

**IN THE SUPREME COURT OF OHIO**

<b>THE DREES COMPANY, et al.</b>	)	Case No. 2010-1548
	)	
<b>Plaintiffs-Appellants,</b>	)	ON APPEAL from the
	)	Warren County Court of Appeals,
-v-	)	Twelfth Appellate District
	)	
<b>HAMILTON TOWNSHIP, OHIO, et al.</b>	)	Ct. of App. No. 2009-11-150
	)	
<b>Defendants-Appellees.</b>	)	

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## STATEMENT OF THE CASE AND FACTS

Appellee Hamilton Township ("the Township" or "Appellee") seeks to exercise the powers of a municipality without actually being one. It attempts to unlawfully raise revenues to support the Township by imposing impact fees on new development. No other Ohio township has enacted such "fees." By the Township's own admission, it enacted impact fees to generate revenue, making them taxes. While virtually every political subdivision in the State is experiencing revenue shortfalls, the Township's audacious power grab should not be permitted. If the court of appeals' erroneous decision stands, limited home rule townships will be cut loose from restraints on unauthorized taxation that the General Assembly plainly included in the Limited Home Rule Township enabling act. Equally troubling, Limited Home Rule townships will be free to adopt revenue raising schemes or other resolutions that conflict with pre-existing, field-occupying legislation. The Township's impact fee resolution is *ultra vires* and cannot withstand judicial review.

### A. The Parties

The Appellants are the Home Builders Association of Greater Cincinnati, The Drees Company, Fischer Single Family Homes II, LLC, John Henry Homes, Inc., and Charleston Signature Homes, LLC. The Association is an unincorporated association of over 250 home builders and residential developers in the Greater Cincinnati metropolitan area. (T.d. 1, ¶ 11). The individual Appellants each own property in Hamilton Township, Warren County, Ohio and have paid impact fees to Appellees on many lots.

Appellee Hamilton Township is a limited home-rule township located in Warren County, Ohio. (T.d. 1, ¶ 90). Appellee, the Hamilton Township Board of Trustees, through the elected Trustees (Appellees Becky Ehling, Kurt Weber and Eugene Duvelius), is the legislative and

administrative body responsible for governing Hamilton Township under Title 5 of the Ohio Revised Code. (T.d. 8, ¶ 1).

B. Origins of the Dispute

On May 2, 2007, 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"). (T.d. 8, ¶ 2 and Exhibit A thereto). The Township later adopted the Hamilton Township Impact Fee Administrative Rules (the "Rules") on August 21, 2007 addressing implementation of the Resolution. (*Id.* at ¶ 3 and Exhibit B thereto).

The Resolution imposes an impact fee on all applicants for zoning certificates for new construction or redevelopment. The Resolution imposes four categories of fees: (1) A Road Impact Fee, (2) a Fire Protection Impact Fee, (3) Police Protection Impact Fee, and (4) a Park Impact Fee. (*Id.* at ¶ 4). The amount of the impact fee varies according to the type of use. The Township exacts a per unit fee for Single-Family Detached Dwellings, Multi-Family Units, and Hotel/Motel rooms. (*Id.* at ¶ 5). It imposes fees for Retail/Commercial, Office/Institutional, Warehouse, Church, School, Nursing Home, and Hospital uses on a per 1,000 sq. ft. basis. (*Id.*). Only Single-Family Detached Dwellings and Multi-Family Units pay the park impact fee. (*Id.* at ¶ 6).

The impact fees established by the Resolution are as follows:

Land Use Type	Unit	Road	Fire	Police	Park	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

(*Id.* at ¶ 7).

The Township phased in the Impact Fees over two years. From the Resolution's effective date until September 1, 2008, the Township charged one-third of the amounts listed above. On September 1, 2008, the Township began charging two-thirds of the amounts listed above. Since August 31, 2009, the Township has charged the full impact fees. (*Id.* at ¶ 9).

The Township officially claims the impact fees benefit the property by providing the Township with adequate funds to provide the same level of service to that property that the Township provides to previously developed properties. (*Id.* at ¶ 27). That "level of service" was, of course, funded through property taxes and other revenue raising means set forth in Chapter 504. of the Revised Code. The Township has admitted in this litigation that it enacted the fees to boost revenues. (T.d. 9 at 3.) Properties developed before the Resolution's effective date of the Resolution pay no fees. (T.d. 8 at ¶ 30). The impact fee assessed by the Township is not based upon the value of the land and improvements thereon, (*Id.* at ¶ 24).

The Township enforces its Impact Fee in two ways. First, it refuses to issue zoning certificates until the impact fee is paid (*Id.* at ¶ 25). If an owner fails to pay, the Township imposes a lien on the property that ostensibly "runs with the land." (*Id.* at ¶ 14). Both

enforcement mechanisms illustrate the Township's overreach. The "fees" are not calculated based on costs of issuing the zoning certificate, or conducting requisite inspections. By imposing an "impact fee" lien on parcels slated for annexation, the Township attempts to create a poison pill intended to dissuade property owners and bordering municipalities alike from seeking annexation.<sup>1</sup> Finally, the Resolution and the Rules provide landowners no means to challenge the allocation or use of an impact fee once it is paid. (*Id.* at ¶ 23).

The Township maintains an account for each category of impact fee, but does not maintain geographic sub-accounts based on the location of the impact fee payer. The money in the impact fee accounts is dispersed only on a "first-in/first-out" basis: the money in the account longest is spent first, regardless of where it is spent. (*Id.* at ¶ 21).

Despite paying lip service to maintaining a uniform level of services for new residents, actual practice reveals the Resolution and Rules as a naked revenue grab. If maintaining a certain level of services really was the operant motive, one would expect the Resolution and Rules to provide credits for dedications in lieu of fees. But the Township offers scant credits to developers for the sort of dedications that would most directly offset the alleged impact of new building and new residents. The Resolution and Rules limit the type of roadway expansion projects that qualify for credit. (*Id.* at ¶ 20). For instance, the Resolution and Rules only provide roadway system improvement credits for roadways on the Thoroughfare Plan. (*Id.* at ¶ 16). Further, the Resolution permits no credit for the dedication of right-of-ways or for "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." (*Id.* at ¶¶ 17, 26). In other words, there is no credit for offsetting the direct impact of the development,

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<sup>1</sup> *Village of Maineville and Salt Run, LLC v. Hamilton Township*, S.D.Oh. No. 1:10cv690.

demonstrating the disconnect between the labeling of the Resolution as an "Impact Fee" and its operation as a tax.

Although many states have enacted legislation expressly allowing local governments to make developmental impact exactions, the Ohio General Assembly has not followed suit. Proposed House Bill 299 in the 126<sup>th</sup> General Assembly would have authorized township trustees to collect impact fees. But HB 299 died in committee. That failed attempt underscores two key points. First, absent legislative actions, townships lack the authority to impose impact fees. Second, if it had passed, HB 299 would have enacted the proposed legislation under Title 57, the state taxation code.

C. Procedural History

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. Appellants also objected that the Township's impact "fee" conflicted with comprehensive, field occupying legislation setting forth the ways in which townships could fund various infrastructure. Finally, Appellants objected that the Resolution and Rules impermissibly altered the structure of township government. The matter was submitted to the Court 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 exaction was 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 Twelfth District Court of Appeals affirmed the erroneous ruling. The appellate panel

glided past the dispositive tax-fee distinction. Instead, it mistook the nature of a stipulation to the trial court, wrongly concluding that Appellants conceded the legitimacy of the Township's stated purpose for the impact exactions. The stipulations included basic acknowledgement of the Township's *stated* reasons for the impact exactions. (T.d. 8, ¶ 27.) The stipulation was not a stipulation that the "purpose" was legitimate or even achieved. The trial court recognized this simple fact. The court of appeals did not.

This matter comes before this Court having been granted discretionary review.

## ARGUMENT

### **PROPOSITION OF LAW NO. I: *A limited home rule township may not impose impact fees.***

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—hence the "limited" character of the township's powers. This case of first impression addresses the parameters of the limited home rule township form of government. This is a case of first impression.

A broad review of Chapter 504. sets the analysis in context. Chapter 504. is comprised of 21 sections. Sections 504.01 through 504.03 address the rules for creating and terminating a "limited home rule township." Section 504.04 both confers and sharply limits powers of a limited home rule township. The bulk of this brief interprets and applies that section. Sections 504.05 through 504.08 address civil fines as the exclusive enforcement mechanism of limited home rule resolutions. Sections 504.09 through 504.17 address self-government issues. Sections 504.18 through 504.21 address water, sewer and storm runoff concerns. This is the entire Chapter. The operative portion of R.C. 504.04 provides:

- (A) A township that adopts a limited home rule government may do all of the following by resolution, provided that any of these resolutions, other than a resolution to supply water or sewer services in accordance with sections 504.18 to 504.20 of the Revised Code, 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 with the requirements and prohibitions of this chapter, and *shall enact no taxes other than those authorized by general law*, and except that no resolution adopted pursuant to this chapter shall encroach upon the powers, duties, and privileges of elected township officers 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;
  - (3) Supply water and sewer services to users within the unincorporated area of the township in accordance with sections 504.18 to 504.20 of the Revised Code;
  - (4) Adopt and enforce within the unincorporated area of the township any resolution of a type described in section 503.52 or 503.60 of the Revised Code.
- (B) No resolution adopted pursuant to this chapter shall do any of the following:
- (1) Create a criminal offense or impose criminal penalties, except as authorized by division (A) of this section or by section 503.52 of the Revised Code;
  - (2) Impose civil fines other than as authorized by this chapter;
  - (3) *Establish or revise subdivision regulations*, road construction standards, urban sediment rules, or storm water and drainage regulations, except as provided in section 504.21 of the Revised Code;
  - (4) Establish or revise building standards, building codes, and other standard codes except as provided in section 504.13 of the Revised Code;
  - (5) Increase, decrease, or otherwise alter the powers or duties of a township under any other chapter of the Revised Code pertaining to agriculture or the conservation or development of natural resources;
  - (6) Establish regulations affecting hunting, trapping, fishing, or the possession, use, or sale of firearms;
  - (7) Establish or revise water or sewer regulations, except in accordance with section 504.18, 504.19, or 504.21 of the Revised Code.

R.C. 504.04(A)-(B) (emphasis added).

While Chapter 504. grants additional powers to limited home rule townships, this statute does not grant powers co-extensive with the Municipal Home Rule Amendment to the Ohio

Constitution. In relation to this case, powers of self-government (not just police powers) are superseded by State law. The term 'general laws' in this context, albeit undefined, encompasses the Revised Code. A township may impose only those taxes and fines that are expressly authorized by the Revised Code. A township may not alter its structure of government in ways not contemplated by Chapter 504. Nor may a township establish subdivision regulations.

The Township's impact fee resolution violates each of these limits on its powers. The impact fee resolution: (1) conflicts with provisions of Chapter 504. and with Revised Code provisions governing the funding of road, park, police and fire improvements; (2) imposes a tax; (3) alters the structure of township government; and (4) acts as a subdivision regulation. Accordingly, it is invalid.

A. The Resolution Conflicts with General Laws

This section explains the multitude of conflicts the Township's Resolution has created with the Revised Code. The analysis begins by discussing the appropriate standard of conflict review in Limited Home Rule cases.

1. *Preemption Standard for Limited Home Rule Township Resolutions*

Heretofore, this Court's conflict jurisprudence has involved two distinct areas of law. First, this Court has a long and prolific history interpreting the Ohio Constitution's Municipal Home Rule Amendment, OH. CONST., Art. XVIII, § 3, when reviewing the interplay between State law and municipal ordinances. *See*, most recently, *Cleveland v. State*, Slip Opinion No. 2010-Ohio-6318. Second, this Court has occasionally been called upon to decide whether federal law preempts Ohio law under the Supremacy Clause of the United States Constitution (Art. VI, Clause 2). *See, e.g., Jenkins v. James B. Day & Co.* (1994), 69 Ohio St. 3d 541, 64 N.E.2d 998; *In re Miamisburg Train Derailment Litigation* (1994), 68 Ohio St.3d 255, 259, 626 N.E.2d 85. Because the Municipal Home Rule Amendment and the Supremacy Clause balance

interests differently, Municipal Home Rule Amendment conflict analysis is incongruent with Supremacy Clause preemption analysis. This case begins a third strand of conflict analysis—resolving conflicts between State law and limited home rule township resolutions. Revised Code Section 504.04 is less deferential to townships than the Municipal Home Rule Amendment is to cities. Accordingly, a differing standard of review is necessary.

a. Municipal Powers Derive from the Constitution, While Townships Depend on Legislative Grants of Authority

Townships and municipal corporations are legally distinct forms of government from both a statutory and state constitutional perspective. *See, Hamilton v. Fairfield Twp.* (1996), 112 Ohio App.3d 255, 678 N.E.2d 599. As a *limited* home rule township, Hamilton Township does not enjoy the full range of municipal powers. Thus, its actions are more readily subject to challenge.

