

IN THE SUPREME COURT OF OHIO

THE DREES COMPANY, *et al.*)
)
 Plaintiffs-Appellants,)
)
 -v-)
)
 HAMILTON TOWNSHIP, OHIO, *et al.*)
)
 Defendants-Appellees.)

10-1548

Case No. _____
 ON APPEAL from the
 Warren County Court of Appeals,
 Twelfth Appellate District
 Ct. of App. No. 2009-11-150

MEMORANDUM IN SUPPORT OF JURISDICTION

Joseph L. Trauth, Jr. (0021803)
 Thomas M. Tepe, Jr. (0071313)
 Charles M. Miller (0073844)
 KEATING MUETHING & KLEKAMP PLL
 One East Fourth Street, Suite 1400
 Cincinnati, Ohio 45202
 Tel: (513) 579-6400
 Fax: (513) 579-6457
 jtrauth@kmklaw.com
 ttepe@kmklaw.com
 cmiller@kmklaw.com

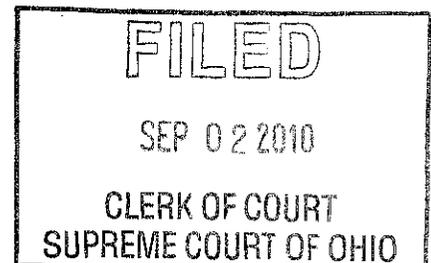
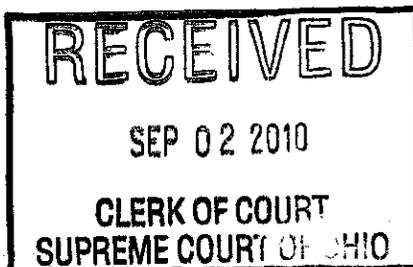
Wilson G. Weisenfelder, Jr.
 James J. Englert
 Lynne M. Longtin
 RENDIGS, FRY, KIELY & DENNIS, L.L.P.
 One West Fourth Street, Suite 900
 Cincinnati, Ohio 45202-3688
 Tel. (513) 381-9200
 Fax (513) 381-9206
 wgw@rendigs.com
 jje@rendigs.com
 lml@rendigs.com

Richard A. Paolo (0022506)
 Kevin L. Swick (0023149)
 ARONOFF ROSEN & HUNT
 425 Walnut Street, Suite 2200
 Cincinnati, Ohio 45202
 Tel: (513) 241-0400
 Fax: (513) 241-2877
 rapaolo@arh-law.com
 klswick@arh-law.com

Warren J. Ritchie
 Thomas T. Keating
 KEATING RITCHIE
 5300 Socialville-Foster Road
 Mason, Ohio 45040
 Tel (513) 891-1530
 Fax (513) 891-1537
 writchier@krslawyers.com
 tkeating@krslawyers.com

*Attorneys for Appellants, The Drees Company,
 Fischer Single Family Homes II, LLC, John
 Henry Homes, Inc, Charleston Signature
 Homes, LLC, and Home Builders Association
 of Greater Cincinnati*

*Attorneys for Appellees,
 Hamilton Township, Ohio et al.*



Maurice A. Thompson (0078548)
1851 Center for Constitutional Law
208 E. State Street
Columbus, Ohio 43215

*Attorney for Amicus Curiae The Buckeye
Institute in support of Appellants*

Richard Cordray
Ohio Attorney General
30 Each Broad Street, 17th Floor
Columbus, Ohio 43215

Attorney for the State of Ohio

Thomas T. Keating
KEATING RITCHIE
5300 Socialville-Foster Road
Mason, Ohio 45040
Tel (513) 891-1530
Fax (513) 891-1537
tkeating@krslawyers.com

*Attorney for Amici Curiae The Ohio Township
Association and the Coalition for Large Ohio
Urban Townships in support of Appellees.*

Table of Contents

	<i>Page</i>
Explanation of why this is a case of public and great general interest	1
Statement of the case and facts	4
Argument in support of propositions of law	6
Proposition of Law No. I:	
<i>A limited home rule township may not impose impact fees.</i>	6
A. The Township’s Impact Fees are taxes.....	7
1. Existing Impact Fee Law	7
2. Impact Fees That Separate the Payer and Beneficiary are Taxes.....	9
B. The Resolution Conflicts with the General Law.....	12
C. The Township Seeks to Alter the Structure of Township Government.....	14
Proposition of Law No. II:	
<i>A self-serving statement within a township resolution that the resolution is intended to be in conformance with State law or to achieve a certain goal, is not conclusive of the validity of the resolution.</i>	14
Conclusion	15

Table of Authorities

Cases

<i>A&M Builders, Inc. v. City of Highland Heights</i> (Ohio App. 8 Dist., Jan. 20, 2000), No. 75676, 2000 WL 45859	8
<i>American Landfill, Inc. v. Stark/Tuscarawas/Wayne Joint Solid Waste Mgmt. Dist.</i> (6 th Cir. 1999), 166 F.3d 835	9, 10
<i>Amherst Builders v. Amherst</i> (1980), 61 Ohio St. 2d 345, 346, 15 Ohio Op. 3d 432, 402 N.E.2d 1181	9
<i>Baltimore Ravens, Inc. v. Self-Insuring Emp. Evaluation Bd.</i> , 94 Ohio St.3d 449, 2002-Ohio-1362	13
<i>Bldg. Indus. Assn. of Cleveland and Suburban Ctys. v. City of Westlake</i> (1995), 103 Ohio App.3d 546, 660 N.E.2d 501.	8
<i>Broward Cty. v. Janis Development Corp.</i> (Fla. App. 1975), 311 So.2d 371	10
<i>City of Montgomery v. Crossroads Land Co., Inc.</i> (Ala. 1978), 355 So.2d 363, 365.....	10
<i>City of Ocean Springs v. Homebuilders Assn. of Miss.</i> (Miss. 2006), 932 So.2d 44.....	10
<i>Durham Land Owners Association v. County of Durham</i> (NC App. (2006)), 177 N.C. App. 629, 630 S.E.2d 200	10
<i>Eastern Diversified Properties, Inc. v. Montgomery County</i> (1990), 319 Md. 45, 570 A.2d 850.....	10
<i>Granzow v. Bur. of Support of Montgomery Cty.</i> (1990), 54 Ohio St.3d 35.....	7
<i>Homebuilders Assn. of Dayton and Miami Valley v. City of Beavercreek</i> (2000), 89 Ohio St.3d 121	2
<i>Home Builders Assn. of Dayton and the Miami Valley v. City of Beavercreek</i> , 1998 Ohio App LEXIS 4957, 1998 WL 735931.....	8
<i>Idaho Building Contractors Ass'n v. City of Coeur D' Alene</i> (1995), 126 Idaho 740, 890 P.2d 326.	11, 12
<i>Marbury v. Madison</i> (1803), 5 U.S. 137.....	14

<i>Mendenhall v. Akron</i> , 117 Ohio St.3d 33, 2008-Ohio-270.....	12
<i>River Walk Apartments, LLC v. Twigg</i> (2007), 396 Md. 527, 914 A.2d 770.....	10
<i>San Juan Cellular Telephone Co. v. Public Service Comm 'n</i> (1 st Cir. 1992), 967 F.2d 683	9
<i>State ex rel. Petroleum Underground Storage Tank Release Comp. Bd. v. Withrow</i> (1991), 62 Ohio St.3d 111.....	7, 9, 10
<i>State, ex rel. Waterbury Development Co., v. Witten</i> (1978), 54 Ohio St. 2d 412, 377 N.E.2d 505.....	8, 9

Statutes

126 H.B. 299	6
R.C. 504.04.....	<i>passim</i>
R.C. 505.37, <i>et seq.</i>	14
R.C. 505.39	13
R.C. 505.48, <i>et seq.</i>	14
R.C. 505.51	13
R.C. 511.18, <i>et seq.</i>	13
R.C. 511.27	13
R.C. 511.33	13
R.C. Chapter 1710.....	14
R.C. 5571.15	13
R.C. 5573.07	13
R.C. 5573.10	13
R.C. 5573.11	13
R.C. 5573.21	13
R.C. 5573.211	13
R.C. Title 57.....	6

Attachments

Trial Court Opinion.....	A-1
Court of Appeals Opinion.....	A-2

EXPLANATION OF WHY THIS IS A CASE OF PUBLIC AND GREAT GENERAL INTEREST

In 1991, the General Assembly enacted Chapter 504. of the Revised Code. Through a stroke of a pen, an entirely new form of political subdivision was created: the Limited Home Rule Township. Chapter 504. grants a qualifying township certain limited powers of self-governance beyond those possessed by a traditional township. The powers granted to a limited home rule township are greater than those possessed by a traditional township. The additional *statutory* powers, however, are not as extensive as those *constitutionally* granted to home rule municipalities—thus the “limited” character of the township’s powers. This Court has never construed Chapter 504. This is the first case ever to address the parameters of the limited home rule township form of government. This is a case of first impression.

