaging in any investment activities other than activities to carry out exclusively the investment component of the OVC Program;

(3) A requirement of periodic financial reporting by the OVC Program administrator to the Authority, which must include an annual audit by an independent auditor and other financial reporting as specified in the agreement or otherwise required by the Authority for the purpose of ensuring compliance with the investment component of the OVC Program;

(4) Specification of additional or further standards or general limitations on allowable investments that minimize the need for the Authority to grant tax credits to provide security against losses, that ensure the compliance of the OVC Program administrator with applicable Ohio and federal laws, and that ensure the safety and soundness of investments made under the OVC Program;

(5) A requirement that the OVC Program administrator pay to the Authority at least 90% of the net profits from investments in venture capital funds;

(6) Specification of the procedures under which the OVC Program administrator will certify immediately to the Authority that a loss on a loan or investment has been incurred under the OVC Program, thereby creating a need for the Authority to grant tax credits under a contract between a lender or an investor and the Authority;

(7) Specification of any general limitations regarding the employment of a fund manager by the OVC Program administrator, in addition to an express limitation that the fund manager be a person with "demonstrated, substantial, successful" experience in the design and management of seed and venture capital investment programs and in capital formation (the fund manager may be an affiliate of the program administrator);

(8) Specification of the terms and conditions under which the Authority or the OVC Program administrator may terminate the agreement (including if the program administrator or its fund manager violates the Authority's investment policy), or under which the Authority may cease granting tax credits to provide security against losses;

(9) A requirement that each program administrator provide capital to the program fund equal to at least 1% of the outstanding loans to the program fund. The program administrators' capital must be placed at the same risk as the loan proceeds of lenders, and the program administrator is entitled to a pro rata share of any net profits or net loss from investments made, but program administrators are not entitled to security against losses (either from the Venture Capital Fund or by tax credits).

Tax credits

(R.C. 150.07, 5725.19, 5729.08, 5733.49, 5733.98, 5747.80, and 5747.98)

The bill empowers the Authority to authorize tax credits for lenders to secure them against losses on their loans to the program fund. The tax credits may be applied to the corporation franchise tax, the personal income tax, and the premium taxes on Ohio-based and non-Ohio-based insurance companies. The tax credits are nonrefundable, meaning a tax refund is not issued if a taxpayer's net tax liability before deducting the credit is less than the amount of the credit. The credits are to be authorized under a written contract between the lender and the authority. Contracts must specify the terms under which credits may be claimed, including the minimum amount of loss incurred before a credit may be claimed. Tax credits may not be claimed during the first four years of the OVC Program (measured from the Authority's adoption of the investment policy), and must be claimed before July 1, 2026.

Limit on annual credit amounts

(R.C. 150.07(C)(2))

The amount of tax credit certificates that may be issued in any single fiscal year is limited to $20 million. There is no limit on the cumulative amount of tax credit certificates that may be issued over the scheduled duration of the OVC Program (until the end of fiscal year 2026). If the limit is reached in any year, tax credit certificates may not be issued for subsequent losses until the following year, as explained below.

Claiming tax credits

Once authorized, credits may be claimed only when a loss is actually incurred, and only to the extent that the loss is not covered by payments from the OVC Fund. Before a tax credit may be claimed, the program administrator must certify the amount of the loss to the Authority, and only then must the Authority issue a tax credit certificate evidencing the lender's right to claim the credit. Once a tax credit certificate is issued, the lender may apply the credit toward its tax liability for the year specified in the certificate, or may transfer the certificate to another person (see below).

If the $20 million annual limit on tax credit certificates is reached in any fiscal year, the authority must defer the issuance of certificates for subsequently certified losses. A lender having a loss certified after the limit is reached must be notified that it may defer receipt of the certificate until the following year. In the following year, the Authority must issue certificates to lenders deferring receipt of certificates; the certificates must be issued in the order in which the lenders' losses were certified. The amount of tax credits represented in deferred tax credit certificates counts toward the $20 million limit for the following year. The Authority may defer a lender's receipt of a tax credit for up to five years (e.g., if the amount of certified losses in consecutive years is so great that the limit is reached), but the Authority may not issue a certificate for any loss certified more than five fiscal years earlier. The Authority must maintain a record of all losses for which tax credit certificates have been deferred.

Transferability of credits

Once a lender receives a tax credit certificate, the lender may transfer the certificate to another person that is liable for either the corporation franchise tax, personal income tax, or one of the taxes on insurance companies for the same year to which the credit may be claimed. The Authority must adopt rules governing such transfers, but only after obtaining the Tax Commissioner's consent.