Since 1912, Ohio municipalities have derived their authority from the Ohio Constitution's Municipal Home Rule Amendment, which states in key part:

Municipalities shall have authority to exercise all powers of local self-government and to adopt within their limits such local police, sanitary and other similar regulations as are not in conflict with the general laws.

OH. CONST., Art. XVIII, § 3. Because municipalities derive their home rule powers from the Constitution, the General Assembly cannot limit municipal powers unless the Constitution itself permits such interference. *West Jefferson v. Robinson* (1965), 1 Ohio St.2d 113, 205 N.E.2d 382. The Municipal Home Rule Amendment does not permit any restrictions on local self-government powers.

Revised Code Chapter 504. governs the formation, termination, structure and powers of a limited home rule township. The powers of a limited home rule township are set forth in R.C.

504.04, entitled "Exercise of home rule powers; limitations; officers; conflicts with municipal or county laws." A limited home rule township may:

(1) Exercise all powers of self-government within the unincorporated area of the township, ***other than powers that are in conflict with the general laws***, except that the township shall comply with the requirements and prohibitions of this chapter, and ***shall enact no taxes other than those authorized by general law*** .

...

(2) Adopt and enforce within the unincorporated area of the township local police, sanitary, and other similar regulations ***that are not in conflict with the general laws or otherwise prohibited by division (B) of this section***;

R.C. 504.04(A)(1) and (2) (emphasis added). This provision contains several limitations on a township's limited home rule powers that are more restrictive than the Municipal Home Rule Amendment. Specifically, township self-government powers cannot conflict with general law; a township may not impose taxes that are not expressly authorized, and there are more restrictive limitations on police powers. Additionally, Division B of the Section contains several express limitations on police powers. *See* R.C. 504.04(B).

b. State Statutes Preempt Conflicting Township Resolutions

Challenging the exercise of municipal powers under the Municipal Home Rule Amendment is a complex, three step process. *Mendenhall v. City of Akron*, 117 Ohio St.3d 33, 2008-Ohio-270, 881 N.E.2d 255, at ¶ 17. A state statute takes precedence over a municipal ordinance when "(1) the ordinance is an exercise of the police power, rather than of local self-government, (2) the statute is a general law, and (3) the ordinance is in conflict with the statute." *Id.*

By contrast, the road to challenging limited home rule township actions is direct. Neither the first or second *Mendenhall* steps are required. A limited home rule township depends exclusively on legislative grant for all its powers. *Yorkavitz v. Columbia Twp. Bd. of Trustees*

(1957), 166 Ohio St. 349, 351, 142 N.E.2d 655. Township police powers are limited to those the General Assembly expressly delegates by statute. *Id. See also, West Chester Twp. Bd. of Trustees v. Speedway Super America LLC*, 12th Dist. No. CA2006-05-104, 2007-Ohio-2844. Courts routinely hold township actions exceeding statutory limits invalid. *Dsuban v. Union Twp. Board of Zoning Appeals* (2000), 140 Ohio App.3d 602, 608-609, 748 N.E.2d 597. *See also, Superior Hauling, Inc. v. Allen Township Zoning Board of Appeals*, 72 Ohio App.3d 313, 2007-Ohio-3109, 874 N.E.2d 1216, at ¶ 18 (holding township zoning inspector and board of zoning appeals acted "beyond their authority," rendering their acts subject to collateral attack). This sharp contrast with the deference given to cities is the starting point for this analysis. The analogy to the Municipal Home Rule context is where there is a conflict between the Municipal Home Rule Amendment and a statute enacted pursuant to Section 34, Article II of the Ohio Constitution. *See, e.g., Lima v. State*, 122 Ohio St.3d 155, 2009-Ohio-2597. In such an instance, the Municipal Home Rule Amendment is not implicated, and the analysis is a straight conflict analysis. *Id.*

i. R.C. 504.04 treats self-government and police powers equally

The first *Mendenhall* step is clearly inapplicable in a R.C. 504.04 analysis, because the Constitution reserves all powers of local self-government to the municipality, while R.C. 504.04 subjects a limited home rule township's self-government powers to restriction by the General Assembly. Specifically, Section 3, Article XVIII of the Ohio Constitution provides, in part, "Municipalities shall have authority to exercise **all** powers of local self-government . . . ." By contrast, R.C. 504.04 provides that a limited home rule township may "Exercise all powers of local self-government within the unincorporated area of the township, **other than powers that are in conflict with the general laws . . . .**" (emphasis added). Thus, unlike a home rule

municipality, a limited home rule township does not possess the absolute right to exercise powers of local self-government, which renders the first part of the *Mendenhall* test inapposite.

ii. In the Revised Code, 'general law' means the Revised Code.

The second *Mendenhall* step is to determine if the state statute is a general law. While the second *Mendenhall* step might appear to apply here, it does not because the term 'general laws' means something different in Section 3, Article XVIII of the Ohio Constitution from what the term refers to in R.C. 504.04. The predecessor to *Mendenhall* noted this limitation: "Canton Codified Ordinance 1129.11 may be enforced because those divisions of R.C. 3781.184 that conflict with it are not 'general laws' *as the term is used in the Home-Rule Amendment to the Ohio Constitution.*" *Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963, at ¶ 41 (Cook, J. concurring)(emphasis added). Lower courts have recognized that if an exercise of township powers "violates an explicit statutory command" from the General Assembly, it is "invalid and unenforceable." *Dsuban*, 140 Ohio App.3d at 608-09. This is the appropriate test to be applied here.

Because this is a case of first impression, it is crucial to recognize the disunity between the term 'general laws' as used in the Revised Code and this Court's interpretations of it in the Municipal Home Rule Amendment. *Canton* set forth the definition of "general laws" in the municipal home rule contest as follows:

To constitute a general law for the purpose of [municipal] home-rule analysis, a statute must: (1) Be part of a statewide and comprehensive legislative enactment; (2) apply to all parts of the state alike and operate uniformly throughout the state; (3) set forth police, sanitary or similar regulations, rather than purport to only grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations and (4) prescribe a rule of conduct upon citizens generally.

*Canton v. State*, 2002-Ohio-2005, at Syllabus. This constitutional definition simply does not match the definition of the term 'general laws' in the Revised Code. The Township contended below that the *Canton* definition applied and that the third and fourth elements are not met here. An examination of the third and fourth elements demonstrate that they are inapposite to R.C. 504.04 analysis.<sup>2</sup>

(A) Statutes grant and limit township powers.

The third *Canton* element states that the Revised Code section must affirmatively regulate some field "rather than purport to only grant or limit legislative power of a municipal corporation to set forth . . . similar regulations." *Id.* The most obvious reason that this test does not apply to limited home rule townships is that it expressly protects "municipal corporations," not townships. Second, because townships are creatures of statute, there is no constitutional barrier restricting the General Assembly's ability to statutorily "grant or limit legislative power" of a township. If this Court imposed such a requirement, it would encroach upon the powers delegated to the General Assembly. *Tobacco Use Prevention & Control Found. v. Boyce*, Slip Opinion No. 2010-Ohio-6207, ¶ 11. Indeed, it is only through statute that a township possesses any power in the first place. The hurdle for restricting township power is not high.

(B) Statutes Prescribe Rules of Conduct for Townships.

The fourth element of the municipal home rule test states that that a general law must prescribe conduct of citizens, not political subdivisions. This aspect of the test is designed to protect a municipality's constitutional local police powers. The Constitutional provision would have little significance if the General Assembly could simply adopt a statute declaring the Municipal Home Rule Amendment inapplicable to certain laws. Because the Constitution does

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<sup>2</sup> The Township did not contest that the Revised Code sections Appellants rely upon meet the first and second elements of the *Canton* definition. Thus, those elements are not discussed here.

not protect township police powers from legislative limits, this element is inapplicable here. *Id.* Thus, a limited home rule township must honor statutory limits on local self-government. Moreover, applying the *Canton* definition of 'general laws' to R.C. 504.04 results in absurdity.

R.C. 504.04 provides, in part, that a limited home rule township "shall enact no taxes other than those authorized by general law." R.C. 504.04(A)(1). Applying the *Canton* definition would result in a limited home rule township being able to enact only those taxes that are authorized by a statute that "(3) set forth police, sanitary or similar regulations, rather than purport to only grant or limit legislative power of a [township] to set forth police, sanitary, or similar regulations and (4) prescribe a rule of conduct upon citizens generally." Obviously, any statute that authorized a township to enact a tax would not set forth any "police, sanitary or similar regulations," but would "grant or limit legislative power of a township" and would not "prescribe a rule of conduct upon citizens generally." Using the *Canton* definition, there could be no general law that authorized a township to enact a tax. Thus, a limited home rule township could not enact any taxes because doing so was not authorized by a general law. This obviously would be an absurd result. Identical undefined terms cannot mean different things within the same Revised Code Section. *See, National Credit Union Admin. v. First National Bank & Trust Co.* (1998), 522 U.S. 479, 501, 118 S.Ct. 927, 104 L.Ed.2d 1; *Sprung v. E.I. DuPont de Nemours & Co.* (Ohio Ct. App. 2d Dist. 1939), 34 N.E.2d 41, 49; 85 Oh Jur 3d, Statutes, § 225, n.4. Therefore, the term 'general law' cannot have the same definition in R.C. 504.04 as it does in Section 3, Article XVIII of the Ohio Constitution.

General Assembly action and interpretation of the term 'general law' as it relates to a township further distinguish the *Canton* definition. A failed attempt to amend R.C. 504.04 further demonstrates that the term 'general law' therein encompasses the Revised Code. A

proposed bill would have granted limited home rule townships the power to "establish a civil service system" outside the confines of R.C. Chapter 124. *See*, 124 Am. HB 268. The bill analysis explained: "Those township civil service provisions apply to any township, including, it appears, limited home rule townships. . . . Although the term "general laws" is not defined and there has not been any court interpretation of it, a reasonable interpretation might be that it encompasses any or most provisions of the Revised Code . . . . If these suppositions are true, the Revised Code provisions regarding township civil service commissions would seem to apply to limited home rule townships." *See*, Legislative Service Commission Analysis of 124 Am. H.B. 268. The General Assembly clearly intended that the term 'general law' in R.C. 504.04 encompass all provisions of the Revised Code.

An examination of other provisions of R.C. Chapter 504. confirm that the term 'general law' in R.C. 504.04 includes any section of the Revised Code.<sup>3</sup>

The term "general law," as used in the Limited Home Rule Township Law, is not defined. Many people interpret it to mean any law related to townships in the Revised Code. That interpretation is not the same interpretation given to "general law" in the context of municipal home rule; however, there is no reason to assume a relationship exists between the terms used in those different contexts. . . . This analysis assumes it refers to any Revised Code provision relevant to townships in general.

Legislative Service Commission Analysis of 124 Am. H.B. 515, n. 1. For this reason, H.B. 515 amended R.C. 504.09 to state that R.C. 507.04, a 'general law' regarding Township recordkeeping, would no longer apply to limited home rule townships. If the Township's definition of 'general law' was applicable to limited home rule townships, the amendment to R.C. 504.09 would have been unnecessary. Moreover, the absence of a corresponding Section to free

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<sup>3</sup> In fact, the Township has admitted to this. *See* T.d. 1, ¶¶ 93, 111, 120; T.d. 5, ¶¶ 93, 111, 120.

a limited home rule township from the statutory funding mechanisms for roads, parks, police and fire protection is telling.

Nowhere in the Ohio Revised Code does the term 'general law' have the same definition used in *Canton*. The very first section of the Revised Code, defines the Revised Code as the *general* statutes governing the State of Ohio.

All *statutes of a permanent and general nature* of the state as revised and consolidated into general provisions, titles, chapters, and sections shall be known and designated as the "Revised Code," for which designation "R.C." may be substituted.

R.C. 1.01. The general statutes of Ohio are part of the general laws as used in the Revised Code.

The only definition section of the Revised Code to use the term 'general law' is R.C. 5747.01. While 'general law' is not the term being defined, the definition is insightful. "'Essential local government purposes' includes *all functions that any subdivision is required by general law to exercise . . .* R.C. 5747.01(Q)(2) (emphasis added). Applying the *Canton* definition would result in the absurdity of there being no 'essential local government purposes' because no statute that directed a political subdivision to perform a function could be classified as a general law.