In recent years, this Court has issued several decisions articulating the limits of municipal home rule powers in areas such as residency requirements and Second Amendment rights. Those cases, however, are of limited value here. As the trial court correctly concluded, a township’s authority under R.C. Ch. 504. is not comparable to a charter municipality’s powers under the Municipal Home Rule Amendment to the Ohio Constitution. There are two significant limitations imposed upon limited home rule townships. First, a township cannot enact a tax unless expressly authorized by the Revised Code. Second, a township cannot exercise local self-government power in conflict with the Revised Code. No such restrictions exist for a home rule municipality, which is vested with a full array of self-government powers. Because of these fundamental differences between “limited home rule” and municipal home rule, the existing municipal home rule precedent is inapposite.

This novel issue of law is raised as a challenge to an “impact fee” tax enacted by Appellee Hamilton Township, Warren County, Ohio (the “Township”). The Township is the first and only township in Ohio to enact an impact fee tax. If the decision below is allowed to

stand, it will not be the last. The Township stated that the impact fee tax was enacted to “raise revenues to maintain existing service levels of roads, police protection, fire protection, and parks” The Township intends to use impact fees to fund expansions to the existing infrastructure throughout the Township, including adding or expanding roads, parks, fire and police stations.

This Court has addressed the powers of a *municipality* to adopt impact fees previously. However, there are three major reasons that precedent does not control here. *Homebuilders Assn. of Dayton and Miami Valley v. City of Beavercreek* (2000), 89 Ohio St.3d 121. First, as mentioned above, a limited home rule township, unlike a municipality, does not possess general taxing authority. In *Beavercreek*, it did not matter whether the city imposed a true fee or a tax mislabeled as a fee—it could do either. A limited home rule township cannot. The characterization of the assessment as a tax would be fatal in this case.

Second, the assessment in *Beavercreek* was targeted back to create the infrastructure to serve the new development. Here, the revenues are spent elsewhere in the Township. Because there is no effort to target the benefit to the fee-payer, the fee here is clearly a tax. The Township admitted, “The impact fees will fund projects which will benefit existing residents.” Because the Revised Code does not authorize townships to impose taxes even when labeled “impact fees”, the exactions at issue here are unlawful.

Third, a limited home rule township cannot exercise “powers that are in conflict with general laws.” This restriction is another distinction between a limited home rule township and a charter city. For these reasons, the trial court recognized that *Beavercreek* does not control. Appellants encourage the Court to read the trial court opinion appended hereto.

Both major limitations on a limited home rule township’s powers are in issue here. The so-called “impact fee” really operates as a tax, and is invalid. The Township’s impact fee also

directly conflicts with multiple Revised Code provisions that set forth how roads, parks, police and fire protection can be funded. It is important for this Court to define the parameters of limited home rule powers.

The appellate court created a second important issue for this Court's consideration. The appellate court held that a township's declaration of intent is conclusive of whether the Resolution imposed a tax. The court acknowledged that if the revenues generated by the impact fee tax were "expended for the equal benefit of all the people," the Resolution would have been invalid. Yet, the court refused to consider the merits because the Township's *purpose* in enacting the Resolution was "to benefit the property by providing the Township with adequate funds to provide the same level of service to that property that the Township currently affords previously developed properties." Thus, the court of appeals held as a matter of law that because the Resolution *stated* a certain intent, the court must conclude that the Resolution *achieved* the intent. Announcing a goal and achieving it are not the same. The Resolution also stated that it did not impose a tax. Neither self-serving declaration is dispositive. The separation of powers doctrine informs us that the General Assembly cannot declare its laws constitutional. Similarly, a Township cannot declare its Resolutions to be in compliance with the Revised Code.

The public and great general interest in this case are palpable. The great general interest is evidenced by the fact that the ever-growing list of *amici* have been involved in this case since it was in the trial court. The public interest in this case is substantial. The State, the General Assembly, and all 1308 Townships, are interested in understanding the distinctions between traditional townships, limited home rule townships, and home rule municipalities.

The great general interest is fueled in large part by the dismal timing of the Township's resolution. What the Township apparently believed would be a politically painless revenue

generating measure has now collided with the worst residential housing market since the Great Depression. If permitted to stand, and replicated elsewhere, impact fees threaten to dampen recovery in a crucial sector of the economy. This would be solely a political issue if the measure was defensible under its claimed enabling authority and the Ohio Constitution. Where it clashes with both, it cannot withstand legal scrutiny.

Appellants The Drees Company, Fischer Single Family Homes II, LLC, John Henry Homes, Inc., Charleston Signature Homes, LLC, and Home Builders Association of Greater Cincinnati, request this Court exercise jurisdiction over this matter.

STATEMENT OF THE CASE AND FACTS

Appellants brought a declaratory judgment action challenging the so-called “impact fee” tax resolution enacted by the Township as an *ultra vires* tax in violation of R.C. §504.04. The Resolution conflicts with multiple Revenue Code provisions governing how a Township may raise revenue, and impermissibly alters the structure of township government. The matter was thoroughly briefed and argued on stipulated facts.

Even though the impact fee tax generates revenue to benefit the Township as a whole and the trial court found the connection between the payer and the intended use of the funds to be “looser . . . than in other fee cases,” the trial court ruled that the impact fee tax is not a tax. The trial court also ruled that even though multiple Revised Code provisions set forth in great detail the exclusive means for a township to generate revenue for roads, parks, police and fire protection, the Township’s creation of a new revenue generation technique does not conflict with the Revised Code or alter the structure of township government. The Court of Appeals affirmed the erroneous ruling.

The Township’s Board of Trustees unanimously passed Amended Resolution No. 2007-0418, entitled Amended Resolution Implementing Impact Fees Within the Unincorporated Areas

of Hamilton Township, Ohio for Roads, Fire and Police, and Parks (the “Resolution”) on May 2, 2007. The Township also adopted administrative rules (“Rules”) implementing the Resolution.

The Resolution imposes an impact fee tax on anyone who applies for a zoning certificate for new construction or redevelopment. Four categories of taxes are set forth in the Resolution: Road, Fire Protection, Police Protection, and Parks. The amount of the impact fee tax varies based on the type of use.¹ Only Single-Family Detached Dwellings and Multi-Family Units are assessed the park component of the impact fee tax.

The Resolution imposes its tax on previously undeveloped property and property undergoing redevelopment, allegedly to offset increased services and improvements needed because of the development. The impact fee tax assessed by the Township is not based on the value of the land and improvements thereon, and are in addition to the real estate taxes paid for the properties. The Township will not issue a zoning certificate until the impact fee tax is paid. In the event that a property owner does not pay the assessment, the Township imposes a lien on the property that, according to the Resolution, “runs with the land”—just like a tax.

The Township maintains an account for each impact fee category, but does not maintain geographic sub-accounts based on the location of the impact fee payer. The money in the accounts is dispersed on a “first-in/first-out” basis: the money in the account longest is spent

¹ The taxes established by the Resolution are as follows:

Land Use Type	Unit	Road	Fire	Police	Parks	Total
Single-Family Detached	Dwelling	\$3,964	\$335	\$206	\$1,648	\$6,153.00
Multi-Family	Dwelling	\$2,782	\$187	\$115	\$921	\$4,005.00
Hotel/Motel	Room	\$2,857	\$160	\$ 98	\$0	\$3,115.00
Retail/Commercial	1,000 sq. ft.	\$7,265	\$432	\$265	\$0	\$7,962.00
Office/Institutional	1,000 sq. ft.	\$4,562	\$244	\$150	\$0	\$4,956.00
Industrial	1,000 sq. ft.	\$3,512	\$153	\$ 94	\$0	\$3,759.00
Warehouse	1,000 sq. ft.	\$2,503	\$ 97	\$ 60	\$0	\$2,660.00
Church	1,000 sq. ft.	\$2,797	\$ 91	\$ 56	\$0	\$2,944.00
School	1,000 sq. ft.	\$3,237	\$138	\$ 85	\$0	\$3,460.00
Nursing Home	1,000 sq. ft.	\$1,871	\$244	\$150	\$0	\$2,265.00
Hospital	1,000 sq. ft.	\$7,212	\$244	\$150	\$0	\$7,606.00

first. The use of the funds is divorced from the property from which they were generated.

Action to offset the most immediate impact of new deployment including “improvements to the major roadway system that primarily serve traffic generated by the applicant’s project, such as acceleration/deceleration lanes into and out of the project” *are not credited* against the impact fee tax. The Township conceded that “the Township developed the impact fee system as a way to fairly and reasonably *raise revenue* to maintain existing service levels of roads, police protection, fire protection, and parks”

Ohio townships have no express statutory authority to exact impact fee taxes. The General Assembly rejected proposed House Bill 299 (“HB 299”), which sought to confer such authority on townships.² HB 299 would have been codified under R.C. Title 57 – Taxation.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: *A limited home rule township may not impose impact fees.*

No enabling legislation has ever been enacted to authorize any township to impose impact fees. Townships, as creatures of statute, possess only those powers expressly granted to them. In this case, the Township has argued that a limited home rule township’s powers are co-extensive with that of a Home Rule Municipality. The Township reads the *limited* aspect of “home rule” right out of its title. The text of the Revised Code does not comport with the Township’s desire for more power and a politically expedient means of raising revenue.