"Loss"

(R.C. 150.01(A)(3))

The bill defines a lender's "loss" for the purpose of defining the amount of loss on loans to the program fund, and, therefore, the maximum amount of tax credit that a lender may claim. A lender incurs a secured loss only if, and only to the extent that, the lender does not receive timely payments of principal or interest on the loan as agreed to between the lender and the program administrator that invests the loan proceeds. In other words, if returns on investments made by the program administrator are not sufficient to enable the program administrator to satisfy all principal and interest payments when they are due, any lender not receiving a full payment of principal or interest incurs a loss. But "loss" does not include any loss incurred by a program administrator on the 1% capital stake each program administrator is required to invest (see "***Selection of program administrators***," above), and does not refer to any loss of program fund money, including losses on investments made by program administrators.

Reports

(R.C. 150.10)

Starting on January 1 of the second year after entering into an OVC Program administrator agreement, and on January 1 of every other year thereafter, the Authority is required to file a written report with the Clerk of the House of Representatives, the Clerk of the Senate, and the chairpersons of the House and

Senate committees that are primarily concerned with economic development. The report must contain the following information:

(1) A description of the details of the Authority's lending and investment policy;

(2) The Authority's assessment of the OVC Program's achievement of its statutorily prescribed purposes;

(3) The value of tax credit certificates issued by the Authority;

(4) The amount of tax credits claimed against the premium tax on domestic or foreign insurance companies and the state income and corporation franchise taxes;

(5) The financial status of the Ohio Venture Capital Fund;

(6) The names of the venture capital funds that have been invested in under the program and the locations of their principal offices, and the names of the companies in which each of those venture capital funds have invested Program Fund money and the locations of the companies' principal offices.

(7) Any recommendations for modifying the OVC Program to better achieve its statutorily prescribed purposes.

Each year that a report is issued, the co-chairpersons of the Authority, or another member of the Authority designated by the co-chairpersons as the Authority's representative, must appear in person before the standing committees of the House and Senate that are predominantly concerned with economic development to give testimony concerning the status of the OVC Program.

Municipal taxation of S corporation distributive shares

Background: S corporations

An S corporation is a corporation that elects special tax treatment under federal income tax law. S corporations, like partnerships, are given pass-through tax treatment under the Internal Revenue Code. "Pass-through tax treatment" means that for tax purposes the entity's tax attributes (income, deductions, losses, credits) flow through the entity to its owners. Pass-through entities record transactions undertaken by the entity and report the results to the government, but pay no federal tax on the results of their operations. Rather, the tax characteristics (i.e., the income, deductions, losses, tax credits, etc.) of the corporation's operating results are passed through the entity directly to its shareholders on a pro rata basis and are reported on the shareholders' individual tax returns for federal (and Ohio) tax purposes.

Prohibition on municipal taxation of distributive shares

(R.C. 718.01)

Not every Ohio municipality grants S corporations the same pass-through tax treatment such corporations receive under federal and Ohio law. Pursuant to their home rule powers, some municipal corporations currently tax the net profits of S corporations that are located in or doing business in the municipality. In addition, the Ohio Supreme Court interprets current law as allowing municipalities to tax resident S corporation shareholders' distributive shares of those same net profits.[1] Hence, under existing law it is possible that an S corporation's net profits can be taxed twice--once at the entity level (by the municipality in which the business is located or doing business) and once at the individual shareholder level (by the municipalities in which the S corporation's shareholders reside). (See *Tetlak v. Bratenahl*, 92 Ohio St.3d 46 (2001)).

The bill prohibits municipalities from taxing S corporation shareholders' distributive shares of net profits. Hence, the bill effectively permits municipalities to tax only net profits of an S corporation as an entity (to the extent that the S corporation is located in or doing business in the municipal corporation). However, a municipal corporation may tax distributive shares as earned income to the extent a shareholder's distributive shares in fact represent income earned for services the shareholder performs for the S corporation. (R.C. 718.01(F)(9)).

Credit for resident S corporation shareholders withdrawn

(R.C. 718.14)

Under current law, effective January 1, 2003, municipal corporations are required to grant a credit to resident S corporation shareholders for taxes the S corporation paid to another municipality. The purpose of the credit is to diminish the possibility and extent of multiple municipalities taxing the same S corporation income--once at the entity level, and again at the shareholder level. But the credit does not entirely preclude such multiple taxation.

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[1] Municipal corporations generally are prohibited from taxing intangible income (e.g., interest, dividends). Distributive shares from an S corporation are not, however, considered a form of intangible income, except to the extent that they represent a pass-through of tangible income received by the corporation.

Since the bill's prohibition against taxing S corporation income at the shareholder level would effectively preclude such multiple taxation, the bill eliminates the credit.