R.C. 6101.07, which governs the composition of a conservancy district court, states "The court shall adopt rules of practice and procedure not inconsistent with this chapter and *the general laws of this state.*" This section deals exclusively with the establishment of a conservancy court. The general laws to which it refers are not restricted to those setting forth police regulations and applying to the citizenry generally.

Revised Code Chapter 302. addresses a county's ability to establish an alternative form of government, and can be considered a corollary to R.C. Chapter 504. It uses the term 'general law' three times. Each use demonstrates that the Revised Code uses the term general law to

mean the codified and uncodified laws of the State of Ohio. The first instance reads, "the provisions of sections 302.01 to 302.24, inclusive, of the Revised Code, applicable to the adopted alternative form of government shall be controlling in such county as to all matters to which they relate, and *other provisions of the general laws of the state* shall be operative therein only insofar as they are not inconsistent with the aforesaid provisions." R.C. 302.01. This section, through use of the term "other," refers to R.C. 302.01 to 302.24 as "provisions of the general laws." These statutes govern the possible form of county government and do not fit the *Canton* definition.

The second and third instances of 'general law' in R.C. Chapter 302. read, "Appointment of officers, which by *general law* in sections 303.04, 303.13, 305.29, 306.01, 306.02, 329.01, 329.06, 5153.39, and 5155.03 of the Revised Code is required to be made by the board of county commissioners . . . other than officers of a court or employees or other persons advisory to or subject to the supervision of a court or judge thereof, which by *general law* in sections 331.01, 339.02, 1545.02, 1545.03, 1545.04, and 1545.05 of the Revised Code are to be appointed by a judge . . . " R.C. 302.18(C). This section clearly labels 16 different sections of the Revised Code to be "general laws." Each section addresses the appointment of government officials. They do not meet the *Canton* definition of "general law."

The Revised Code consistently uses the term 'general law' to refer to the codified and uncodified statutes enacted by the General Assembly. This is the definition used in R.C. 504.04. Accordingly, a limited home rule township cannot enact a resolution that conflicts with any provision of the Revised Code, especially provisions expressly delineating or limiting the powers of a township. R.C. Chapters 5571. and 5573. are general laws, as are R.C. 505.39, 505.51, 511.27 and 511.33. Thus, the *Canton* definition of 'general laws' is inapplicable here.

iii. The conflict test for limited home rule resolutions

Having whittled away the two inapplicable *Mendenhall* preemption steps, we are left with the appropriate test: "A state statute takes precedence over a local [resolution] when . . . the [resolution] is in conflict with the statute." *Mendenhall*, at ¶ 17. Because a township has no inherent constitutionally granted powers, there can be no presumption that a statute does not preempt a township resolution. This is a pure preemption test like the one employed in the *Lima v. State* "general employee welfare" line of cases. Additionally, pure preemption analysis includes both field and conflict preemption.

Field preemption exists where the scheme of [State] regulation is so pervasive as to make reasonable the inference that [the General Assembly] left no room for the [townships] to supplement it. Conflict preemption occurs where compliance with both [State] and [local] regulations is a physical impossibility, or where [a local] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of [the General Assembly].

*State Farm Bank v. Reardon* (C.A.6, 2008), 539 F.3d 336, 342. (internal citations and quotations omitted). A court's duty is to determine whether the township resolution is consistent with the structure and purpose of applicable state law. *Id.* Here, a home rule township must comply with the statutes that limit what a township can do.

Although this Court has not had occasion to fully delve into field preemption analysis in its Municipal Home Rule Amendment cases, it has conducted a similar analysis when considering whether a statute is part of a "comprehensive legislative enactment." *See Cleveland*, 2010-Ohio-6318. In *Cleveland*, the Court concluded that a statute that expressly preempted the field of firearm regulation was part of a comprehensive legislative enactment, and thus constitutional. To so determine, the Court surveyed the numerous regulations the State has placed upon firearm ownership, possession, transfer and concealed carrying. Relevant to the

analysis *sub judice*, the Court reasoned, "A comprehensive enactment need not regulate every aspect of disputed conduct, nor must it regulate the conduct in a particularly invasive fashion. 'Comprehensive' does not mean 'perfect.' Nor does 'comprehensive' mean 'exhaustive.'" *Id.* at ¶ 21 (citations and punctuation omitted). Under the *Cleveland* standard, extensive regulation by the Revised Code of the manner in which a township may fund roads, parks, police and fire protection preempts the field. The Township's conflicting Resolution cannot stand.

## 2. *The Resolution Conflicts with the General Law*

"Although on occasion a state statute and municipal ordinance will directly contradict 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*, 117 Ohio St.3d at ¶ 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 may do. The Township admitted in its briefing below, "Ohio law contains numerous statutes addressing how a township can function." These statutes, as the only authority under which a township may act, 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.

In 1997, the Attorney General advised a non-home rule township that it lacked any implied authority to charge an impact fee on top of its regular building permit fee to defray costs of drainage and erosion problems. 1997 Ohio Atty.Gen.Ops. No. 1997-022. The Attorney General noted any implied township power to impose fees for building or zoning permits extended only to cover inspection costs, processing the application, and any continuing regulation. *Id.* (citing 1986 Atty.Gen.Ops. No. 86-081, at 2-457 [stating "any implied authority to charge a fee pursuant to the authority to regulate extends . . . only to the authority to charge a

fee in such amount as is reasonable to cover the costs of inspection and regulation."])

As the Attorney General aptly noted, the General Assembly clearly knew how to extend such authority by statute if it so chose. Indeed, the General Assembly expressly allowed townships to levy fees to cover infrastructure costs and to make up for reduced real property valuations arising from disposing solid waste within township boundaries. *See* R.C. 3734.57.

This situation closely parallels Hamilton Township's claims that new development will force it to construct new infrastructure. Absent legislation authorizing such exactions, the Attorney General concluded, townships cannot charge impact fees to recoup costs of potential environmental damage. *Id.* The structure is comprehensive. The legislature left no room for townships to supplement it.

a. Imposing Impact Fees Conflicts with R.C. Chapter 504.

The Township Resolution conflicts with the limited home rule enabling act by placing a prospective lien purporting to "run with the land" on property it deems subject to its impact fee resolution. For over 50 years, the Ohio Supreme Court and appellate districts have held township powers are limited to those "expressly delegated to them by statute." *Yorkavitz*, 166 Ohio St. at 351; *Atwater Township Trustees v. BFI Willowcreek Landfill* (1993), 67 Ohio St.3d 293, 297 n. 6, 1993 Ohio 216, 617 N.E.2d 1089; *Speedway Super America*, 2007-Ohio-2844 at ¶ 67. Hence, if an limited home rule township enacts impact fees, leaving aside other challenges to the legitimacy of such fees, the enforcement powers on such a resolution would be limited to those specifically laid out in Chapter 504. 2002 Ohio Atty.Gen.Ops. No. 2002-032.

The limited home rule enabling act was not enacted for revenue raising. Payments to townships are mentioned in only three specific ways: fines,<sup>4</sup> special assessments,<sup>5</sup> and filing

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<sup>4</sup> R.C. §§ 504.04–504.08

<sup>5</sup> R.C. 504.18

fees.<sup>6</sup> The Township has conceded that the Resolution does not enact a special assessment or filing fee. It has never claimed the impact fee to be a fine.

A review of the very strict limits the General Assembly placed on a limited home rule township's ability to impose fines, special assessment and filing fees demonstrates that had the General Assembly intended to permit a township to impose impact fees, it would have done so explicitly and with detailed instructions on how such powers would be carried out. This is precisely what was proposed in 126 H.B. 299, which was left upon the table in the House Local Government Committee. The proposed bill would have enacted an entirely new twelve-section Revised Code chapter. Notably, the chapter would have been codified in Title 57 – Taxation.

Chapter 504. curtails the issuance of fines for violations of resolutions, and prohibits the imposition of a fine not expressly allowed by Chapter 504. See R.C. 504.04(B)(2). Any fine imposed by a limited home rule resolutions may not exceed \$1,000 per violation. R.C. 504.05. Peace officers serve citations, which the alleged violator may answer within 14 days in a court of law. R.C. 504.06. Any subsequent hearing must be duly noticed and conducted *by a Court* according to the Ohio Rules of Civil Procedure. R.C. 504.07(C). Only after obtaining a judgment can township trustees file for a lien on the violator's property. R.C. 504.08. The impact fees imposed here greatly exceed \$1,000.00. It exceeds six times that amount per house. There is no procedure to protest the fees in Court. Thus, the impact fees do not comply with the provisions of Chapter 504. that authorize a township to charge its residents under limited circumstances.

Incredibly, in a classic overreach of its statutory powers, the resolution reads, "The obligation to pay the impact fees shall run with the land." Resolution, § III(1). This violates

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<sup>6</sup> R.C. 504.21

R.C. 504.08 which permits an assessment to run with the land only after a judgment has been obtained. Not content with this overreach, Hamilton Township then passed a resolution seeking to lien undeveloped property annexed by the Village of Maineville subsequent to the filing of this case. Resolution No 08-1015-A purports to authorize the Impact Fee Administrator to:

execute and cause to be filed appropriate affidavits in the Warren County Recorder's Office to indicate that Hamilton Township claims a continuing lien for all property within the Township for the payment of impact fees, *even if said property is annexed to any municipal corporations subsequent to the effective date of the Impact Fee Resolution.*

*Id.* After passing Resolution No. 08-1015-A, the Township has filed multiple affidavits with the County Recorder attempting to encumber the title of property incorporated into Maineville, Loveland, and South Lebanon, spurring additional litigation. *See Village of Maineville and Salt Run, LLC v. Hamilton Township*, S.D.OH. No. 1:10cv690.

The Affidavits filed reference R.C. 709.023 as the authority for the Township to continue to impose impact fees on the annexed property. *Id.* at ¶ 10. The only legal means by which the impact fee imposed by Hamilton Township could run with the land under this statute is if it were a real property tax. *See* R.C. 709.023(H).<sup>7</sup> If the impact fees run with the land after annexation, the impact fees must be a tax—an unauthorized tax. (*See* Section B, *infra*.)

Had the General Assembly intended to authorize townships to impose impact fees within Chapter 504., it could have done so. An example is the authorization for a limited home rule township to supply water and sewer services. *See* R.C. §§ 504.18–504.20. These provisions set forth how a limited home rule township may supply water and sewer services and delineate the

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<sup>7</sup> “Notwithstanding anything to the contrary in section 503.07 of the Revised Code, . . . territory annexed into a municipal corporation pursuant to this section shall not at any time be excluded from the township under section 503.07 of the Revised Code and, thus, *remains subject to the township’s real property taxes.*” R.C. 709.023(H) (emphasis added).

means by which a township may assess the properties that are benefited.<sup>8</sup> See R.C. 504.18(C). No similar enabling legislation exists for township impact fees. Impact fees are not authorized by the Revised Code.

b. Funding Road Improvements with Impact Fees Conflicts with Revised Code Chapters 5571. and 5573.

By funding road improvements with impact fees, the Resolution conflicts with several general laws in the Ohio Revised Code, including R.C. 5571.15 and 5573.07, which set forth the *only* mechanisms for funding road improvements; R.C. 5573.211 which requires that road improvements benefit a designated road improvement district; and, R.C. 5573.10 and 5573.11, which require a county engineer to estimate assessments, to be paid semi-annually to the county auditor, based on the *benefit* each property owner realizes.

i. Statutory Funding Mechanisms Are Exclusive

Townships must follow the procedures and regulations set forth by R.C. Chapters 5571. and 5573., *inter alia*, when improving roadways. A township's board of trustees may "construct, reconstruct, resurface, or improve" public roadways without presentation of a petition by a unanimous vote expressing the necessity of such improvements. R.C. 5571.15(A). The Township's method of funding such improvements must comport with R.C. 5573.07. *Id.*

R.C. 5573.07 provides that assessments for road improvements may be applied against real estate abutting the improvement, real estate within one-half mile of either side of the improvement, and real estate within one mile of either side of the improvement, according to the benefits accruing to such real estate. R.C. 5573.07(A). Any remaining balance may be fulfilled from "the proceeds of any levy for road purposes upon the grand duplicate of all taxable property in the township" or from the Township's general funds. R.C. 5573.07(B)(1-2).

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<sup>8</sup> Even this Statute is based upon "benefit" and not "impact."

The Ohio Revised Code does not expressly authorize any other funding mechanism to pay for road improvements. Specifically, it does not grant townships the authority to assess impact fees to fund road improvements. The Resolution does not fund road improvements through any mechanism described by R.C. 5573.07. Because the impact fee is assessed on new development anywhere in the Township and the impact fee revenue may be utilized for any road improvement project (*See* Section I(12) of the Resolution without regard to the proximity of the fee payer, it is not an assessment of real estate abutting the improvement, real estate within one-half mile of the improvement, or real estate within one mile of the improvement. Moreover, because the impact fee is not assessed on all taxable property in the Township and because the impact fees are spent on a "first in/first out" basis, (T.d. 8, ¶ 24) the Resolution conflicts with the funding provision established by R.C. 5573.07.