The powers of a limited home rule township are both granted and limited by R.C. 504.04.³ The Resolution violated R.C. 504.04 in three explicit ways. The Resolution enacted a

² 126 HB 299.

³ R.C. 504.04 provides, in part: (A) A township that adopts a limited home rule government may do all of the following by resolution, provided that any of these resolutions . . . may be enforced only by the imposition of civil fines as authorized in this chapter:

(1) Exercise all powers of local self-government within the unincorporated area of the township, *other than powers that are in conflict with general laws*, except that the township shall comply

tax not “authorized by general law.” It impermissibly “modified the form or structure of the township government” through the creation of a government “district” not contemplated by the Revised Code. It also conflicted with the Revised Code by usurping the funding methodologies permitted by the Revised Code.

A. The Township’s Impact Fees are taxes.

1. *Existing Impact Fee Law*

Before ultimately losing its way, the trial court accurately framed most of the legal issues. We begin by noting what the trial court got right. Townships may not impose taxes unless authorized to do so by general law. Entry Granting Partial Summary Judgment, at 10 (citing Ohio Rev. Code §504.04). “If the [impact] fee is merely a tax by another name, then it is not a permissible enactment.” *Id.* at 11. To determine whether supposed fees are really taxes, “the court looks at the substance of the assessments, and not merely their form.” *Id. citing State ex rel. Petroleum Underground Storage Tank Release Comp. Bd. v. Withrow* (1991), 62 Ohio St.3d 111.

This Court deems it well-settled that, “A fee is a charge imposed by the government in return for a service it provides.” *Withrow*, 62 Ohio St.3d at 113. Thus “a ‘fee’ is in fact a ‘tax’ if it exceeds the ‘cost and expense’ to government of providing the service in question.” *Granszow v. Bur. of Support of Montgomery Cty.* (1990), 54 Ohio St.3d 35, 38. For example, a governmental body tasked with regulating conduct charges a fee to issue a license, permit or certificate, or to perform a service directly pegged to the fee at issue. Here, the Township

with the requirements and prohibitions of this chapter, and ***shall enact no taxes other than those authorized by general law, . . . or change, alter, combine, eliminate, or otherwise modify the form or structure of the township government*** unless the change is required or permitted by this chapter; (2) Adopt and enforce within the unincorporated area of the township local police, sanitary, and other similar regulations that are ***not in conflict with general laws*** or otherwise prohibited by division (B) of this section. * * *

already collects a zoning certificate fee to cover administrative expenses. The impact fees, instead, are designed to pay for future capacity expanding capital improvement *unrelated to the property*. These improvements *equally benefit existing and new development*. *Id.* at ¶¶ 27-30. These “impact fees” are taxes in disguise.

All Ohio appellate courts that have addressed the issue, save one, have determined that impact fees are taxes. The only exception is the 12th Appellate District in this case. The Eighth District Court of Appeals addressed a park impact fee ordinance, which segregated the revenues in dispute into a “Park and Recreation Improvement Fund,” much as the Township has done with the funds at issue here. *A&M Builders, Inc. v. City of Highland Heights* (Ohio App. 8 Dist. 2000), No. 75676, 2000 WL 45859 at *3-4. The Court was not fooled by the accounting gimmick: “The simple act of placing these *taxes* in a segregated fund does not magically transform the taxes into fees.” *Id.* at * 3. The Eighth District ruled identically in *Bldg. Indus. Assn. of Cleveland and Suburban Ctys. v. City of Westlake* (Ohio App. 8 Dist. 1995), 103 Ohio App.3d 546, 660 N.E.2d 501. The impact fees were taxes because, *inter alia*, “[t]here is no guarantee that new construction purchasers will in fact use the City’s park and recreation system.” *A&M Builders, Inc.* at * 4.

The Second District also concluded an impact fee was really a tax because only impact fee payers would shoulder the burden of infrastructure improvements. *Home Builders Assn. of Dayton and the Miami Valley v. City of Beavercreek*, 1998 Ohio App LEXIS 4957, 1998 WL 735931 *29 (reversed on other grounds). The same is true here. Many purchasers of new construction in Hamilton Township will not use the “services” for which they are being assessed. When an assessment is detached from a benefit, it is a tax.

All of these impact fee cases were rooted in a 1978 Ohio Supreme Court case ruling that

an impact fee was an invalid tax. *State ex rel. Waterbury Development Co., v. Witten* (1978), 54 Ohio St. 2d 412, 377 N.E.2d 505. In *Waterbury*, the Supreme Court struck a water tap fee and a park impact fee because both placed the burden of future infrastructure improvements on new development. *Id.* at 415. A subsequent decision explained *Waterbury*, “since collection of the fee did not comply with statutes relating to taxes and special assessments, it was not a valid revenue-raising measure.” *Amherst Builders v. Amherst* (1980), 61 Ohio St. 2d 345, 346, 15 Ohio Op. 3d 432, 402 N.E.2d 1181 Here, the Resolution is not authorized by any Revised Code provision governing taxes or special assessments.

2. *Impact Fees That Separate the Payer and Beneficiary are Taxes.*

Courts have developed well-settled guidelines for distinguishing taxes from fees. See, e.g., *San Juan Cellular Telephone Co. v. Public Service Comm’n* (1st Cir. 1992), 967 F.2d 683, 685 (a seminal case); *American Landfill, Inc. v. Stark/Tuscarawas/Wayne Joint Solid Waste Mgmt. Dist.* (6th Cir. 1999), 166 F.3d 835, 837-38 (concluding a solid waste assessment imposed under the Ohio Revised Code was a tax). These decisions offer guidance for the case-by-case analysis law requires. *Withrow*, 62 Ohio St.3d, at 117.

The tax/fee test focuses on (1) the entity imposing the assessment, (2) the parties upon whom the assessment is imposed and (3) whether the assessment is expended for general public purposes, or used for the regulation or benefit of the parties upon whom the assessment is imposed. *American Landfill*, 166 F.3d at 837. In cases where the assessment “falls near the middle of the spectrum between a regulatory fee and a classic tax, the predominant factor is the revenue’s ultimate use.” *Id.* at 838; *San Juan*, 967 F.2d at 685.

In *American Landfill*, the Sixth Circuit concluded Ohio solid waste management district impact fee assessments were taxes. *Id.* at 839. As with the impact fees in this case, the fees at issue were alleged to have ***resulted from the location of a solid waste facility in the counties.***

Id. at 836. In other words, the assessments were meant to broadly address the *impact* of locating a solid waste facility in a particular district. The *American Landfill* court concluded the assessments were taxes. Even though the money went to a special fund, the Sixth Circuit reasoned, that fund ultimately “serve[d] public purposes benefiting the entire community.” *Id.* at 839. As the court aptly summarized, the fund’s ultimate use “relate directly to the general welfare of the citizens of [Ohio], and dedication to a particular aspect of state welfare makes them no less ‘general revenue raising levies.’” *Id.* The same is true here. Far from being limited to defraying expenses associated with a specific building, the impact fee taxes are intended to be spent on public infrastructure unassociated with the development, as a means to benefit the public broadly. The Township even admits it created the whole impact fee scheme as a revenue raising measure because the residents would not approve additional taxes.

The Township argues that the infrastructure improvements funded by impact fees are “made necessary by” new development. Assuming this is true, it does not matter. In order to be classified as a fee, a charge must specially benefit the property that pays the fee. *Withrow*, 62 Ohio St.3d, at 117. The “made necessary” standard employed by the Township creates a tax. *Eastern Diversified Properties, Inc. v. Montgomery County* (1990), 319 Md. 45, 570 A.2d 850.⁴

⁴ Courts from across the country agree this supposed fee is a tax. The Mississippi Supreme Court concluded that impact fees used to pay for services traditionally funded by tax revenues were taxes, not fees. *River Walk Apartments, LLC v. Twigg* (2007), 396 Md. 527, 546-47, 914 A.2d 770, 781.; *City of Ocean Springs v. Homebuilders Assn. of Miss.* (Miss. 2006), 932 So.2d 44, 58-59. The Iowa Supreme Court has also rejected impact fees as unauthorized taxes even where supposedly intended “for the benefit of the developers who have generated this need.” *Home Builder’s Assn. of Greater Des Moines v. City of West Des Moines* (Iowa 2002), 644 N.W.2d 339, 348; *Durham Land Owners Association v. County of Durham* NC App. (2006) 177 N.C. App. 629, 630 S.E.2d 200 (noting that counties in North Carolina (like townships in Ohio), are “creatures of the General Assembly,” possessing no “inherent legislative powers.”); *Broward Cty. v. Janis Development Corp.* (Fla. 4th App. Dist. 1975), 311 So.2d 371 (striking impact fees as taxes where the fees were imposed to raise revenue and were not geographically restricting the use of the funds generated); *City of Montgomery v. Crossroads Land Co., Inc.* (Ala. 1978), 355