Property tax exemption for pollution control facilities--current law

(R.C. 5709.20 to 5709.27 and 6111.31 to 6111.39)

Under current law, property qualifies for exemption from taxation if its function is to reduce or eliminate air, noise, or water pollution. For such property to be exempted, the property owner must apply for and obtain a pollution control exemption certificate. In the case of property used for air or noise pollution control, the application must be filed with the Tax Commissioner; in the case of property used for water pollution control, the application must be filed with the Director of Environmental Protection. These officials must investigate and determine whether the property qualifies for tax exemption.

There is no statutory deadline for determining qualification for tax exemption. And, once a determination is made, the property owner or the county auditor may request a hearing to challenge the determination.[2] But when the determination becomes final, the tax exemption relates back to the date when the application was filed (in the case of air and noise pollution control property) or the date when the owner acquired the property or began building it (in the case of water pollution control property). If, in the meantime, property taxes were paid for the property, the taxes must be refunded, with interest, by the various taxing authorities where the property is located.

Notice to taxing authorities of pending tax exemption applications

(R.C. 5709.211, 6111.31, and 6111.311; Section 3)

The bill prescribes a procedure for notifying affected taxing authorities of pollution control tax exemption applications. Generally, the notices serve to provide advance notification of the possible effects of the exemption if it is granted--particularly the potential for refunds. The procedure is initiated when an application for a pollution exemption certificate is filed.

In the case of air and noise pollution control property, the Tax Commissioner, as soon as it is practicable to do so, must estimate the assessed value of the property and issue a statement to the county auditor of the county where the property is (or will be) located. The statement must show the property's

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[2] *In the case of water pollution control property, the Tax Commissioner also may request a hearing.*

estimated assessed value and the date that the exemption, if it is approved, will become effective (if that date is known when the statement is issued). In the case of water pollution control property, the Director of Environmental Protection initiates the procedure by forwarding a copy of the application to the Tax Commissioner within 30 days after the application is received; the Tax Commissioner then must issue the statement to the county auditor as soon as it is practicable to do so.

Within 60 days after receiving such a statement from the Tax Commissioner, the county auditor must send notices to the various taxing authorities that would be affected by the tax exemption.[3] The notices must state the following:

- That a pollution control exemption application has been filed;
- That approval of the application will exempt the property from taxation and may require the taxing authority to refund taxes already paid for the property;
- The date the exemption would take effect (if it is shown on the Tax Commissioner's statement);
- The estimated assessed value of the property;
- The annual taxes on the property (computed on the basis of current tax rates).

These statements and notices must be issued with respect to exemption certificate applications filed on or after the bill's effective date, and with respect to any applications received before the bill's effective date if the exemption certificate has not been issued before January 1, 2004.

Amended statements, notices

If the estimated assessed value of pollution control property changes by more than 10% after the Tax Commissioner issues a statement, the Tax Commissioner must issue an amended statement reflecting the change. The county auditor must amend notices sent to taxing authorities to reflect the amended statement.

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[3] *In the case of water pollution control property, the county auditor need not send the statement if, within the 60-day period, the county auditor is notified that the Environmental Protection Agency has approved the exemption certificate.*

Notices are for informational purposes only

The bill specifies that the statements and notices are issued exclusively for the purpose of notifying taxing authorities of the potential for tax refunds. They are not appealable by any person, and are not assessments for the purpose of triggering a petition for reassessment by the taxpayer (i.e., an administrative appeal of tax valuation). Nor are they to be considered an official notice that, under existing law, opens the way for the recipient to make an appeal to the Board of Tax Appeals (see R.C. 5717.02).

Disclosure of information

(R.C. 5703.21(C)(7))

The bill specifies that the Tax Commissioner's providing statements to county auditors under the bill is not a violation against the general prohibition against the Tax Commissioner (or Department of Taxation employees or agents) disclosing confidential taxpayer information.

Likewise, the issuance of notices by county auditors under the bill would not constitute a prohibited disclosure of confidential taxpayer information because existing law provides an exception to the prohibition for disclosures made in the course of the county auditor performing lawful duties such as those required by the bill. (See R.C. 5715.49 and 5715.50.)

Opportunity to file previously dismissed commercial real property tax complaints

(Sections 4 and 5)

Under current law, a complaint against a real property assessment must be filed with the county board of revision by March 31 of the year after the year to which the assessment relates. A complaint may be filed only once during each three-year "interim period" corresponding with the period between sexennial reappraisals and the statistical updating of assessments that occurs midway between each reappraisal. Although the statute permits nonattorneys to represent property owners before a board of revision, the Ohio Supreme Court has held that real property tax assessment complaints constitute the practice of law, and that therefore complaints must be prepared and filed either by the property owner in a *pro se* capacity or by an attorney representing the owner, but may not be filed by any other representative who is not an attorney. See *Sharon Village, Ltd. v. Licking Cty. Bd. of Revision*, 78 Ohio St.3d 479 (1997).