The Revised Code does not authorize a township to fund road improvements via impact fees. The Resolution impermissibly conflicts with R.C. Chapters 5571. and 5573.

ii. Road Improvement Funds Must Benefit a "Road District"

R.C. 5573.211 requires that a township creating a road improvement fund, similar to the fund created by the Resolution, must establish a correlating road district for expenditure of the funds. Additionally, the road improvement fund can only be funded by a tax of three mills or less upon all the taxable property in the township road district. R.C. 5573.211.

The Resolution establishes a road improvement fund, but violates R.C. 5573.211 by funding the road improvement fund with revenue from an impact tax applied to only some of the property in the Township. Additionally, the Township has not established a roadway improvement district in connection with the Resolution. Instead of a three mill or less tax on all taxable property in the district, the Resolution authorizes the Township to fund its road improvement fund with impact fees not based on the taxable value of land, assessed only against

some property without mention of a road improvement district. The Resolution therefore is in conflict with R.C. 5573.211.

iii. The Resolution Conflicts With Assessment Law

When a township undertakes assessments authorized by R.C. 5571.15 for road improvements, the county engineer must provide an estimated assessment "according to the *benefits* which will result to the real estate." R.C. 5573.10. The affected property owners may object to any assessment before the Township Board of Trustees. *Id.* Additionally, assessments for road improvements may only be collected by the county auditor in semi-annual installments over the period of ten years. R.C. 5573.11.

Assuming that the Township has the authority to impose impact fees to fund road improvements (which it does not), the Township has failed to comply with the provisions of R.C. 5573.10 and 5573.11. The Resolution does not require an assessment by a county engineer, but instead allows the Township's Community Development Director to subsume the role of county engineer. (T.d. 8, ¶ 15.) The Resolution also provides no requirement that the county engineer, or in this case, the Community Development Director, provide individualized assessments for each property based on its benefit from road improvements. In fact, all newly developed properties are charged the same fee regardless of their relation to the benefit of new road improvements. (Section IV of the Resolution.) Further, the Resolution, and the Township's subsequent administrative regulations, eliminate the property owner's right to object to the assessment as required by R.C. 5573.10. (T.d. 8, ¶ 23.) Finally, because the Resolution requires a one-time fee payment directly to the Township, it conflicts with the requirement of R.C. 5573.11 that road improvement assessments be paid to the county auditor, over a ten year period, in semi-annual payments. Thus, even assuming that the Township may fund road improvements with impact fees, the Resolution conflicts with the requirements of R.C. 5573.10 and 5573.11.

As this Court recently ruled, "A comprehensive enactment need not regulate every aspect of disputed conduct, nor must it regulate the conduct in a particularly invasive fashion. 'Comprehensive' does not mean 'perfect.' Nor does 'comprehensive' mean 'exhaustive.'" *Cleveland*, 2010-Ohio-6318 at ¶ 21 (citations and punctuation omitted). The General Assembly's enactments regulating the funding of township road improvements are comprehensive, and field occupying. The Township's Resolution, which attempts to create an alternative funding mechanism, is preempted thereby. The Township may not violate the Revised Code by using an impact fee to fund roadway improvements. By attempting to charge only newly developed property in the Township without regard to benefits received and assessed regardless of the property's value, the Resolution conflicts with R.C. 5573.07 and 5573.27. Moreover, the Resolution's administration guidelines, including absence of the County Engineer's involvement, lack of benefit-to-property assessment, elimination of an objection process to the board of township trustees, and failure to provide a ten-year semi-annual payment mechanism, conflict with R.C. 5573.10 and 5773.11.

c. Parks May Not Be Funded By Impact Fees

Pursuant to R.C. 511.27 and 511.33, a township may fund park operation, management, and improvement only through taxes "levied upon all taxable property" in the township or funds in the township treasury otherwise "unappropriated for any other reason." R.C. 511.33. If the township requires additional funds in excess of two thousand dollars per year for park management and improvement, it must submit the question of levying the tax to the electorate in the township. *Id.*

The Resolution authorizes funding park improvements through the imposition of a park impact fee applied only to some newly developed residential property without voter approval.<sup>9</sup> The Resolution thereby conflicts with R.C. 511.27 and R.C. 511.33 by failing to uniformly levy a tax on all property and by failing to submit the proposal to raise park revenue to the vote of the general electorate. Moreover, the park land acquisition needs this fee was allegedly needed to fund have been met via the donation of a 135 acre tract of land while this case was pending.<sup>10</sup>

d. Police Protection May Not Be Funded By An Impact Fee

Pursuant to R.C. 505.51, a township may fund police protection expenses only by "levy[ing] a tax upon all of the taxable property in the township police district." The Resolution, however, provides funds for police protection through the imposition of an impact fee on only newly developed property throughout the township.<sup>11</sup> Since the impact fee is not assessed against all taxable property in the township, the Resolution conflicts with R.C. 505.51.

e. Fire Protection May Not Be Funded With An Impact Fee

Pursuant to R.C. 505.39, a township may "levy a sufficient tax upon all taxable property in the township or in a fire district" in order to fund fire protection system operation, maintenance, and improvement. The Township's attempt to generate funds for fire protection systems through the imposition of an impact fee<sup>12</sup> conflicts with R.C. 505.39 because it does not apply a tax on all taxable property, but instead imposes a fee on only property undergoing development. The Township's impact fee thereby conflicts with R.C. 505.39.

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<sup>9</sup> Section IV of the Resolution.

<sup>10</sup> [http://www.hamilton-township.org/public\\_services/parks.html](http://www.hamilton-township.org/public_services/parks.html).

<sup>11</sup> Section IV of the Resolution.

<sup>12</sup> Section IV of the Resolution.

In sum, the Township's Resolution attempts to raise revenues by means other than those expressly authorized by statute – road, park, police and fire improvements. The Resolution imposes assessments for each of these services in conflict with comprehensive, field-occupying provisions of the Ohio Revised Code. Thus, the Resolution must be declared invalid.

B. The Impact Fees are Impermissible Taxes

Revised Code Chapter 504. specifically forbids a limited home rule township to impose taxes "other than those authorized by general law . . . ." R.C. 504.04(A)(1). The Township may not impose any tax not specifically authorized by the Ohio Revised Code. *Blacker v. Wiethe* (1968), 16 Ohio St.2d 65, 242 N.E.2d 655; *Wachendorf v. Shaver* (1948), 149 Ohio St. 231, 78 N.E.2d 370. The Revised Code expressly authorizes townships to adopt certain revenue generating mechanisms, but does not explicitly authorize a township to assess an impact fee. No enabling legislation has ever been enacted to authorize any township to impose impact fees.<sup>13</sup>

The Township attempts to avoid R.C. 504.04's restriction on levying taxes by mischaracterizing the Impact Fee as a fee. The label, however, does not mask the Resolution's taxing nature and substantive characteristics. Because the revenues generally benefit all Township residents, not just the payers, this impact fee is not a fee. The impact fee is a tax. Because this form of taxation is not expressly authorized by the Revised Code, it is impermissible.

1. *The Impact Fee's Attributes Resemble a Tax*

Courts have developed well-settled guidelines for distinguishing taxes from fees. *See, e.g., State ex rel. Petroleum Underground Storage Tank Release Comp. Bd. v. Withrow* (1991),

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<sup>13</sup> When the General Assembly wants to give townships taxation power, it has a blueprint for doing so. For example, Revised Code Chapter 5739. permits townships to levy excise taxes on certain resorts. *See, e.g., R.C. 5739.01.*

62 Ohio St.3d 111, 579 N.E.2d 705. See also, *San Juan Cellular Telephone Co. v. Public Service Comm'n* (C.A.1, 1992), 967 F.2d 683, 685;<sup>14</sup> *American Landfill, Inc. v. Stark/Tuscarawas/Wayne Joint Solid Waste Mgmt. Dist.* (C.A.6, 1999), 166 F.3d 835, 837-38 (concluding a solid waste assessment imposed under the Ohio Revised Code was a tax). As required by this Court, Ohio courts review "the substance of the assessments, and not merely their form" and perform a case-by-case analysis when distinguishing taxes from fees. *Withrow*, 62 Ohio St.3d at 117.

a. Impact fees are levied in addition to zoning certificate fees.

"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." *Granzow v. Bur. of Support of Montgomery Cty.* (1990), 54 Ohio St.3d 35, 38, 560 N.E.2d 1307. When a political subdivision designs an assessment to generate revenue outstripping the cost of service related to the fee, it levies a tax, not a fee. *State ex rel. Gordon v. Rhodes* (1952), 158 Ohio St. 129, Paragraph Two of Syllabus, 107 N.E.2d 206. See also, *Building Industry Ass'n of Cleveland and Suburban Counties v. Westlake* (1995), 103 Ohio App.3d 546, 551, 660 N.E.2d 501 ("If the measure is construed as a fee, the charge must not exceed the cost and expense to the government of providing the service in question"); *Firestone v. City of Cambridge* (1925), 113 Ohio St. 57, 62-64, 148 N.E. 470 (holding that when a fee provides general revenue, it is a tax).<sup>15</sup> For example, a governmental body tasked with regulating conduct charges a fee to issue a license, permit or

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<sup>14</sup> *San Juan* is a seminal case.

<sup>15</sup> Other States similarly distinguish between taxes and fees. See e.g., *Idaho Building Contractors Ass'n v. City of Coeur D'Alene* (Idaho 1995), 126 Idaho 740, 890 P.2d 326 (holding that fees are intended to compensate for a service provided to a particular consumer while taxes benefit the public at large); *City of Ocean Springs v. Homebuilders Ass'n* (Miss.2006), 932 So.2d 44 (holding that a fee relates to an individual benefit or privilege while a tax applies to public purposes).

certificate, or to perform a service directly pegged to the fee at issue. In this case, no service is provided to the fee payer. The Township spends the proceeds on systemic infrastructure improvements to benefit all residents.

The Resolution does not provide that the Township perform any direct service beyond issuing a zoning certificate to a new developer paying the fee. The Township already collects a zoning certificate fee to cover administrative expenses. The impact fees are levied to pay for future capacity expanding capital improvement unrelated to the property. These improvements equally benefit existing and new development. These "impact fees" are taxes in disguise.

A Zoning Certificate fee cannot exceed the cost necessary for inspection and regulation. *See* 1997 Ohio Atty.Gen.Ops. No. 1997-22. An "excessive and unusual" zoning fee is a tax. *Blower v. Alside Homes Corp.* (1963), 90 Ohio L. Abs. 516, 187 N.E.2d 636. Because the impact fee is in addition to the zoning certificate fee, the impact fee is an impermissible tax.

b. Impact Fees serve the same purpose as taxes.

The Township cannot evade the fact that its impact exactions serve the same purpose as taxes. Courts routinely characterize impact fees earmarked for services "traditionally . . . funded by tax revenue" as taxes, not fees. *City of Ocean Springs*, 932 So.2d at 58-59. As discussed above in Section A.2., the impact fees serve the identical purpose of specific taxes a township is authorized to levy—often as the exclusive means to raise revenues for the specified purpose. Hamilton Township has exercised its authority to implement these taxes. For example, Hamilton Township currently has in place three tax levies for the purpose of "providing and maintaining fire apparatus, . . ., buildings, or sites therefore, . . ., or to purchase ambulance equipment . . ." The three Fire/EMS levies impose a total tax at the rate of 5 mils. The fact that Hamilton Township has a tax in place to fund the very same expenditures that the impact fees are intended to fund demonstrates that the impact fees are used to fund public services.

Moreover, because the properties subject to the impact fees are also subject to the tax levies, those properties are being taxed twice for the same service. For instance, Fischer Homes paid \$2,030.16 in impact fees to obtain a zoning certificate for the parcel at 6742 Waverly Park. Of the total impact fee \$110.35 was allocated to fire protection. However, for 2007, Fischer Homes paid \$43.22 in fire/EMS taxes to Hamilton Township for the empty lot valued at \$35,000. Fischer Homes constructed a home on the property, which was conveyed to a homeowner in 2008 for \$199,900. The improvements Fischer Homes made to the property increased the value of the property by 571%. The taxes the Township will receive from the property owner also increased substantially.