“[A] tax is ‘an enforced contribution to provide for the support of the government.’” *Id.* at 52. The court noted that the stated purpose for the impact fees at issue was to ensure that new development paid its “pro rata share of the costs of impact highway improvements necessitated by such new development.” *Id.* The so-called impact fee was really a tax because the general public was the beneficiary of the impact fee tax. *Id.*

An impact fee is a tax when it “is to be used for ‘capital improvements’ without limitation as to the location of those improvements or whether they will in fact be used solely by those creating the new developments.” *Idaho Building Contractors Ass’n v. City of Coeur D’Alene* (1995), 126 Idaho 740, 743, 890 P.2d 326, 329. Here, the impact fees are spent in the order received, on work in the order performed—anywhere in the Township. There is no effort to benefit the property for which the fee was paid. The roads, parks and other infrastructure which the Township proposes to fund with impact fee taxes are not targeted back to the fee payer. They benefit the entire community. The Trial Court conceded the Township’s impact fee scheme presents “*a looser connection between the individual fee payer and the service provided than in other fee cases.*”

According to the Trial Court, the new home purchaser receives the assurance that they will receive the same level of fire protection and recreational park use that previous residents presumably already enjoy by virtue of merely paying taxes. *Existing property owners receive the exact same benefit without paying the fee.* Any additional parks police, fire stations, and lanes of traffic will serve all equally. This is particularly obvious here when the entire Township

So.2d 363, 365 (“Municipal corporations possess no inherent power to levy assessments for local improvements...In order therefore to justify such assessments, it is necessary that authority for them be found in legislative act; the presumption being that, in the absence of legislative grant providing for a special source of revenue for public improvements, funds for that purpose are to be raised by an exercise of the power of general taxation.”)

is the “impact fee district.”

The lower courts agreed with the Township’s argument that “maintaining the level of existing service” is a benefit to the impact fee taxpayer. However, a rising tide raises all boats. The addition of services benefits all. A new firehouse benefits all properties near it, new or old, equally. Expansions to the Township park system benefit all park users equally. To the extent that the level of government service would arguably be reduced by the failure to expand government infrastructure, the reduction in services would be borne by all.⁵

The Township is using impact fees in place of taxes to expand its services to all recipients. The cost is targeted to new development. The benefit is diffuse. “[T]he assessment here is no different than a charge for the privilege of living in the [Township]...The fact that additional services are made necessary by growth and development does not change the essential nature of the services provided: they are for the public at large.” *Coeur D’Alene*, 126 Idaho, at 744. This undeniable fact renders the Resolution an impermissible tax.

B. The Resolution Conflicts with the General Law

A township may not exercise either “powers of local self-government” nor “local police, sanitary and other similar regulations” that “conflict with general laws”.⁶ Limiting the powers of local self-governance to those that do not conflict with general laws is a significant restriction upon a limited home rule township *not imposed upon a municipality*.

The General Assembly, through the Ohio Revised Code, has enacted comprehensive legislation regarding funding township road improvements, police protection funding, fire protection funding, and park systems funding. The conflicting Resolution cannot stand.

“Although on occasion a state statute and municipal ordinance will directly contradict

⁵ Appellants reject the notion that maintain a service at existing levels constitutes a service “reduction” for existing development but not for new development.

⁶ See R.C. 504.04(A)(1)–(2).

each other, and thereby make a conflict analysis simple and direct, that is not always the case. It is in this context of more nuanced cases that the concept of conflict by implication has arisen.” *Mendenhall v. Akron* (2008), 117 Ohio St.3d 33, 2008-Ohio-270, ¶ 31. The question is whether the Resolution permits what a state statute indirectly prohibits. *Id.* Here, a limited home rule township must comply with the statutes that limit what a township can do. The Township admitted, “Ohio law contains numerous statutes addressing how a township can function.” These statutes form a comprehensive, field-occupying, structure of law that dictate the means by which townships may permissively raise revenues for road, park, police and fire improvements. The structure comprehensive. The legislature left no room for townships to supplement it.

Funding road improvements with impact fee taxes conflicts R.C. 5571.15 and R.C. 5573.07, which set forth the *only* mechanisms for funding township road improvements; R.C. 5573.211 which requires that road improvements benefit a designated road improvement district; and, R.C. 5573.10 and R.C. 5573.11, which require the county engineer to estimate the township road assessments, based on the benefit each property owner realizes.

Improvements to township parks, and police and fire districts, may be funded only by taxing “*all* of the taxable property” in the districts. R.C. §§ 505.39, 505.51, 511.27 and 511.33. Because State statutes detail the permissible means by which a township may raise revenue, those means are exclusive and preempt a township’s ability to raise revenues using other techniques, including the impact fees in dispute here. The well-settled statutory construction principle of “*Expressio unius est exclusion alterius*” applies here. *Baltimore Ravens, Inc. v. Self-Insuring Emp. Evaluation Bd.* (2002), 94 Ohio St.3d 449, 2002-Ohio-1362. The Resolution imposes regulations in each of these areas in conflict with the applicable provisions of the Revised Code. Thus, the Resolution must be declared invalid.

C. The Township Seeks to Alter the Structure of Township Government

The Township has turned its back on a third aspect of the limited home rule statute. A limited home rule resolution may not “change, alter, combine, eliminate, or otherwise modify the form or structure of the township government unless the change is required or permitted by this chapter.” R.C. 504.04(A)(1). The Revised Code provides that as part of its form and structure, a township may create road districts (R.C. 5573.21), park districts (R.C. 511.18, *et seq.*), police districts (R.C. 505.48, *et seq.*), and fire districts (R.C. 505.37, *et seq.*). The Revised Code even authorizes “special improvement districts.” R.C. 1710. No part of the Revised Code authorizes impact fee districts. The impact fee district is in essence a combined road, park, police and fire district with a funding structure different than those permitted by the Revised Code. By creating such a combined district—and creating its own funding structure—the Township has impermissibly changed and altered its form and structure of government. The Township is expressly prohibited from doing so. The Resolution violates this provision.

Proposition of Law No. II: *A self-serving statement within a township resolution that the resolution is intended to be in conformance with State law or to achieve a certain goal, is not conclusive of the validity of the Resolution*

The appellate court accepted carte blanche the Township’s declaration of intent. Such a self-serving statement cannot stand as conclusive proof of the Resolution’s validity. Separation of powers dictates that a reviewing court must undertake an independent review of the Resolution. *Marbury v. Madison* (1803), 5 U.S. 137. Moreover, the stated purpose of the Resolution is impermissible. This entire case is focused on whether charging only new development for the cost of expanding services that benefit the whole community is a legitimate exercise of power. Appellants would never have stipulated to the Resolution’s validity—that is the entire point of the case.

The appellate court found the following stipulation to be dispositive of whether the

Resolution imposed a tax: “The *purpose* of the impact fee is to benefit the property by providing the Township with adequate funds *to provide the same level of service* to that property that the Township currently affords previously developed properties.” Opinion, ¶ 18. (Emphasis altered). The appellate court failed to understand the stipulation. It stipulated only to the Township’s purpose. There was no stipulation that the purpose was legitimate or properly achieved. Appellants have vehemently contested the legitimacy of requiring new development to bear the cost of expanding the Township’s overall infrastructure. A rising tide raises all boats. If new development benefits, then existing development benefits the same.

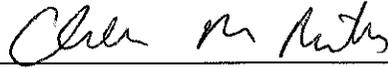
This Court has said, when reviewing a legislative enactment, “of course, we must conduct an independent review.” *State ex. Rel. Ohio Congress of Parents and Teachers v. State Board of Education*, 111 Ohio St.3d 568, 573-574. The law does not require Appellants to challenge the Township’s veracity regarding its stated intent when challenging whether the Township possesses the authority to take certain actions to achieve the stated goal. This is true even if the stated purpose was legitimate. For instance, if the Township enacted a resolution for the purpose of feeding the homeless, a challenger of the statute would not have to contest whether the Resolution met the stated purpose if the resolution achieved that purpose by taxing retail grocery sales. The tax would be illegitimate no matter the purpose. The same is true here.

As discussed under Proposition of Law No. I, the purpose of the Resolution is flawed. The Township violated the Revised Code, and impermissibly taxed new development for the cost of expanding the Township infrastructure for the equal benefit of all. The Township’s intent is irrelevant. Its action was unlawful.

CONCLUSION

This case presents novel and important questions of law about the authority granted to limited home rule townships. Appellants respectfully request that the Court exercise jurisdiction.

Respectfully submitted,



Joseph L. Trauth, Jr. (0021803)
Thomas M. Tepe, Jr. (0071313)
Charles M. Miller (0073844)
KEATING MUETHING & KLEKAMP PLL
One East Fourth Street, Suite 1400
Cincinnati, Ohio 45202
Tel: (513) 579-6400
Fax: (513) 579-6457
jtrauth@kmklaw.com
ttepe@kmklaw.com
cmiller@kmklaw.com

And

Richard A. Paolo (0022506)
Kevin L. Swick (0023149)
ARONOFF ROSEN & HUNT
425 Walnut Street, Suite 2200
Cincinnati, Ohio 45202
Tel: (513) 241-0400
Fax: (513) 241-2877
rapaolo@arh-law.com
klswick@arh-law.com

*Attorneys for Appellants, The Drees Company,
Fischer Single Family Homes II, LLC, John Henry
Homes, Inc, Charleston Signature Homes, LLC, and
Home Builders Association of Greater Cincinnati.*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following parties by ordinary mail this 1st day of September, 2010.