The bill creates a special exception permitting certain owners of commercial property (or their attorneys) to file new property assessment complaints if their previous complaints were dismissed on the grounds that the complaints were not filed by an attorney (see **COMMENT**, below). To file a new complaint, the owner must not have paid the full amount of taxes due on the challenged assessment. The new complaint may reach back to affect assessments made over the previous ten years, as long as the years affected by the complaint all occur within the same six-year appraisal period. Such new complaints must be filed with the board of revision within six months after the bill becomes effective. If, upon the basis of considering a new complaint, a board of revision determines that the original assessment was excessive, the board must order the tax lists to be adjusted accordingly to remove any outstanding charges appearing on the list. However, if taxes were overpaid, a refund may not be issued to the owner, and the overpayment may not be credited against the owner's future taxes.

The bill also includes a statement of the General Assembly's intent in enacting Section 4. The statement cites the legislature's constitutional authority to pass remedial laws that, although having retroactive effect, cure procedural errors or defects rather than affecting vested, substantive rights. The intent statement asserts that the bill, by permitting previously dismissed property tax complaints to be filed, is such a remedial law. (See **COMMENT**.)

COMMENT

On the basis of two recent Ohio Supreme Court decisions, Section 4 of the bill appears to violate the constitutional prohibition against the enactment of laws retroactively affecting vested, substantive rights. In 1997, the Ohio Supreme Court held that a nonattorney's preparation and filing of a tax complaint with a county board of revision on behalf of a taxpayer constitutes the unauthorized practice of law. *Sharon Village*. In response to this holding, the General Assembly enacted Sub. H.B. No. 694, which amended sections 5715.13 and 5715.19 of the Revised Code to clarify who may file a complaint with a board of revision. Sub. H.B. No. 694 created an exception to the general rule set forth in R.C. 5715.19(A)(2) that a real property taxpayer is, in the absence of a showing of changed circumstances, prohibited from filing successive valuation complaints in the same interim period. Sub. H.B. No. 694 provided that if a board of revision, board of tax appeals, or any court dismisses a complaint for the reason that the act of filing the complaint was the unauthorized practice of law, the taxpayer could refile the complaint. Sub. H.B. No. 694 was intended to ensure that taxpayers were not denied decisions on their complaints simply because nonattorneys filed the original complaints on their behalf.

The Ohio Supreme Court held that Sub. H.B. No. 694 is unconstitutional retroactive legislation that cannot constitutionally be applied to permit the refiling of once-dismissed property tax complaints. The Court has concluded that Sub. H.B. No. 694 is substantively retroactive, and therefore unconstitutional, because it both creates a new right and imposes a new burden. Specifically, the Court found that the act creates a new right to file successive valuation complaints in the same triennium. At the same time, the law takes away the legal right of county officials to have complaints dismissed that were not properly prepared and filed. The Court further concluded that Sub. H.B. No. 694 imposes a new burden on county officials by requiring them to defend their valuations for a second time, leaving open the possibility that taxes would have to be refunded. According to the Court, county officials who had opposed reductions in assessed valuations when the first complaints were dismissed have a reasonable expectation that those valuations have been determined with finality and will not be revisited in a subsequent complaint. *See Cincinnati School Dist. Bd. of Edn. v. Hamilton Cty. Bd. of Revision*, 91 Ohio St.3d 308, 316-317 (2001) ("*Mirge Corporation*"); *Rubbermaid, Inc. v. Wayne Cty. Auditor*, 95 Ohio St.3d 358, 359-361 (2002).

Section 4 of the bill creates a new right in certain taxpayers to refile what are, under existing law, invalid complaints. Simultaneously, Section 4 imposes a new burden on county officials to defend valuations that are no longer open to challenge under existing law, just as Sub. H.B. No. 694 attempted to do.

In addition to the problem of retroactivity, Section 4 may violate the Equal Protection Clauses of the Ohio and Federal Constitutions. All taxpayers who are similarly situated are entitled to equality of treatment under any Ohio tax law. *General Electric Co. v. Decourcy*, 60 Ohio St.2d 68, 71 (1979). Accordingly, the legislature may not extend to one class of taxpayers favorable tax treatment that is not afforded to other classes unless there is some rational basis--some legitimate, plausible policy reason--for the disparate treatment. *Decourcy*, 60 Ohio St.2d at 71; *Park Corp. v. Brook Park*, No. 79410, 2002 Ohio App. LEXIS 2267, at **11 (Cuyahoga Cty. May 9, 2002). Section 4 classifies taxpayers on the basis of the type of property they own and extends the right to refile only to owners of commercial parcels.

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	10-16-01	p. 975
Reported, S. Ways & Means	03-13-02	p. 1573
Passed Senate (32-0)	03-13-02	p. 1576
Reported, H. Ways & Means	11-21-02	p. 2115

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