The increase in taxes that the Township will receive is demonstrated by comparing the 6742 Waverly Park property to a nearby home. For example, the home at 6658 Waverly Park was valued at a comparable \$206,080 in 2007. The property owner was subjected to \$247.40 in Fire/EMS taxes that year—572% more than any empty lot. When the 6742 Waverly Park home is fully assessed, it will be assessed at tax rates nearly identical to the 6658 Waverly Park home. This nearly 6-fold increase in annual fire/EMS taxes is the source from which the Township is required to rely to increase its service levels in response to the development of the property. Charging an impact fee on top of the tax increase is a duplicative tax for the same service.

As another example, the 6742 Waverly Park lot paid \$14.34 in taxes to the Township for roads and bridges for the 2007 tax year. The 6658 Waverly Park home paid \$142.06—nearly ten times as much. The 6742 Waverly Park home will pay similar taxes when fully assessed. In addition to the nearly ten fold tax increase, the property was subject to \$1,308.12 in road impact fees. This is a duplicative tax for the same service.

Recently, the Mississippi Supreme Court struck down an impact fee ordinance, because the exactions were taxes. The Mississippi Supreme Court found it significant that the impact fee revenues were earmarked for services "traditionally . . . funded by tax revenues." *City of Ocean Springs* at 56, ¶ 44. The roads, parks, fire and police protection that Hamilton Township proposes to fund from impact fees are traditionally funded by tax revenues. The attempt to create a supplemental source of revenue from property owners is a tax.

c. Earmarking revenue to a specific account is not dispositive

The Township has argued that the impact fees are not taxes because the revenues are held in segregated accounts. Focusing on substance over form, courts have rejected mere segregation of revenue as dispositive of a charge's status as a fee or a tax.

The Sixth Circuit has concluded Ohio solid waste management district impact fee assessments are taxes. *American Landfill, Inc.*, 166 F.3d at 839. As with the impact fees in this case, the fees authorized by R.C. 3734.57(B) were earmarked for numerous purposes, including providing financial assistance to counties in maintaining roads, public facilities and emergency services, which were needed because of 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 county. The *American Landfill* court concluded the assessments were taxes. Even though the money went to a special fund, the Sixth Circuit reasoned, that the fund ultimately "serve[d] public purposes benefiting the entire community." *Id.* at 839. As the court aptly summarized, the fund's stated purposes "'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.*

Similarly, in *A & M Builders*, the Eighth District Court of Appeals addressed a park impact fee ordinance, which segregated the revenues 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* (Jan. 20, 2000), 8th Dist. 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.

In similar fashion, the Supreme Court of Washington struck down two county impact fee resolutions as unauthorized taxes, despite the fact that the counties required all collected fees to be deposited in special accounts. *Hillis Homes, Inc. v. Snohomish Cty.* (Wash.1982), 97 Wn.2d 804, 806-07, 650 P.2d 193 (superseded by statute). Moreover, the Washington counties went a step beyond the Township and restricted the use of the proceeds to infrastructure benefiting the geographic areas from which the payments were generated. *Id.* at 806. As the *Snohomish* court recognized, the so-called impact fees were really taxes because the counties did not exact them with any intention of regulating subdivisions. The *Snohomish* court concluded, "it appears that the primary purpose, if not the only purpose of both ordinances, is to raise revenue rather than to regulate residential developments." *Id.* at 810.

2. *Charges separating the payer and beneficiary are taxes*

"The chief distinction [between a tax and a fee] is that a tax is an exaction for public purposes while a fee relates to an individual privilege or benefit to the payer." *American Landfill*, 166 F.3d at 838. Courts distinguishing between fees and taxes focus on the relationship between the revenue and the payer. Courts have developed well-settled guidelines for distinguishing taxes from fees. *Id.* at 837-38. These decisions offer guidance for the case-by-case analysis that is required. *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. Here, the impact fees are imposed by a local government—not a regulatory agency. The payers, property owners, are not regulated entities. The improvements funded will not exclusively benefit the fee payer. The improvements are for public benefit. This is especially true for the property that has been annexed to local municipalities, where the Township will not be servicing the property, but the Township still intends to impose the impact fee. Thus, under the three part test, these impact fees are taxes.

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 Township has argued that although there is no special benefit to the payer, the infrastructure improvements funded by impact fees are "made necessary" by new development. No court has ever employed a "made necessary" test to determine if an assessment is a tax. The "made necessary" standard employed by the Township creates a tax. *See, e.g., Eastern Diversified Properties, Inc. v. Montgomery County* (1990), 319 Md. 45, 570 A.2d 850 (1990); *River Walk Apartments, LLC v. Twigg* (2007), 396 Md. 527, 546-47, 914 A.2d 770. The *Eastern Diversified* court concluded "the purpose of the [exaction] enactment governs rather than the legislative label." 319 Md. at 52, 54, 570 A.2d at 854. That court pointed out, "a fee is typically 'part of a regulatory measure,' where a tax is 'an enforced contribution to provide for the support of the government.'" *Id.* Noting 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 highway improvements necessitated by such new development," the *Eastern Diversified* court easily concluded the so called impact fee was really a tax. *Id.*

*A & M Builders* relied upon a nearly identical Ohio case against Westlake striking down a park impact fee. *Westlake*, 103 Ohio App.3d 546. Both courts found the park impact fee to be a tax 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.*, 2000 WL 45859, at \* 4. The same is true here. Many purchasers of new construction in Hamilton Township will not use the park, police and fire "services" for which they are being assessed. When an assessment is detached from a benefit, it is a tax. The Resolution imposes a tax.

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." *City of Coeur D' Alene*, 126 Idaho at 743. The Second District also concluded the 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* (Oct. 23, 1998), 2d Dist. Nos. 97-CA-113, 97-CA-115, 1998 Ohio App LEXIS 4957, 1998 WL 735931, at \*29 (reversed because a home rule municipality is free to levy taxes and fees). Far from being limited to defraying expenses associated with a specific building, these fees will be spent on public infrastructure unassociated with the development to benefit the public broadly. Moreover, the Township admits it created the whole impact fee scheme as a revenue raising measure. The impact fees are meant to obviate the need to raise taxes locally to respond to growth.

The impact fees are spent in the order performed. Even assuming new development is specially benefitted by infrastructure improvements, the benefit is not targeted to the fee payer. In the current economic climate when development has slowed dramatically, 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. This disconnect between payment of the exaction and ultimate benefit further demonstrates that the impact fees are taxes.

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." (T.d. 27, at 11.) The Trial Court thus acknowledged braking new ground. According to the Trial Court, the new home purchaser receives the assurance that they will receive the same level of traffic congestion, park space, and police and fire protection that previous residents already enjoy.

Existing property owners receive the same benefit without paying the fee. Wider roads, and additional park, police, and fire equipment will serve all equally. This is particularly true here where the entire Township is the "impact fee district." The Township claims the purpose of "maintaining" a constant level of service for all. In truth, the Township intends to improve the level of service for all above what it would be absent the impact fee tax. This amounts to a fatal disconnect between the fee-payer and the expenditure of the proceeds. It is not as though occupants of a new house will be specially prohibited from using a township park if the impact fees are stricken. Nor will an occupant of an older house be prohibited from using a park constructed with impact fees. These are public facilities that the impact fee payers are funding. "A neighborhood park is not provided specifically to the residents of a development or even the neighborhood in which it is located." *Home Builder's Association of Greater Des Moines v. City of West Des Moines* (Iowa 2002), 644 N.W.2d 339, 348 (striking down an impact fee as a tax).

The trial court 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. A new firehouse benefits all properties near it, new or old, equally. Expansions to the Township

park system benefit all park users equally. Replacing a narrow chip-and-seal back-road with a wide asphalt arterial road benefits all drivers 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 equally. The Township is using impact fees in place of taxes to expand its services to all recipients. The cost is targeted to new development. But 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 Ida. 740, 744. This undeniable fact renders the Resolution an impermissible tax.

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.

D. The Resolution Improperly Establishes Subdivision Regulations.

Fees, by definition, carry a strong regulatory nexus. But as Chapter 504. spells out, limited home rule townships may not establish or revise subdivision regulations. R.C. 504.04(B)(3). The power to impose subdivision regulations within unincorporated areas of counties and townships is vested with the county government. R.C. 711.10. Subdivision regulations permit a county "to secure and provide . . . for the avoidance of congestion of population." R.C. 711.10(C).

Warren County's subdivision regulations, enacted in 1979, were most recently amended in June 2007. The Warren County Subdivision Regulations are designed to avoid congestion. Moreover, the Warren County Subdivision Regulations expressly set forth whether and when a developer will be required to make or contribute to roadway improvements based upon the level of service required by the subdivision. The road impact fee adopted by Hamilton Township are an attempt to "establish or revise subdivision regulations" in conflict with the Warren County Subdivision Regulations, which is prohibited by R.C. 504.04(B)(3).

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For all of the above stated reasons, the Township Resolution must be stricken. The funding of road, park, police and fire improvements via impact fees conflicts with, and is preempted by, comprehensive, field-occupying State regulations. The Resolution enacted a tax. the Resolution also impermissibly altered the structure of Township government through the creation of an impact fee district. Finally, the Resolution conflicts with Warren County Subdivision Regulations regarding the roadway impact a developer is required to offset. Accordingly, the Court of Appeals decision should be reversed.

**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*

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Prior to the trial court's decision, both Appellants and the Township mutually agreed to several stipulations. Among others, Stipulation 27 states: "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 current affords previously developed properties." Stipulation 27 is adapted from the recitals included in the Resolution. Notably, Stipulation 27 does not state that Appellants agreed to the legitimacy or legality of the Township's purpose in enacting the impact fees or that the Resolution operated consistent with its stated purpose. The court of common pleas did not find that by stipulating to the Township's *purpose* in enacting impact fees, Appellants waived their ability to argue that the impact fees impermissibly benefitted existing development and were actually illegal taxes. In fact, the court of common pleas provided a lengthy analysis evaluating Appellants' arguments that the impact fee actually constituted a tax, never once suggesting that Stipulation 27 had waived their argument.

The court of appeals, however, without regard to the trial court's analysis or interpretation, seized upon Stipulation 27 to dismiss Appellants' claim that the impact fee actually constituted a tax. The court of appeals quickly and summarily dismissed Appellants' arguments finding, instead, that Appellants stipulated that the impact fee specially benefits the property that pays the fee and therefore it could not be classified as a tax. *See Drees v. Hamilton Township*, 12th Dist. No. CA2009-11-150, 2010-Ohio-3473 at ¶17-19. Because Appellants' entire claim is premised on the illegitimacy of the impact fee, Appellants would never stipulate that the charge has the characteristics of a fee, and not a tax, or that the Resolution was a legitimate and legal legislative enactment. The court of appeals failed to separate Appellants'

stipulation acknowledging Township's purported purpose from a stipulation of fact as to the actual operation of the Impact Fee Ordinance.

Thus, the court of appeals' reliance on Appellees' bare statement of purpose in Stipulation 27 fails in two respects. First, the court of appeals failed to undertake an independent review of the Township's legislative action to determine its legality, instead adopting, without question, the Township's stated purpose. Second, the court of appeals ignored well-settled law regarding the interpretation of stipulations.

A. Courts Must Undertake an Independent Review of Legislative Action

This Court requires that courts reviewing legislative enactments "must conduct an independent review." *State ex. rel. Ohio Congress of Parents and Teachers v. State Bd. of Educ.*, 111 Ohio St.3d 568, 2006-Ohio-5512, 857 N.E.2d 1148, at ¶ 20. The very basic notion of separation of powers, which has guided judicial review of legislative action for more than two centuries, requires that a reviewing court undertake an independent review of a legislative enactment. *Marbury v. Madison* (1803), 5 U.S. 137, 2 L. Ed. 60.

Judicial review of legislative action requires that a court do more than blindly accept a legislative body's statement of validity of its actions. In this case, however, the court of appeals decided Appellants' entire claim based on Stipulation 27 – which represented the Township's intended *purpose* in enacting impact fees. The court never considered whether the impact *actually operated* pursuant to the Township's stated purpose. Appellants need not challenge the purpose of a legislative act when the underlying act is clearly illegal. To the extent that the Township's purpose may be legal, the actual operation of the impact fee ordinance violates the statutory authority of limited home rule townships. 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. An illegal tax

is an illegitimate exercise of legislative authority no matter the purpose. An independent review of the Resolution by the court of appeals would have revealed that it did not operate pursuant to its stated purpose and therefore constituted an impermissible tax.

B. Courts Must Interpret a Stipulation Consistent with the Intent of the Parties and Cannot Rely on a Stipulation Offering a Conclusion of Law

Well-established rules regarding the interpretation of stipulations clearly conflict with the Court of Appeals' disposition of Appellants' argument on Stipulation 27 alone. The Court of Appeals' interpretation clearly conflicts with the parties' intent. By blindly accepting Stipulation 27 as a legal conclusion, the court failed to undertake its own factual and legal analysis.