Wilson G. Weisenfelder, Jr.
James J. Englert
Lynne M. Longtin
RENDIGS, FRY, KIELY & DENNIS, L.L.P.
One West Fourth Street, Suite 900
Cincinnati, Ohio 45202-3688

*Trial Attorneys for Appellees/Defendants,
Hamilton Township, Ohio et al.*

Warren J. Ritchie
Thomas T. Keating
KEATING RITCHIE
5300 Socialville Foster Rd
Mason, Ohio 45040-9417

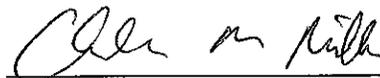
*Additional Trial Counsel for
Appellees/Defendants, Hamilton Township, Ohio et al.
and Counsel for Amici Curiae*

Maurice A. Thompson
1851 Center for Constitutional Law
208 E. State Street
Columbus, Ohio 43215

Attorney for Amicus Curiae

Richard Cordray
Ohio Attorney General
30 Each Broad Street, 17th Floor
Columbus, Ohio 43215

Attorney for the State of Ohio



Charles M. Miller

IN THE COURT OF COMMON PLEAS
WARREN COUNTY, OHIO

DREES COMPANY

VS

CASE NO: 07CV70181

HAMILTON TOWNSHIP OHIO

October 21, 2009

To: CHARLES M MILLER

YOU ARE HEREBY NOTIFIED THAT A FINAL APPEALABLE JUDGMENT WAS
ENTERED IN THE ABOVE CASE ON OCTOBER 21, 2009.

JAMES L. SPAETH
CLERK OF COURTS
500 JUSTICE DRIVE
P.O. BOX 238
LEBANON, OH 45036

C: WARREN J RITCHIE
WILSON G WEISENFELDER JR
WARREN J RITCHIE
WILSON G WEISENFELDER JR
WARREN J RITCHIE

WILSON G WEISENFELDER JR
WARREN J RITCHIE
WILSON G WEISENFELDER JR
WARREN J RITCHIE
WILSON G WEISENFELDER JR

COMMON PLEAS COURT
WARREN COUNTY OHIO
FILED

2009 SEP 30 AM 10:20

JAMES L. SPAETH
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
STATE OF OHIO, COUNTY OF WARREN
GENERAL DIVISION

THE DREES COMPANY, et al., :
Plaintiffs : CASE NO. 07CV70181
v. : ENTRY GRANTING PARTIAL
HAMILTON TWNSP, OH, et al., : SUMMARY JUDGMENT TO
Defendants : DEFENDANTS

Pending before the court are cross motions for partial summary judgment filed by Plaintiffs and by Defendants as to counts I through IX of Plaintiffs' complaint.¹ These counts assert that impact fees imposed by Hamilton Township on new construction constitute an illegal tax, are not permissible fees, and that the Township's action is preempted by other statutory funding schemes. For the reasons that follow, partial summary judgment is granted to Defendants.

I. Stipulated Facts

Hamilton Township is a limited home rule township created under chapter 504 of the Ohio Revised Code. Its powers are described in R.C. 504.04, which allows the Township to "exercise all powers of local self-government. . . other than powers that are in conflict with general laws, except that the township shall comply

¹ The parties agreed to bifurcate the issues to address first whether the proposed impact fee is something Hamilton Township is authorized to assess in the first instance. Consequently, the Court will not at this time determine whether Defendants are entitled to summary judgment on counts XIV or XV.



with the requirements and prohibitions of this chapter, and shall enact no taxes other than those authorized by general law.”²

In May 2007, the Township Board of Trustees passed Amended Resolution 2007-0418, which was titled “Amended Resolution Implementing Impact Fees within the Unincorporated Areas of Hamilton Township, Ohio, for Roads, Fire, Police, and Parks.” Fees are assessed whenever someone applies for a zoning certificate for new construction or redevelopment. Properties developed before the effective date of the Resolution are not assessed the fees.

The aim of the new impact fees is “to ensure that impact-generating development bears a proportionate share of the cost of improvements to the Township’s major roadway facilities, its fire and police protection, and its park system.” Fees are assessed based upon the proposed land use for which the zoning application is made, on either a per unit basis, or per 1000 square foot basis for some commercial development. Only residential units are charged the parks impact fee.

Collected fees are kept in accounts for each of the four categories of impact fees, and are kept separate from the Township’s general fund. Each of the four impact fee accounts contain fees collected from all over the Township. There are no geographical subcategories in each account. What this means is that fees paid in one geographical area of the Township may not necessarily be spent in that

² R.C. 504.04(A)(1)

geographical area. For instance, a parks fee paid for a particular subdivision may be spent creating a park distant from that subdivision. The Resolution requires that fees be spent on projects initiated within three years of the date the fees were collected. The Resolution contains provisions for refunding fees that have not been spent within time limits provided for in the Resolution. There are other provisions that permit developers to receive credits for improvements they constructed.

Four of the named Plaintiffs are housing construction companies that applied for zoning certificates, were assessed the impact fees, and paid them under protest. Plaintiff Homebuilders Assoc. of Greater Cincinnati represents the interests of over two hundred fifty homebuilders and residential developers in the Cincinnati area. The individuals named as Defendants in this action are members of the Hamilton Township Board of Trustees, except that Gary Boeres is the Impact Fee Administrator for the Township.

Further discussion of the facts will be made as necessary to disposition below.

II. Standard

Summary judgment is a procedure for moving beyond the allegations in the pleadings and analyzing the evidentiary materials in the record to determine whether an actual need for a trial exists.³ "Summary judgment is proper when 1) no genuine issue as to material fact remains to be litigated; 2) the moving party is

³ *Ormet Primary Aluminum Corp. v. Employers' Ins. Of Wasau* (2000), 88 Ohio St.3d 292, 300

entitled to judgment as a matter of law; and 3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.”⁴ “Regardless of who may have the burden of proof at trial, the burden is upon the party moving for summary judgment to establish that there is no genuine issue of material fact and that he is entitled to a judgment as a matter of law.”⁵ “After a proper summary judgment motion has been made, the nonmoving party must supply evidence that a material issue of fact exists; evidence of a possible inference is insufficient.”⁶

III. Authority to Impose Impact Fees

Townships are established under Chapter 503 of the Ohio Revised Code. There is no grant of any general police power or power of self government in Chapter 503, but only grants of specific powers by legislative enactment. Chapter 504 of the Revised Code allows for the electorate of a township to adopt a “limited home rule government under which the Township exercises limited powers of local self government and limited police powers.”⁷ Municipalities, in contrast, do not derive their authority from statutes, but from the Ohio Constitution. O. Const.

⁴ *Welco Industries, Inc. v. Applied Cos.* (1993), 67 Ohio St.3d 344, 346

⁵ *AAA Enterprises, Inc. v. River Place Comm. Urban Redev. Corp.* (1990), 50 Ohio St.3d 157, paragraph 2 of the syllabus

⁶ *Cox v. Commercial Parts & Serv.* (1994), 96 Ohio App.3d 417, 421

⁷ R.C. 504.01. A police power is one that provides “for the common welfare of the governed.” *Dublin v. State* (2009), 181 Ohio App.3d 384, 390, citing *State v. Martin* (1958), 168 Ohio St. 37, 40.

XVIII, section 3, establishes that municipalities enjoy "all powers of local self government and [may] adopt and enforce within their limits such local police, sanitary, and other similar regulations as are not in conflict with general laws." Section 3 contemplates no limitation on a municipality's power of self government, only on its police power.⁸ Home Rule Townships, on the other hand, may find exercise of both police power and power of self government circumscribed by "general laws."

A. What is a General Law?

The parties at length have debated the definition of "general law." Hamilton Township urges the definition provided in *City of Canton v. State*⁹ which holds that a general law is one that is (1) part of a statewide and comprehensive legislative enactment, (2) applies to all parts of the state alike and operates uniformly throughout the state, (3) sets forth police, sanitary, or similar regulations, rather than purporting only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations, and (4) prescribes a rule of conduct on citizens generally.¹⁰

Canton dealt with the authority of a municipality to enact an ordinance pursuant to its police power. The Ohio Constitution provides that only the

⁸ But other provisions of the Ohio Constitution permit legislative limitations on a municipality's right to tax, O.Const. XVIII sec. 13, and on its right to regulate labor issues, O.Const. II, sec. 34. See *City of Lima v. State* 122 Ohio St.3d 155; 2009-Ohio-2597

⁹ 95 Ohio St.3d 149; 2002-Ohio-2005

¹⁰ *Id.*, syllabus.

municipality's exercise of police power must yield to general law, not its exercise of power of self government. The Court had to decide whether a municipal ordinance relating to "police, sanitary, or similar regulations," was, or was not, in conflict with a general law.

