"Dark Store" loophole gives big box stores big tax breaks at the expense of homeowners

What? You mean that thriving big box store full of merchandise will be valued for property tax purposes like the vacant store across town? And the commercial property owners will end up paying less taxes? How is that fair?

Legislation is moving in the General Assembly that manipulates property assessment and appeals practices to unfairly give significant tax breaks to big box stores and other large commercial properties. If enacted, the proposal will leave local governments, including school districts, scrambling to cope with lost revenue and shift millions of dollars in tax burden from commercial property owners to homeowners and other taxpayers.

House Bill 1213 (Rep. Kampf, R-Chester) is legislation that prohibits taxing bodies to seek appeals of under-assessed properties, and only allows appeals to be sought under very limited circumstances. Further, the taxed entity or person can request the dismissal of an appeal and the taxing body has the burden to prove that the reassessment is justified. Similar legislation is found under **Senate Bill 586** (Sen. Argall, R- Schuylkill).

Despite the focus on property tax reform and providing senior citizens and other homeowners with relief from rising property taxes, the proposal has far greater implications. In truth, the issue is being used in other states by owners of large apartment complexes and "big box" commercial properties who believe they are over-assessed. They want to create a loophole enabling them to more easily and successfully challenge their assessments and pay significantly lower property taxes.

The "Dark Store" loophole

House Bill 1213 changes the definition of "market value" to prohibit consideration of "encumbrances" such as a lease or mortgage. The bill could enable commercial businesses to appeal their tax bills and be valued as if the properties were vacant buildings up for sale. The assessment would be on the building only, and would not include the contents or the revenue it would generate. The argument is that these buildings are so specific to their purpose that if they were vacated, a new buyer could not use the structure as-is.

This is known as the "Dark Store" loophole and its purpose is to reduce the amount of taxes of owed by these commercial properties by millions and to make it difficult – it not impossible – for local taxing bodies to tax these businesses for their fair share. In states

like Alabama, Indiana, Michigan, Texas and Wisconsin where this loophole is a problem, commercial properties are winning assessment challenges, receiving refunds from local governments and paying less taxes.

What does this mean for school districts?

The "Dark Store" loophole will negatively impact every school district, municipality and county in the state. This approach to assessment litigation has been attempted here in Pennsylvania but has failed in the courts, to date. In those attempts, the values presented by the taxpayers' hand-picked appraisers were frequently 25% to 50% of the true value of the properties.

Although difficult to project, the initial estimates of statewide revenue loss exceed $1 billion per year, increasing over time. The bill will effectively collapse the tax revenue base in many school districts. **PSBA's conservative estimate of a 25% reduction of assessed commercial property value showed a potential revenue loss to school districts of more than $677 million.** (The estimate was based on figures from the Department of Community and Economic Development using 2015 property values and 2015-16 millage rates.)

When large business owners are not paying their fair share of taxes, who is making up the difference? What is being lost in these discussions is that *all other* property owners in a school district must bear the tax burden of the under-assessed properties and/or "Dark Store" assessed properties. Any property that is simply under-assessed for whatever reason inherently shifts the tax burden over to those property owners who are properly assessed, in the form of increased millage rates.

What Pennsylvania's courts have said

To date, common sense has prevailed in Pennsylvania court cases on this issue. Commercial property owners are pushing hard now for the General Assembly to effectively negate these court decisions and place the "Dark Store" loophole into state law.

Valley Forge Towers et al v. Upper Merion SD and Keystone Realty Advisers is an appeal that is pending in the PA Supreme Court at 49 MAP 2016. The appellants are owners of apartment buildings and other commercial properties who sued in equity to enjoin the school district from appealing tax assessments only of higher value commercial properties, and seeking declaratory judgment that this violated the Uniformity Clause of the PA Constitution because it allegedly had the effect of systematically subjecting commercial properties to higher assessments, when allegedly single-family homes were also under-assessed but the district purposely did not appeal those. They are appealing a September 2015 decision of the Commonwealth Court, affirming the Court of Common Pleas' decision granting the preliminary objections of the school district and co-defendant, ruling that appeals by taxing authorities do not constitute spot reassessment, and that the use of monetary thresholds in deciding which assessments to appeal was a reasonable approach that does not violate the Uniformity Clause of the PA Constitution or the Equal Protection Clause of the U.S. Constitution. ***The court recognized that owners of under-assessed properties are not paying their fair share of the community's tax burden, and are forcing other taxpayers to subsidize their tax obligations.***

It is well established that appeals by taxing districts promote uniformity and help to correct dis-uniformity caused by infrequent countywide reassessments, as well as that it is reasonable for taxing authorities to focus their efforts on the most glaring examples where the escaping tax revenue is sufficient to justify the cost of litigation. Courts also recognize that other taxpayers must depend on their school districts and municipalities to correct these examples, and have no other voice.

In a "friend of the court" brief filed by the Pennsylvania Economy League (PEL) in the Valley Forge Towers appeal, PEL warns:

> *"Enjoining school districts or other taxing authorities from filing assessment appeals on incorrectly assessed properties would have a severe detrimental effect on uniformity because all appeals reduce the COD [Co-efficient of Dispersion] and, therefore, all appeals which correct incorrect assessments increase uniformity. This is a mathematical fact."*

The constitutional importance of these appeals to our assessment system and to fairness to taxpayers was obvious to the General Assembly in 1921, when authority for local taxing districts to appeal assessments in the same manner as property owners was first added to the assessment law. Undoing this sensible reasoning today would push our already-deficient tax assessment system even further towards complete unconstitutionality.

The General Assembly needs to slam the door on the "Dark Store" loophole.