1. *Interpretation of a stipulation must reflect the parties' intent.*

Stipulations must be interpreted and enforced so as to carry out the intent of the parties. *See Miller v. Miller* (Jan. 11, 1989), 9th Dist. No. 4409, 1989 Ohio App. LEXIS 72, at \*4-5 (a stipulation should be enforced consistent with the intent of the parties); *Harris v. Salyards* (July 5, 1990), 9th Dist. No. 2546, 1990 Ohio App. LEXIS 2820, at \*3-4 ("In construing a stipulation, we must consider the intent of the parties."); *State v. Smith*, 3d Dist. No. 11-09-02, 2009-Ohio-3154 at ¶7 ("Ultimately, stipulation agreements, like contracts, should be interpreted to carry out the intent of the parties as evidenced by the contract's language.") Thus, in interpreting a stipulation, a court determining the intent of the parties should not construe the parties' language so "as to give it the effect of an admission of fact obviously intended to be controverted, or the waiver of a right not plainly intended to be relinquished." *Beyer v. Miller* (1951), 90 Ohio App. 66, 69, 103 N.E.2d 588, quoting 50 Am. Jur. 609, § 8. Moreover, a court may disregard stipulated facts that have been controverted by competent, credible evidence. *In re Petition of Stratcap Investments, Inc.*, 154 Ohio App.3d 89, 2003-Ohio-4589, 796 N.E.2d 73, at ¶ 5, n.1. Additionally, a court may not independently evaluate a stipulation in order to develop a

consequence not intended by the parties. *See Citizens Comm. Against Interstate Route 675 v. Lewis* (S.D. Ohio 1982), 542 F.Supp. 496, 546-547 (A stipulation related to authenticity of documents cannot be construed as an admission that statements contained in the documents are true.)

The court of appeals' interpretation of Stipulation 27 clearly violates these well-settled rules of interpretation. Without acknowledging the intent of the parties, the appellate court provided its own interpretation of Stipulation 27. As stated previously, Stipulation 27 relates only to the Township's purpose in enacting the impact fee – not how the Impact Fee Resolution substantively operates. Appellants have vehemently contested the legitimacy of requiring new development to bear the cost of expanding the Township's overall infrastructure – in direct contradiction to the Township's stated purpose in Stipulation 27. By accepting the Township's purpose as stated in Stipulation 27, the appellate court gave the stipulation the effect of an admission without considering the legality of the Impact Fees Resolution's actual operation - which was obviously intended to be controverted by Appellants. Appellants never intended to forfeit their entire argument – that the impact fee actually constituted an illegal tax by equally benefitting all properties in the Township – in agreeing to Stipulation 27. To construe the stipulation properly with respect to the parties' intent, the court should have found that the parties merely agreed that the Township had stated a purpose for the impact fees, but not that Appellants were agreeing that the impact fee actually operated in accordance with the purpose or that Appellants had agreed to the legitimacy or legality of the purpose. Thus, because the appellate court's decision is based on an improper and unsubstantiated interpretation of the parties' stipulation, it cannot stand.

2. *A court must undertake an independent factual and legal analysis of stipulations offering legal conclusions.*

Further, to the extent that the Court of Appeals plainly adopted the Township's conclusion in the stipulation that the impact fee was to only benefit its payers, it impermissibly abandoned its duty to undertake its own analysis of facts and legal analysis. A stipulation involving a legal conclusion is not binding on a court and when confronted with a stipulation entailing a legal conclusion, a court must undertake an independent factual and legal analysis of the claims presented. *Diversified Capping Equip., Inc. v. Clinton Pattern Works Inc.*, 6th Dist. No. WD-01-035, 2002-Ohio-2295 at ¶24. The "[r]esolution of questions of law and legal conclusions arising from stipulated facts" resides properly with the courts, not the parties so stipulating. *Hatch v. Lallo*, 9th Dist. No. 20642, 2002-Ohio-1376, 2002 Ohio App. LEXIS 1387, at \*12-13, (quotations omitted). Thus, when a stipulation involves a legal conclusion, the court may not adopt the parties' legal analysis. *Chas. Todd Corp., Inc. v. Rosemont Indus., Inc.* (1990), 66 Ohio App.3d 691, 693, 586 N.E.2d 139 (citations omitted). See also *Burdge v. Bd. of Cty. Commrs* (1982), 7 Ohio App. 3d 356, 357-358, 455 N.E.2d 1055, overruled on other grounds, *New 52 Project v. Proctor*, 10th Dist. No. 07AP-487, 2008-Ohio-465, (holding that parties could not enter into stipulations entailing legal conclusions).

By concluding that the Impact Fee Resolution operated according to the Township's purpose, the appellate court impermissibly abdicated its duty to perform a legal analysis as to the Impact Fee Resolution's actual operation. Whether or not the impact fee benefits all residents or only those charged, and consequently whether the charge amounts to a tax or fee, is a question of law – residing purely in the jurisdiction of the court and not the parties. To properly understand the mechanics of the impact fee ordinance, the court should have undertaken an analysis to

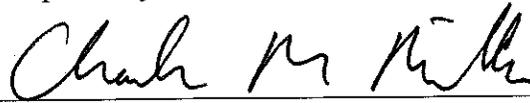
determine whether the charge operated as a tax or fee and then rendered its decision. Instead, it merely adopted the bald-faced conclusion of the Township and engaged in no analysis.

In sum, the Court of Appeals erred by merely relying on the Township's self-serving purpose in Stipulation 27 to dispose of Appellants' claims. Not only did it fail to engage in an independent analysis of the legality of the Impact Fee Resolution and its subsequent operation, but in concluding that Stipulation 27 provides the only evidence as to how the Impact Fee Resolution operates, not merely evidence of the Township's intent, the Court of Appeals disregarded the parties' intentions and abandoned its duty to decide questions of law. Furthermore, assuming *arguendo* that the Resolution operates pursuant to the Township's stated purpose in Stipulation 27, the Resolution nevertheless confers authority to the Township inconsistent with the powers authorized by the Revised Code. Even considering an interpretation of Stipulation 27 contrary to Appellants' position, the Resolution advances an illegal purpose—having new development shoulder the burden of infrastructure expansion. The Township may not collect funds from particular properties to fund improvements that benefit the entire community. Thus, no matter the benevolent Township's purpose, the Resolution is invalid.

#### CONCLUSION

The Hamilton Township Resolution imposing impact fees, the only of its kind in the State, was enacted in violation of R.C. 504.04 and should be stricken.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Merits Brief was served upon the following parties by ordinary mail this 14<sup>th</sup> day of February, 2011.

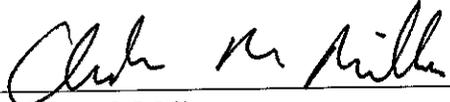
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IN THE SUPREME COURT OF OHIO

THE DREES COMPANY, *et al.* ) Case No. 2010-1548  
 )  
 Plaintiffs-Appellants, ) ON APPEAL from the  
 ) Warren County Court of Appeals,  
 -v- ) Twelfth Appellate District  
 )  
 HAMILTON TOWNSHIP, OHIO, *et al.* ) Ct. of App. No. 2009-11-150  
 )  
 Defendants-Appellees. )

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APPENDIX TO MERIT BRIEF OF APPELLANTS

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I hereby certify that a copy of the forgoing was served upon the following parties by ordinary mail this 16<sup>th</sup> day of November, 2009:

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Charles M. Miller

COURT OF COMMON PLEAS  
WARREN COUNTY, OHIO

WARREN COUNTY COURT / OHIO  
FILED

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JAMES L. SPAETH  
CLERK OF COURTS

THE DREES COMPANY, <i>et al.</i>	)	Case No. 07-CV-70181
	)	
Plaintiffs,	)	
	)	(Judge Flannery)
-v-	)	
	)	
HAMILTON TOWNSHIP, OHIO, <i>et al.</i>	)	JUDGMENT ENTRY
	)	
Defendants.	)	
	)	

This Court having considered and granted Plaintiffs' Motion to Amend their complaint to withdraw all unresolved claims, and the claims against Gary Boeres, the Court finds no remaining issues of material fact or law.

Accordingly, pursuant to Civ. R. 58(A), this Court's September 30, 2009 Entry shall now be a final, appealable order as of the date of this Order.

The Clerk of Courts is directed to serve this final judgment upon the parties hereto as required by Civ. R. 58(B).

SO ORDERED.

/s/ JAMES L. FLANNERY  
\_\_\_\_\_  
Judge James L. Flannery

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COMMON PLEAS COURT  
WARREN COUNTY OHIO  
FILED

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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.,	:	CASE NO. 07CV70181
Plaintiffs	:	
v.	:	<u>ENTRY GRANTING PARTIAL</u>
HAMILTON TWNSP, OH, et al.,	:	<u>SUMMARY JUDGMENT TO</u>
Defendants	:	<u>DEFENDANTS</u>

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.<sup>1</sup> 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

<sup>1</sup> 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.

WARREN COUNTY  
COMMON PLEAS COURT  
JUDGE JAMES L. FLANNERY  
100 Justice Drive  
Xenia, Ohio 45036



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

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

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<sup>2</sup> 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.<sup>3</sup> "Summary judgment is proper when 1) no genuine issue as to material fact remains to be litigated; 2) the moving party is

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<sup>3</sup> *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.”<sup>4</sup> “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.”<sup>5</sup> “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.”<sup>6</sup>

### 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.”<sup>7</sup> Municipalities, in contrast, do not derive their authority from statutes, but from the Ohio Constitution. O. Const.

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

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

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

<sup>7</sup> 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.<sup>8</sup> 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*<sup>9</sup> 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.<sup>10</sup>

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

<sup>8</sup> 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

<sup>9</sup> 95 Ohio St.3d 149; 2002-Ohio-2005

<sup>10</sup> *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 municipalities<sup>11</sup>, 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."<sup>12</sup> 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.

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<sup>11</sup> 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.

<sup>12</sup> *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.”<sup>13</sup> This is a test of “contrary directives,” [and] is met if the [resolution] and statute in question provide contradictory guidance.”<sup>14</sup> The Ohio Supreme Court has also recognized a “conflict by implication.”<sup>15</sup> “When determining whether a conflict by implication exists, we examine whether the General Assembly indicated that the

<sup>13</sup> *Fondassy 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

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

<sup>15</sup> *Id.*

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

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.<sup>18</sup> 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."<sup>19</sup> R.C.

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<sup>16</sup> *Id.* at 41

<sup>17</sup> *Id.* at 42

<sup>18</sup> R.C. 5571.01(A)

<sup>19</sup> 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."<sup>20</sup> 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."<sup>21</sup>

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."<sup>22</sup> If there is not enough money in the treasury, then the board may levy a tax.<sup>23</sup>

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<sup>20</sup> R.C. 5573.07(B)(2)

<sup>21</sup> R.C. 5573.09

<sup>22</sup> R.C. 511.33

<sup>23</sup> *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.<sup>24</sup> There is no provision of general law granting Hamilton Township authority to impose taxes in the manner proposed in the impact

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<sup>24</sup> 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."<sup>25</sup> 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."<sup>26</sup> 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."<sup>27</sup> The Court observed that the fees provided a benefit to the public, by ensuring that

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

<sup>26</sup> *Id.* at 117

<sup>27</sup> *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."<sup>28</sup>

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.<sup>29</sup> 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]."<sup>30</sup> 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

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

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

<sup>30</sup> *Id* at 552

and existing construction.”<sup>31</sup> 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.”<sup>32</sup>

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

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<sup>31</sup> *Id.*

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

enjoy the same level of police and fire protection as existing residents, and Plaintiffs have not shown that the fees will enhance the value to existing residents of those same services. New residents are the class benefitted by the fees.

Plaintiffs urge that the lack of geographic connection between the residence of a fee payer and for instance, a new park, weighs in favor of a tax finding. Fees are used to pay for projects on a first in, first out basis. It is the case that a new resident may pay a fee that is ultimately used for a new park installation on the other side of the Township. There is a looser connection between the individual fee payer and the service provided than in other fee cases. But the Court does not find this distinction fatal to the assessment's classification as a fee. As noted above, the Township has treated all impact fee payers as a class, and fees paid are used for improvements that benefit the class of fee payers, and have not been shown to benefit the class of non fee payers.

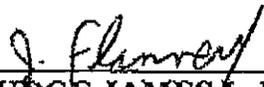
The Court concludes that the impact fee is not a tax.

#### **V. Subdivision Regulations**

Finally, Plaintiffs aver that the impact fee resolution establishes or revises subdivision regulations in violation of R.C. 504.04(B)(3). It does not. There is nothing in the resolution that requires or forbids development in any particular part of the township. It merely provides for funding of public services for new development.