The definition of "general law" in the *Canton* decision is properly understood as an interpretive statement made within the context of O. Const. XVIII, section 3. It is a statement by the *Canton* court that the general assembly may not propound legislation that limits authority constitutionally granted to municipalities¹¹, but it may exercise the state's own police power with enactments that relate to "police, sanitary, or similar regulations," though those enactments conflict with municipal ordinances. "The meaning of this . . . principle of law is that a statute which prohibits the exercise by a municipality of its home rule powers without such statute serving an overriding statewide interest would directly contravene the constitutional grant of municipal power."¹² Put another way, the Ohio Constitution grants authority to municipalities, and what the Constitution grants, the general assembly may not take away, although the exercise of police power by municipalities will yield to the exercise of police power by the general assembly, where the two are in conflict.

¹¹ Except legislation that limits the rights of municipalities to levy taxes or collect debts. O Const. XVIII, section 13, and legislation treating the comfort or welfare of workers. O. Const. II, section 34.

¹² *Canton v. State, supra*, at 156, citing *Clermont Environmental Reclamation Co. v. Wiederhold* (1982), 2 Ohio St.3d 44, 48.

But there is no such constitutional obstacle to legislative enactments circumscribing the authority of a home rule township to exercise either its police power or its power of self government. Those powers do not flow from the Ohio Constitution, but rather flow from the legislative enactments themselves. The general assembly grants the authority, and may limit it. For this reason, the definition of “general law” provided in *Canton* is not a useful one for purposes of the analysis this Court must engage in. This Court concludes that a general law, for purposes of R.C. 504.04, is any enactment of the Ohio general assembly.

Hamilton Township may enact a resolution to impose impact fees, as an exercise of its police power, so long as the resolution is not “in conflict with” any other provision of the Ohio Revised Code.

B. Is the Resolution in conflict with any other statute?

To be in conflict with a general law, “the test is whether the [resolution] permits or licenses that which the statute forbids and prohibits, and vice versa.”¹³ This is a test of “‘contrary directives,’ [and] is met if the [resolution] and statute in question provide contradictory guidance.”¹⁴ The Ohio Supreme Court has also recognized a “conflict by implication.”¹⁵ “When determining whether a conflict by implication exists, we examine whether the General Assembly indicated that the

¹³ *Fondessy Ent., Inc. v. Oregon* (1986), 23 Ohio St.3d 213, 217, citing *Struthers v. Sokol* (1923), 108 Ohio St. 263, paragraph 2 of the syllabus

¹⁴ *Mendenhall v. Akron* 117 Ohio St.3d 33, 40; 2008-Ohio-270

¹⁵ *Id.*

relevant state statute is to control a subject exclusively.”¹⁶ However, the Court expressly declined to adopt a preemption analysis based upon the state’s apparent intent to completely occupy a field of regulation.¹⁷

The inquiry before the Court becomes, does the Impact Fee Resolution permit that which is forbidden by a statute? Or does it forbid what is expressly allowed by a statute? Plaintiffs urge that the resolution conflicts with the provisions of chapters 505, 511, 5517, 5571, and 5573 of the Ohio Revised Code. Plaintiffs assert that these chapters provide the only means by which Hamilton Township may fund improvements to roads, parks, police, or fire service. The parties are agreed that none of the statutes expressly deal with impact fees. Defendants argue that the funding methods described in those portions of the Code are not exclusive, and that other methods not in conflict with them may be adopted.

1. Roads

A board of township trustees may construct, reconstruct, or improve any public road under its jurisdiction.¹⁸ The board, by unanimous resolution, and without the presentation of a petition to citizens of the township, may take the necessary steps to construct or improve a road, and “[t]he cost thereof may be paid by any of the methods provided in section 5573.07 of the Revised Code.”¹⁹ R.C.

¹⁶ *Id.* at 41

¹⁷ *Id.* at 42

¹⁸ R.C. 5571.01(A)

¹⁹ R.C. 5571.14(A)

5573.07 permits road improvements to be funded through assessments, levies, or "from any funds in the township treasury available therefore."²⁰ R.C. 5573.09 permits a board, by unanimous vote, to order the payment of road construction to be made from the proceeds of a levy, "or out of any road improvement fund available therefor."²¹

Nothing in these sections expressly prohibits the use of alternative methods for funding road improvements. Nothing in the statutes expressly requires that "road improvement funds" contain only proceeds of levies or assessments. The Ohio Supreme Court has declined to adopt a field preemption analysis for "conflict" in these cases, and this Court declines to adopt such an analysis here. The Court concludes that the impact fee resolution does not permit a funding mechanism forbidden by the Revised Code, and does not forbid any funding mechanism permitted by it.

2. Parks

A board of township trustees may pay the expenses of park improvements from "any funds in the township treasury then unappropriated for any other purpose."²² If there is not enough money in the treasury, then the board may levy a tax.²³

²⁰ R.C. 5573.07(B)(2)

²¹ R.C. 5573.09

²² R.C. 511.33

²³ *Id.*

No provision of Chapter 511 defines the exclusive means for funding "the township treasury" for parks purposes. If a tax is levied, it shall be levied in accordance with Chapter 511, but no tax levy is necessary to support parks, if there is sufficient money in the treasury for the purpose. The Court concludes that the impact fee resolution is not in conflict with these provisions.

3. Police and Fire Protection

R.C. 505.511 permits a township to levy a tax upon all of the taxable property in the township to defray "all or a portion of expenses of the district in providing police protection." If a levy may be used to defray only a portion of the expenses associated with providing police service, it must necessarily be the case that at least some portion may be paid with funds other than levy proceeds.

The resolution does not conflict with this statute.

R.C. 505.38 likewise allows for a tax levy to provide funding for fire protection in the township. An impact fee is not expressly forbidden by this section, nor does the resolution prohibit funding through a tax levy. There is no conflict.

IV. When is a Fee a Tax?

Home rule townships may not impose taxes except as expressly authorized by the Ohio general assembly.²⁴ There is no provision of general law granting Hamilton Township authority to impose taxes in the manner proposed in the impact

²⁴ R.C. 504.04

fee resolution. If the fee is merely a tax by another name, then it is not a permissible enactment.

Plaintiffs argue that the impact fee is a tax because (1) the amount of the fee greatly exceeds the cost to the township of providing the service of processing a zoning permit; and (2) the proceeds are used to fund improvements that benefit members of the public other than the fee payers.

In making this determination, the court looks at “the substance of the assessments, and not merely their form.”²⁵ The Ohio Supreme Court has declined to provide “a single test that will correctly distinguish a tax from a fee in all situations where the words ‘tax’ and ‘fee’ arise.”²⁶ Each determination must be made on a case by case basis.

In the context of an assessment charged to the owners and operators of underground storage tanks, the Ohio Supreme Court noted that the fees were part of a regulatory scheme designed to deal with environmental problems caused by leaking storage tanks. They created a fund that could be used for environmental cleanup. The assessments were never placed in the general fund, but were “used only for narrow and specific purposes, all directly related to UST problems.”²⁷ The Court observed that the fees provided a benefit to the public, by ensuring that

²⁵ *State ex rel. Petroleum Undergrd. Storage Tank Release Comp. Bd. v. Withrow* (1991), 62 Ohio St.3d 111, 117

²⁶ *Id.* at 117

²⁷ *Id.* at 116

money was available for environmental cleanup, but held that public benefit in this context would not militate in favor of finding the assessment a tax. The assessments provided a benefit to the fee payers, by providing a sort of insurance fund in the event of environmental mishap. For that reason, the Court concluded that the assessments were not taxes, because they provided those assessed with a form of protection in exchange for the payment. "A fee is a charge imposed by a government in return for a service it provides. A fee is not a tax."²⁸

The Eighth Appellate District struck down an impact fee for public parks and recreational facilities as an unconstitutional tax on real estate because the Court found that the assessment program was "open-ended," permitting use of the assessments to maintain and operate existing park facilities, benefitting existing residents.²⁹ The Court found "no guarantee that these new construction purchasers will in fact use the existing park system, let alone cause a need for building new facilities, unlike the certainty of new users using and burdening a local sewage system as was the case in [*Amherst Bldrs. v. Amherst* (1980), 61 Ohio St.2d 345]."³⁰ They concluded that the assessments were not roughly equal to the cost to provide parks service to the payors of the assessments, but were "necessarily inflated so as to pay for that share of the program which should be borne by the present residents

²⁸ *Id.* at 113, citing *Cincinnati v. Roettinger* (1922), 105 Ohio St. 145, 153

²⁹ *Building Ind. Assoc. of Cleveland v. Westlake* (1995), 103 Ohio App.3d 546

³⁰ *Id.* at 552

and existing construction.”³¹ The Ohio Supreme Court has also held that “a ‘fee’ is in fact a ‘tax’ if it exceeds the ‘cost and expense’ to government of providing the service in question.”³²

The most salient features of these analyses are whether the charge is roughly equal to the cost of providing the service, and whether the service being paid for is provided primarily to the payers of the fee, or to other persons.

This Court notes first that the impact fees are assessed when a zoning permit is applied for, but the fees are not intended to defray the costs of providing the zoning permit. Rather, each impact fee for fire protection, police, roads, and parks, is placed into a segregated account that is meant to fund fire protection, police, roads, and parks required to serve the new population at the same level enjoyed by existing residents. Plaintiffs do not argue that the impact fees are excessive compared to the cost of making the proposed improvements. Nor is it apparent that the fees are inflated to cover the cost of improvements that should be borne by residents of existing developments. This is not a factor that weighs in favor of finding the impact fees to be taxes.

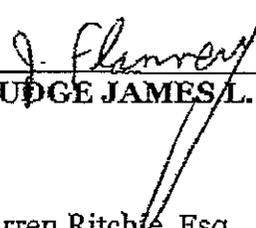
The Court further finds that there are sufficient benefits provided to those who pay the impact fees to conclude they are receiving a service in exchange for each charge. The fees are ostensibly set at a level that will allow new residents to

³¹ *Id.*

³² *Granzow v. Bur. Of Support of Montgomery Co.* (1990), 54 Ohio St.3d 35

Hamilton Township, pursuant to its statutory limited police powers, may make and fund improvements to benefit new development by use of its system of impact fees, because the resolution is not in conflict with any other Ohio statute, and because it is sufficiently narrowly tailored to provide services to the class of fee payers in exchange for the fees. Defendants' motion for partial summary judgment is well taken and is granted. This matter will be set for a case management conference on the remaining issues.

IT IS SO ORDERED.



JUDGE JAMES L. FLANNERY

c: Wilson G. Weisenfelder, Esq., Warren Ritchie, Esq.
Charles M. Miller, Esq.

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

COURT OF APPEALS
WARREN COUNTY
FILED

JUL 26 2010

James L. Spaeth, Clerk
LEBANON OHIO

THE DREES COMPANY, et al., :

Plaintiffs-Appellants, :

CASE NO. CA2009-11-150

JUDGMENT ENTRY

- VS - :

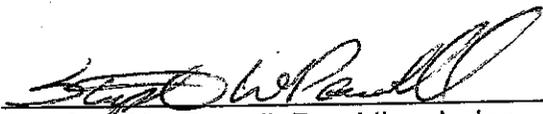
HAMILTON TOWNSHIP, OHIO, et al., :

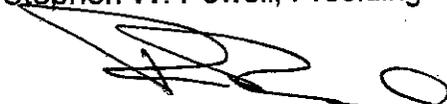
Defendants-Appellees. :

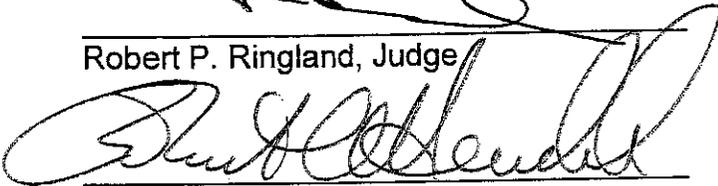
The assignment of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Warren County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed in compliance with App.R. 24.


Stephen W. Powell, Presiding Judge


Robert P. Ringland, Judge


Robert A. Hendrickson, Judge

COURT OF APPEALS
WARREN COUNTY
FILED

JUL 26 2010

James L. Spaeth, Clerk
LEBANON OHIO

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

THE DREES COMPANY, et al., :

Plaintiffs-Appellants, :

- vs - :

HAMILTON TOWNSHIP, OHIO, et al., :

Defendants-Appellees. :

CASE NO. CA2009-11-150

OPINION

7/26/2010

CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 07CV70181

Keating, Muething & Klekamp PPL, Joseph L. Trauth, Jr., Thomas M. Tepe, Charles M. Miller, One East Fourth Street, Suite 1400, Cincinnati, Ohio 45202, for plaintiffs-appellants, The Drees Company, Fischer Single Family Homes II, LLC, John Henry Homes, Inc., Charleston Signature Homes, LLC, and Home Builders Association of Greater Cincinnati

Aronoff Rosen & Hunt, Richard A. Paolo, Kevin L. Swick, 425 Walnut Street, Suite 2200, Cincinnati, Ohio 45202, for plaintiffs-appellants, The Drees Company, Fischer Single Family Homes II, LLC, John Henry Homes, Inc., Charleston Signature Homes, LLC, and Home Builders Association of Greater Cincinnati

Rendigs, Fry, Kiely & Dennis, LLP, Wilson G. Weisenfelder, Jr., James Englert and Lynne M. Longtin, One West Fourth Street, Suite 900, Cincinnati, Ohio 45202, and Keating Ritchie, Warren J. Ritchie, 5300 Socialville-Foster Road, Mason, Ohio 45040, for defendants-appellees, Hamilton Township, Ohio and Hamilton Township Board of Trustees

Keating Ritchie, Thomas T. Keating, 5300 Socialville-Foster Road, Mason, Ohio 45040,

for amicus curiae, The Ohio Township Association and the Coalition for Large Ohio Urban Townships

Maurice A. Thompson, Buckeye Institute, 1851 Center for Constitutional Law, 88 East Broad Street, Suite 1120, Columbus, Ohio 43215, amicus curiae for plaintiffs-appellants

Richard Cordray, Ohio Attorney General, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215

POWELL, P.J.

{¶1} Plaintiffs-appellants, The Drees Company, Fischer Single Family Homes II, LLC, John Henry Homes, Inc., Charleston Signature Homes, LLC, and the Home Builders Association of Greater Cincinnati (collectively, Builders), appeal from the decision of the Warren County Court of Common Pleas granting summary judgment in favor of defendants-appellees, Hamilton Township, Ohio, Hamilton Township Board of Trustees, Becky Ehling, Trustee, Michael Munoz, Trustee, and O.T. Bishop, Trustee (collectively, the Township), in a case regarding the authority of the Township to impose "impact fees" upon anyone who applies for a zoning certificate for new construction or redevelopment within its unincorporated areas. For the reasons outlined below, we affirm.

{¶2} The stipulated facts and exhibits submitted to the trial court provide for the following:

{¶3} In recent years, Warren County has been the second fastest growing county in the state of Ohio and has been ranked the 52nd fastest growing county in the nation. The Township, which occupies 34.4 square miles of south central Warren County, is a limited home rule township established pursuant to R.C. Chapter 504.

{¶4} On May 2, 2007, the Hamilton Township Board of Trustees passed Amended Resolution No. 2007-0418, entitled "Amended Resolution Implementing Impact Fees Within Unincorporated Areas of Hamilton Township, Ohio for Roads, Fire and

Police, and Parks," that established a fee schedule charged to anyone who applied for a zoning certificate for new construction or redevelopment within the Township's unincorporated areas. As the title indicates, the resolution includes four fee categories: a road impact fee, a fire protection impact fee, a police protection impact fee, and a park impact fee. The sum of these four fees, which varies based on the intended land use, make up the total impact fee charged to the applicant on a per unit basis and are charged as follows:

Land Use Type	Unit	Road	Fire	Police	Park	Total
Single-Family Detached	Dwelling	\$3,964	\$335	\$206	\$1,648	\$6,153
Multi-Family	Dwelling	\$2,782	\$187	\$115	\$921	\$4,005
Hotel/Motel	Room	\$2,857	\$160	\$98	\$0	\$3,115
Retail/Commercial	1,000 sq. ft.	\$7,265	\$432	\$265	\$0	\$7,962
Office/Institutional	1,000 sq. ft.	\$4,562	\$244	\$150	\$0	\$4,956
Industrial	1,000 sq. ft.	\$3,512	\$153	\$94	\$0	\$3,759
Warehouse	1,000 sq. ft.	\$2,503	\$97	\$60	\$0	\$2,660
Church	1,000 sq. ft.	\$2,797	\$91	\$56	\$0	\$2,944
School	1,000 sq. ft.	\$3,237	\$138	\$85	\$0	\$3,460
Nursing Home	1,000 sq. ft.	\$1,871	\$244	\$150	\$0	\$2,265
Hospital	1,000 sq. ft.	\$7,212	\$244	\$150	\$0	\$7,606

{15} Each of the collected fees, which are assessed "to offset increased services and improvements needed because of the development," and which must be paid before a zoning certificate will be issued, are kept in separate accounts apart from the Township's general fund. Once collected, the fees are to be used "to benefit the property by providing the Township with adequate funds to provide the same level of service to that property that the Township currently affords previously developed properties." If the fees are not spent on projects initiated within three years of their collection date, the fees are to be refunded with interest. The resolution also defines a list of projects exempt from payment and creates an extensive system of credits.

{16} In the fall of 2007, The Drees Company, Fischer Single Family Homes II,

John Henry Homes, and Charleston Signature Homes, applied for a zoning certificate with the Township, were assessed the applicable "impact fee," and paid the charge under protest. After the zoning applications were approved, Builders filed a complaint against the Township seeking injunctive relief, declaratory judgment, and damages.¹ Builders and the Township then filed cross-motions for summary judgment. After holding a hearing on the matter, the trial court granted summary judgment in favor of the Township.

{¶7} Builders now appeal the trial court's decision granting summary judgment to the Township, raising one assignment of error.