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 P. Spaeth*, Clerk  
LEBANON OHIO

THE DREES COMPANY, et al., :

Plaintiffs-Appellants, :

CASE NO. CA2009-11-150

- vs -

JUDGMENT ENTRY

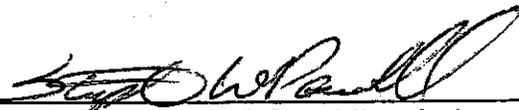
HAMILTON TOWNSHIP, OHIO, et al., :

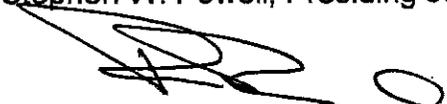
Defendants-Appellees. :

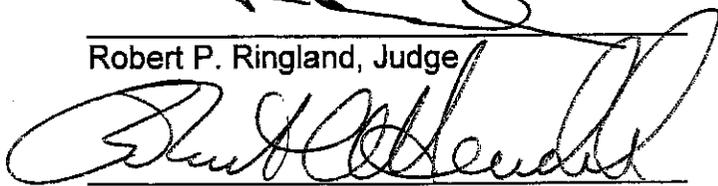
The assignment of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed.

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

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, : CASE NO. CA2009-11-150  
 :  
 : OPINION  
 - vs - :  
 : 7/26/2010  
 :  
 HAMILTON TOWNSHIP, OHIO, et al., :  
 :  
 Defendants-Appellees. :

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, 17<sup>th</sup> 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.<sup>1</sup> 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."<sup>2</sup> 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

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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."<sup>3</sup> 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

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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>

COMMON PLEAS COURT  
WARREN COUNTY OHIO  
FILED

2008 SEP 16 AM 10:50

AMES L. SPAETH  
CLERK OF COURTS

**COURT OF COMMON PLEAS  
WARREN COUNTY, OHIO**

**THE DREES COMPANY, et al.,** ) Case No. 07CV10181

**Plaintiffs,** ) (Judge Flannery)

-v-

) STIPULATIONS OF FACT AND  
) EXHIBITS

**HAMILTON TOWNSHIP, OHIO, et al.,** )

**Defendants.** )

Plaintiffs The Drees Company ("Drees Homes"), Fischer Single Family Homes II, LLC ("Fischer Homes"), John Henry Homes, Inc. ("John Henry Homes"), Charleston Signature Homes, LLC ("Charleston Homes"), and Home Builders Association of Greater Cincinnati ("Association"), on behalf of its members, (collectively, "Plaintiffs"), and Defendants Hamilton Township, Ohio, Hamilton Township Board of Trustees ("Trustees"), Becky Ehling, Trustee ("Ehling"), Michael Munoz, Trustee ("Munoz"), O. T. Bishop, Trustee ("Bishop"), and Gary T. Boeres ("Boeres"), (collectively, the "Township") by and through counsel, hereby stipulate to the following facts and exhibits.

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I. STIPULATIONS OF FACT

1. Defendant Hamilton Township Board of Trustees, through the elected Trustees/Defendants O.T. Bishop, Becky Ehling, and Michael Munoz, were the legislative and administrative body responsible for governing Hamilton Township under Title V of the Ohio Revised Code, on May 2, 2007 and when this Case was commenced.

2. On May 2, 2007, the 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").

3. The Township adopted the Hamilton Township Impact Fee Administrative Rules ("Rules") on August 21, 2007.

4. The Resolution enacted tables of fees to be charged to anyone who applies for a zoning certificate for new construction or redevelopment. Four categories of fees are included in the Resolution, Road Impact Fee, Fire Protection Impact Fee, Police Protection Impact Fee, and Park Impact Fee.

5. The amount of the Impact Fee varies based upon the land use. Single-Family Detached Dwellings, Multi-Family Units and Hotel/Motel rooms are assessed fees on a per unit basis. Retail/Commercial, Office/Institutional, Industrial, Warehouse, Church, School, Nursing Home, and Hospital are assessed a fees on a per 1,000 sq. ft. basis.

6. No park component of the Impact Fee shall be assessed for land use types other than single-family detached and multi-family.

7. The impact fees established by the Resolution are set forth in Chart 1.

**CHART 1**

Land Use Type	Unit	Road	Fire	Police	Park	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

8. If the land owner or zoning certificate applicant does not agree with the fees assessed according to Chart 1, he (she) may pay for an independent study of the impact of the intended use of the land, and a \$250.00 administrative fee to the Township for costs associated with reviewing the independent study.

9. The Township currently imposes one-third of the amounts listed in chart as the impact fee. The impact fee is scheduled to increase to two-thirds of the amounts listed in the Chart on September 1, 2008. The full impact fee is scheduled to be charged beginning August 31, 2009.

10. Plaintiff Drees Homes submitted Application Number 07-0420 to the Township through which Drees Homes applied for a zoning certificate to construct a single family home at Lot 178, Turning Leaf 6 Subdivision, 596 Woodbine Ct., Hamilton Township, Warren County, Ohio—Parcel No. 17-36-260-0460 (the "Drees Parcel") on September 24, 2007 (the "Drees Zoning Application"). Drees Homes paid a \$200 zoning application fee to the Township to

cover the administrative costs associated with the Drees Zoning Application. In addition to the application fee, the Township required Drees Homes to pay a \$1,308.12 road impact fee, \$110.35 fire protection impact fee, \$62.65 police protection impact fee, and \$543.84 parks impact fee, for a total impact fee of \$2,030.16. Drees Homes paid the application fee and the impact fee under protest. The former Township Zoning Inspector, Rande Rigby, approved the Drees Zoning Application on September 28, 2007, thereby converting the zoning application into a zoning certificate.

11. Plaintiff Fischer Homes applied for multiple zoning certificate to construct single family homes. Fischer Homes paid a \$200 zoning application fee to the Township to cover the administrative costs associated with each Fischer Zoning Application. In addition to the application fee, the Township required Fischer Homes to pay a \$1,308.12 road impact fee, \$110.35 fire protection impact fee, \$62.65 police protection impact fee, and \$543.84 parks impact fee, for a total impact fee of \$2,030.16 before the Township would issue each zoning certificate. Fischer Homes paid the impact fees under protest. The former Township Zoning Inspector, Rande Rigby, approved the Fischer Zoning Application, thereby converting the zoning applications into zoning certificates.

12. Plaintiff John Henry Homes submitted Application Number 07-0461 to the Township through which John Henry Homes applied for a zoning certificate to construct a single family home at Lot 75, Turning Leaf 2 Subdivision, 519 Honey Locust Ct., Hamilton Township, Warren County, Ohio—Parcel No. 17-36-370-0280 (the "John Henry Parcel") on November 7, 2007 (the "John Henry Zoning Application"). John Henry Homes paid a \$200 zoning application fee to the Township to cover the administrative costs associated with the John Henry Zoning Application. In addition to the application fee, the Township required John Henry

Homes to pay a \$1,308.12 road impact fee, \$110.35 fire protection impact fee, \$62.65 police protection impact fee, and \$543.84 parks impact fee, for a total impact fee of \$2,030.16. The former Township Zoning Inspector, Rande Rigby, approved the John Henry Zoning Application on November 8, 2007, thereby converting the zoning application into a zoning certificate. John Henry Homes paid the application fee and the impact fee under protest.

13. Plaintiff Charleston Homes submitted Application Number 07-0467 to the Township through which Charleston Homes applied for a zoning certificate to construct a single family home at Lot 140, Hopewell Valley Subdivision, 3179 Yellow Tail Terrace, Hamilton Township, Warren County, Ohio—Parcel No. 17-18-130-004 (the “Charleston Parcel”) on November 8, 2007 (the “Charleston Zoning Application”). Charleston Homes paid a \$200 zoning application fee to the Township to cover the administrative costs associated with the Charleston Zoning Application. In addition to the application fee, the Township required Charleston Homes to pay a \$1,308.12 road impact fee, \$110.55 fire protection impact fee, \$67.65 police protection impact fee, and \$543.84 parks impact fee, for a total impact fee of \$2,030.16. Charleston Homes paid the application fee and the impact fee under protest. The former Township Zoning Inspector, Rande Rigby, approved the Charleston Zoning Application on December 7, 2007, thereby converting the zoning application into a zoning certificate.

14. The Impact Fee is a lien upon the property that runs with the land.

15. Boeres, the current Impact Fee Administrator for the Township, is responsible for administering the impact fee. Boeres is not a Certified Professional Engineer, nor does he have an engineering degree.

16. The Resolution permits a land owner or developer to receive partial or full credits for contributions toward the cost of major roadway system improvements provided the roadway is on the Thoroughfare Plan.

17. However, no credit will be applied for the dedication of right-of ways or for "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."

18. The Township will allocate a maximum of 75% of the annual impact fees collected to reimburse developers for eligible improvement credits. If the amount allocated for reimbursements is not sufficient to make all payments due to developers for that year, each developer will receive a pro-rata share of the amount owed, and the unpaid amount will be added to the amount owed for the following year. If less than 75% of the annual impact fee collections is required for reimbursements in any given year, the remainder may be used for public project expenditures.

19. The Resolution and Rules permit offset for system improvements completed prior to June 2, 2007. However, the offset is reduced by the impact fee that would have been assessed for the completed portion of the subdivision for which credit is sought.

20. The Resolution and Rules limit the type of roadway expansion projects that qualify for credit.

21. The Resolution created accounts in which it maintains each category of impact fee. The accounts do not contain geographic sub-accounts. All impact fees collected by the Township are deposited into the impact fee accounts. Monies in each impact fee account will be

spent on a "first-in / first-out" basis, meaning that the money that has been in each account the longest will be spent first.

22. The Resolution and Rules promulgated by the Township extensively detail the assessment, collection, and determination of the amount of an impact fee, exemption or credit.

23. Neither the Resolution nor the Rules provide a means for the landowner or developer to challenge the allocation or use of an impact fee once it has been paid.

24. The impact fee assessed by the Township is not based upon the value of the land and improvements thereon.

25. The Township will not issue a zoning certificate unless an impact fee is paid as required by the Resolution and the Rules.

26. The Resolution provides no credit will be applied to the road impact fee for improvements to the major roadway system that primarily serves traffic generated by the Applicants' project, such as acceleration/deceleration lanes into and out of the project.

27. 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.

28. The Resolution assesses an impact fee to previously undeveloped property, and property undergoing redevelopment, to offset increased services and improvements needed because of the development.

29. The land upon which an impact fee has been assessed has been in the Township since its formation.

30. The Township does not assess a similar impact fee to properties that were developed before the Resolution became effective.

**II. JOINT EXHIBITS**

A. A true and accurate copy of Amended Resolution No. 2007-0418 is attached hereto as Exhibit A.

B. A true and accurate copy of the Hamilton Township Impact Fee Administrative Rules are attached hereto as Exhibit B.

C. A true and accurate copy of the Hamilton Township Impact Fee Study is attached hereto as Exhibit C.

D. A true and accurate copy of the Drees Zoning Certificate and Protest Letter are attached hereto as Exhibit D.

E. A true and accurate copy of the Fischer Zoning Certificates and Protest Letter are attached hereto as Exhibit E.

F. A true and accurate copy of the John Henry Zoning Certificate and Protest Letter are attached hereto as Exhibit F.

G. A true and accurate copy of the Charleston Zoning Certificate and Protest Letter are attached hereto as Exhibit G.

H. A true and accurate copy of the Police, Fire and EMS tax levies currently in place for Hamilton Township are attached hereto as Exhibit H.

I. A true and accurate copy of the 2007 real estate tax assessment for the Drees Parcel is attached hereto as Exhibit I.

J. A true and accurate copy of the 2007 real estate tax assessment for 512 Woodbine Court, Hamilton Township (Parcel No. 17363260390) is attached hereto as Exhibit J.

K. A true and accurate copy of the 2007 real estate tax assessment for 584 Woodbine Court, Hamilton Township (Parcel No. 17363260450) is attached hereto as Exhibit K.

**II. JOINT EXHIBITS**

- A. A true and accurate copy of Amended Resolution No. 2007-0418 is attached hereto as Exhibit A.
- B. A true and accurate copy of the Hamilton Township Impact Fee Administrative Rules are attached hereto as Exhibit B.
- C. A true and accurate copy of the Hamilton Township Impact Fee Study is attached hereto as Exhibit C.
- D. A true and accurate copy of the Drees Zoning Certificate and Protest Letter are attached hereto as Exhibit D.
- E. A true and accurate copy of the Fischer Zoning Certificates and Protest Letter are attached hereto as Exhibit E.
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- J. A true and accurate copy of the 2007 real estate tax assessment for 512 Woodbine Court, Hamilton Township (Parcel No. 17363260390) is attached hereto as Exhibit J.
- K. A true and accurate copy of the 2007 real estate tax assessment for 584 Woodbine Court, Hamilton Township (Parcel No. 17363260450) is attached hereto as Exhibit K.