{¶8} "THE TRIAL COURT ERRED BY NOT GRANTING SUMMARY JUDGMENT IN FAVOR OF [BUILDERS], AND INSTEAD GRANTING SUMMARY JUDGMENT IN FAVOR OF [THE TOWNSHIP]."

{¶9} In their sole assignment of error, Builders argue that the trial court erred by granting summary judgment to the Township. We disagree.

Summary Judgment Standard of Review

{¶10} Summary judgment is a procedural device used to terminate litigation when there are no issues in a case requiring a formal trial. *Forste v. Oakview Const., Inc.*, Warren App. No. CA2009-05-054, 2009-Ohio-5516, ¶7. A trial court may grant summary judgment only when: (1) there is no genuine issue of any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) the evidence submitted can only lead reasonable minds to a conclusion which is adverse to the nonmoving party. Civ.R. 56(C); *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

{¶11} An appellate court's review of a summary judgment decision is de novo. *Creech v. Brock & Assoc. Constr.*, 183 Ohio App.3d 711, 2009-Ohio-3930, ¶9, citing

1. We question whether Home Builders Association of Greater Cincinnati has standing to pursue its claim against the Township. However, since the remaining appellants have standing, and since the issue was not raised previously, we will not address that issue here.

Grafton v. Ohio Edison Co., 77 Ohio St.3d 102, 105, 1996-Ohio-336. In applying the de novo standard, a reviewing court is required to "us[e] the same standard that the trial court should have used, and * * * examine the evidence to determine whether as a matter of law no genuine issues exist for trial." *Bravard v. Curran*, 155 Ohio App.3d 713, 2004-Ohio-181, ¶9, quoting *Brewer v. Cleveland Bd. of Edn.* (1997), 122 Ohio App.3d 378, 383.

Ohio's Limited Home Rule Townships & R.C. Chapter 504

{¶12} In Ohio, "townships are creatures of the law and have only such authority as is conferred on them by law." *State ex rel. Schramm v. Ayres* (1952), 158 Ohio St. 30, 33. In turn, Ohio townships have no inherent or constitutionally granted police power, but instead, are "limited to that which is expressly delegated to them by statute." *W. Chester Twp. Bd. of Trustees v. Speedway Superamerica, L.L.C.*, Butler App. No. CA2006-05-104, 2007-Ohio-2844, ¶66; *Yorkavitz v. Bd. of Trustees of Columbia Twp.* (1957), 166 Ohio St. 349, 351.

{¶13} There are two types of townships in Ohio; namely, a standard township and a limited home rule township. Pursuant to R.C. 504.04(A)(1), a limited home rule township "may * * * [e]xercise all powers of local self government within the unincorporated area of the township, other than powers that are in conflict with general law * * *." See *Board of Twp. Trustees of Deerfield Twp. v. City of Mason*, Warren App. No. CA2001-07-069, 2002-Ohio-374. However, while the General Assembly has granted limited home rule townships broad governing authority, they "shall enact no taxes other than those authorized by general law * * *." R.C. 504.04(A)(1).

A Tax, or Not A Tax? That is the Question

{¶14} Initially, Builders argue that the trial court erred by granting summary judgment to the Township because the "impact fees are really taxes" that are "not authorized by any Revised Code provision governing taxes or special assessments a

township can impose."² We disagree.

{¶15} As noted above, a limited home rule township "shall enact no taxes other than those authorized by general law." R.C. 504.04(A)(1). A tax, while not explicitly defined in the Ohio Revised Code, "refers to those general burdens imposed for the purpose of supporting the government, and more especially the method of providing the revenues which are expended for the equal benefit of all the people." *Cincinnati v. Roettinger* (1922), 105 Ohio St. 145, 153-154. "A fee, however, is incident to a voluntary act, e.g., a request that a public agency permit an applicant to * * * construct a house * * *." *National Cable Television Assn. v. United States* (1974), 415 U.S. 336, 340-341. "A fee is a charge imposed by a government in return for a service it provides; a fee is not a tax." *State ex rel. Petroleum Underground Storage Tank Release Comp. Bd. v. Withrow* (1991), 62 Ohio St.3d 111, 113.

{¶16} While these definitions are certainly informative, determining whether a charge is a tax or a fee is a difficult task, for "it is not possible to come up with a single test that will correctly distinguish a tax for a fee in all situations where the words 'tax' and 'fee' arise." *Withrow* at 117; see, generally, Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, (2006), 59 SMU L.Rev. 177, 249-252 (discussing various tests courts have employed to aid in the difficult task of classifying a charge as a fee or a tax). Therefore, because "a tax for one inquiry is not necessarily a tax under other circumstances," courts must evaluate whether a charge is a fee or a tax on a case-by-case basis. *Withrow* at 115, 117.

{¶17} In support of their claim, Builders argue that the charges are taxes because

2. On appeal, Builders do not argue that the resolution violates Section 2, Article XII of the Ohio Constitution, their substantive due process and equal protection rights, or that the resolution constitutes an illegal taking without just compensation. See *Bldg. Industry Assn. of Cleveland & Suburban Ctys. v. Westlake* (1995), 103 Ohio App.3d 546; *Home Builders Assn. of Dayton & the Miami Valley v. Beavercreek*, 89 Ohio St.3d 121, 2000-Ohio-115.

they "are intended to be spent on public infrastructure unassociated with the development, as a means to benefit the public broadly," that "the benefit is not targeted to the fee payer," and that "it is easy to envision that a property for which an impact fee is paid may never see an improvement that directly benefits it, even if every impact fee dollar is spent." However, while it may be true that money generated through taxes is "expended for the equal benefit of all the people," Builders' claim flies in the face of the parties stipulated facts, which state, in pertinent part:

{¶18} "The purpose of the impact fee is to benefit *the property* by providing the Township with adequate funds to provide the same level of service to *that property* that the Township currently affords previously developed properties." (Emphasis added.)

{¶19} To quote Builders, "[i]n order to be classified as a fee, a charge must specially benefit the property that pays the fee." Based on the parties stipulated facts, that is exactly what occurs here; namely, a payment to the Township to obtain a zoning certificate in order to build on property within its unincorporated areas so that "*that property*" can receive the same level of service provided to previously developed properties. By stipulating to these facts, Builders are now bound by their agreement. See, e.g., *Westfield Ins. v. Hunter*, Butler App. Nos. CA2009-05-134, 2009-06-157, 2009-Ohio-5642, ¶28.

{¶20} Furthermore, the collected charges are never placed in the Township's general fund, but instead, separated into individual funds to be used only for narrow and specific purposes occasioned by the Township's ever-expanding population growth. In addition, the collected charges are refunded if not spent on projects initiated within three years of their collection date. These factors, when taken together, indicate that the charges imposed by the Township are fees paid in return for the services it provides. See *Withdraw* at 116-117. Therefore, after a thorough review of the record, and based on the

narrow and confined facts of this case, we find the charges imposed upon all applicants seeking a zoning certificate for new construction or redevelopment within the Township's unincorporated areas function not as a tax, but as a fee. Accordingly, because the collected charges are fees, Builders' first argument is overruled.

Contrary Directives & Conflict by Implication

{¶21} Builders also argue that the Township's resolution conflicts with various provisions found in R.C. Chapters 505, 511, 5571, and 5573 because, according to them, the resolution "attempts to raise revenues by means other than those expressly authorized by statute as the sole means by which funds may be generated for zoning, roads, police, fire, and parks systems."³ However, after an extensive review of the alleged conflicting statutory language, none of these provisions expressly prohibit townships from charging impact fees to fund these services, nor do they provide for the exclusive means by which these services must be funded. *City of Fairfield v. Stephens*, Butler App. No. CA2001-06-149, 2002-Ohio-4120, ¶19; *Mendenhall v. Akron*, 117 Ohio St.3d 33, 2008-Ohio-270, ¶32; *Village of Struthers v. Sokol* (1923), 108 Ohio St. 263, paragraph two of the syllabus. Therefore, just as the trial court found, and for reasons with which we agree, the Township's resolution does not conflict with the various named provisions found in R.C. Chapters 505, 511, 5571 and 5573. Accordingly, Builders' second argument is overruled.

Alter the Structure of the Township Government

{¶22} In their final argument, Builders claim that the Township has "impermissibly changed and altered its form and structure of government" by creating an "impact fee district." However, by simply charging impact fees to anyone who applies for a zoning

4. More specifically, Builders alleged that Township's resolution conflicts with R.C. 505.10, 505.39, 511.27, 511.33, 5571.15, 5573.07, 5573.10, 5573.11, and 5573.211.

certificate for new construction or redevelopment within its unincorporated areas to account for the increased need for services and improvements, the Township has not changed or altered its statutorily permissible limited home rule form of government as provided for by R.C. Chapter 504. Therefore, Builders' final argument is overruled.

{¶23} In light of the foregoing, we find no error in the trial court's decision granting summary judgment to the Township. Builders' sole assignment of error is overruled.

{¶24} Judgment affirmed.

RINGLAND and HENDRICKSON, JJ., concur.

This opinion or decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/ROD/documents/>. Final versions of decisions are also available on the Twelfth District's web site at: <http://www.twelfth.courts.state.oh.us/search.asp>