L. A true and accurate copy of the 2007 real estate tax assessment for the Fischer Homes Parcel is attached hereto as Exhibit L.

M. A true and accurate copy of the 2007 real estate tax assessment for 6658 Waverly Park, Hamilton Township (Parcel No. 17291760120) is attached hereto as Exhibit M.

N. A true and accurate copy of the 2007 real estate tax assessment for 6712 Waverly Park, Hamilton Township (Parcel No. 17293300180) is attached hereto as Exhibit N.

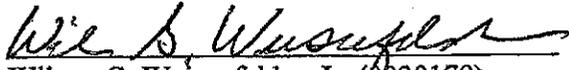
O. A true and accurate copy of the 2007 real estate tax assessment for the John Henry Parcel is attached hereto as Exhibit O.

P. A true and accurate copy of the 2007 real estate tax assessment for 500 Honey Locust Court, Hamilton Township (Parcel No. 17363260170) is attached hereto as Exhibit P.

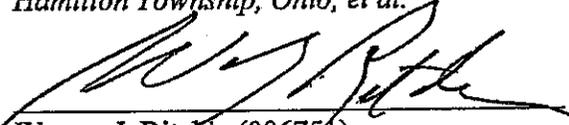
Q. A true and accurate copy of the 2007 real estate tax assessment for 536 Honey Locust Court, Hamilton Township (Parcel No. 17363260130) is attached hereto as Exhibit Q.

R. A true and accurate copy of the 2007 real estate tax assessment for the Charleston Signature Homes Parcel is attached as Exhibit R.

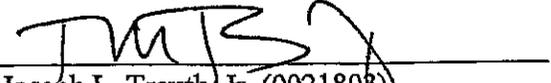
SO STIPULATED this 15<sup>th</sup> day of September, 2008.



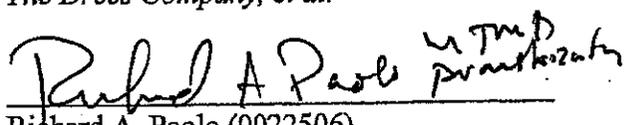
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## HAMILTON TOWNSHIP, OHIO

AMENDED RESOLUTION NO. 2007 - 0418

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**AMENDED RESOLUTION IMPLEMENTING IMPACT FEES WITHIN THE UNINCORPORATED  
AREAS OF HAMILTON TOWNSHIP, OHIO FOR ROADS, FIRE AND POLICE, AND PARKS**

**WHEREAS**, the law of the State of Ohio, as affirmed by the Ohio Supreme Court, authorizes home rule governments to implement impact fees which assure existing and new property owners and businesses that the level of service provided for roadways; police, fire and emergency services; and park systems will be continued; and

**WHEREAS**, the Hamilton Township Board of Trustees has determined that Hamilton Township, Ohio, being a Home Rule Township vested with the authority and responsibility to provide services to its citizens, employees, property owners and those traveling through the Township, under the provisions of Revised Code Section 504 and the Ohio Constitution, have the proper authority to implement this impact fee system; and

**WHEREAS**, this Resolution has been advertised, made available to the public, and has been read by title on two separate days as required by Revised Code §504.10; and

**WHEREAS**, the Hamilton Township Board of Trustees has held a public hearing concerning the proposed impact fees and has had a work session with its professional consultant and has spent nine months studying the proper ways to implement impact fees; and

**WHEREAS**, the Hamilton Township Board of Trustees has instructed the staff and consultants to confer with the development community active in Hamilton Township, Ohio to evaluate the alternatives in the implementation of a fair impact fee system; and

**NOW THEREFORE, BE IT HEREBY RESOLVED BY THE BOARD OF TRUSTEES OF HAMILTON TOWNSHIP, OHIO**, all Trustees concurring, that the following impact fee system is hereby adopted for all of the unincorporated areas of Hamilton Township, Ohio:

I. **Factual Findings.** For the purpose of authorizing and implementing this impact fee system in Hamilton Township, Ohio, the Hamilton Township Board of Trustees hereby makes the following factual findings:

(1) The Hamilton Township Board of Trustees hereby accepts the Duncan Associates Hamilton Township Impact Fee Study completed in February, 2007 as an authoritative basis and equitable methodology to calculate and impose a fair impact fee in Hamilton Township, Ohio.

(2) The Hamilton Township Board of Trustees hereby determines that it would be appropriate 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; to ensure that the proportionate share does not exceed the cost of providing facilities to the development that paid the fee; and to ensure that funds collected from impact-generating developments are actually used to construct system improvements that serve such development. It is

further the intent of the Trustees to use impact fees to implement the Township's Thoroughfare Plan, its Fire/Rescue Capital Improvements Plan, its Police Capital Improvements Plan and its Park Capital Improvement Plan.

~~(3) It is the intent of this resolution to collect funds from impact-generating developments which are proportionate to the amount of funds necessary to offset the demands generated by that development for capital improvements for which the impact fee is to be paid.~~

(4) The Hamilton Township Board of Trustees hereby determines that, as suggested by the dissenting justices in the Supreme Court case of *City of Beavercreek, Ohio v. Homebuilders Association of Dayton and Miami Valley*, the funds generated by the impact fee shall be spent on the necessary capital improvements within a reasonable time period after the collection of fees in order to assure the fairness of the impact fee system and to serve the development which generated the fee.

(5) The Hamilton Township Board of Trustees hereby determines that the impact fee system established by this Resolution is not a tax on the right of property owners to subdivide and develop their property, but is a fee which assures the continuation of capital services to benefit one of the fastest growing townships in the State of Ohio and the United States of America, utilizing a system which is widely accepted as a valid exercise of the police power to protect health, safety and the wellbeing of the community.

(6) The Hamilton Township Board of Trustees hereby determines that the protection of the health, safety, and general welfare of the citizens and property owners of the Township requires that the major roadway facilities of the Township be improved to maintain them at their current levels of service in order to meet the demands of new development.

(7) The Hamilton Township Board of Trustees has determined that the protection of the health, safety, and general welfare of the citizens and property owners of the Township requires that the fire protection and police protection facilities of the Township be improved to maintain them at their current levels of service in order to meet the demands of new development.

(8) The Hamilton Township Board of Trustees hereby determines that the protection of the health, safety, and general welfare of the citizens and property owners of the Township requires that the park facilities of the Township be improved to maintain them at their current levels of service in order to meet the demands of new development.

(9) The Hamilton Township Board of Trustees hereby determines that the implementation of this impact fee system will enable the Township to impose a fair and equitable means of sharing the costs of required improvements to the major roadway facilities, the police and fire protection facilities, and provision of park facilities on those developments which create the need.

(10) The Hamilton Township Board of Trustees hereby determines that the consultant has studied and relied upon the Land Use Plan prepared and approved by the Warren County Regional Planning Commission and previously implemented by the Township; and the Hamilton Township Thoroughfare Plan prepared by Wilbur Smith & Associates and implemented by the Township and incorporated into the Warren County Thoroughfare Plan; and the Hamilton Township Parks Capital Improvement Plan completed in 2005 by CDS & Associates which was also implemented by Hamilton Township; and the Hamilton Township Analysis of Current Fire and Rescue

Operations completed in 2004 by Kramer & Associates; and the Police Capital Improvement Plan, completed by CDS & Associates and McKenna & Associates in the establishment of this impact fee system. The Hamilton Township Board of Trustees hereby reaffirms the authenticity of such studies and relies upon them in the establishment of this impact fee system.

~~(11) The Hamilton Township Board of Trustees hereby determines that the methodology and the study which underlies this impact fee system, prepared by Duncan Associates sets forth reasonable methodologies and analyses for determining the impacts of various types of development on the Township's major roadway system facilities, its fire protection system, police protection system and park system.~~

(12) The Hamilton Township Board of Trustees hereby determines that the impact fees established by this resolution are based on the Duncan Associates impact fee study and that the fees imposed upon all developers by this Resolution do not exceed the costs of acquiring and constructing additional capital facilities and equipment required to serve all of the new developments which will pay the fees.

(13) The Hamilton Township Board of Trustees hereby determines that the types of capital improvements which will be generated from the implementation of the impact fee are of a nature that they will benefit all of the impact generating developments in the Township after the implementation of the fee, and therefore, it is appropriate to treat the entire Township as one single service area for calculating, collecting and spending the impact fees for roadway services, police and fire services and park services.

(14) The Hamilton Township Board of Trustees hereby determines that there is both a rational nexus and a rough proportionality between the development impacts created by each type of new development covered by this resolution and the impact fees that such development will be required to pay, as required by Ohio law.

(15) The Hamilton Township Board of Trustees hereby determines that this impact fee system, by which the impact fees paid by impact-generating development will be used to maintain the existing level of service by improving the major roadway facilities, the police and fire facilities and park facilities, so that the development that pays the fees will receive a corresponding benefit within a reasonable period of time after the fee is paid.

**II. Definitions.** For the purpose of interpreting this resolution, certain words used herein are defined as follows:

(1) *Applicant:* The applicant for a zoning certificate for which an impact fee is due pursuant to the provisions of this resolution.

(2) *Dwelling Unit.* Any building or portion thereof designed or intended to be used exclusively for residence purposes by one family or housekeeping unit, including a permanently sited manufactured home, but not a manufactured home in a manufactured home park, industrialized unit, mobile home, tent, cabin, trailer, travel trailer, trailer coach, camper on a truck, or other recreational vehicle.

(3) *Equivalent Dwelling Unit (EDU)*: Represents the impact of a typical single-family dwelling on the park system. A typical single-family detached dwelling unit represents, on average, one EDU. A dwelling unit of another housing type represents a fraction of an EDU, based on the ratio of the average household size of the other housing type to the average household size of the typical single-family detached unit.

(4) *Fire Protection System*. Land, facilities, vehicles and capital equipment owned by the Township and used for providing fire protection services, including fire stations, fire department administrative offices, training facilities, fire-fighting apparatus and support vehicles.

(5) *Fire Protection System Improvements*: Capital improvements that result in a net expansion of the capacity of the fire protection system to serve new development. Remodeling, replacement or maintenance of existing equipment or facilities do not constitute fire protection system improvements, except to the extent that they have the net effect of adding capacity. For example, half of the cost of tearing down a 5,000 square foot fire station and replacing it with a 10,000 square foot fire station could reasonably be considered a system improvement.

(6) *Functional Population*: The number of "full-time equivalent" people present at the site of a land use.

(7) *Gross Floor Area*: The total of the gross horizontal area of all floors, including usable basements and cellars, below the roof and within the outer surface of the main walls of principal or accessory buildings or the centerlines of a party wall separating such buildings or portions thereof, or within lines drawn parallel to and two (2) feet within the roof line of any building or portions thereof without walls, but excluding unscreened residential porches or balconies, vehicle parking garages, accessory or commercial vehicular parking areas and structures, and nonresidential arcades and similar open areas that are accessible to the general public, and are not designed or used as sales, display, storage, service or production areas.

(8) *Impact Fee Administrator*: The Township Community Development Director, who is responsible for administering the provisions of this resolution, or his or her designee. The Impact Fee Administrator is charged with the responsibility of implementing and administering this fee by the Trustees.

(9) *Impact Fees*: The impact fees are the sum of the following three impact fees as calculated pursuant to the terms of this Resolution: The road impact fees; the police fee and fire fee which collectively are the police and fire impact fees; and the park impact fees.

(10) *Impact Fee Study*: The *Impact Fee Study* prepared for the Township by Duncan Associates, initiated in July, 2006 and completed in February, 2007, and accepted by the Hamilton Township Board of Trustees in March, 2007, as it may be amended subsequently.

(11) *Impact-Generating Development*: Any land development designed or intended to permit a use of the land that will increase the number of "service units," as that term is defined hereunder.

(12) *Impact-Generating Development, Commencement of*: Occurs upon the application for a zoning certificate for new construction or redevelopment.

(13) *Land Use Type.* Usage of property as identified in the fee determination schedules of this Resolution. Such land usage types are not equivalent to the land use types of the Hamilton Township Land Use Plan or the Hamilton Township Zoning Code.

(14) *Major Roadway System:* ~~Arterials and collectors, including County roads but~~ excluding US 22 and SR 48, located within the Township's unincorporated area and identified in the Township's *Major Thoroughfare Plan*.

(15) *Major Roadway System Improvements:* Improvements that expand the capacity of the major roadway system, including but not limited to the acquisition of right-of-way, construction of new roads, widening of existing roads, intersection improvements, and installation of traffic signals. Lane reconstruction, sidewalk construction, medians, landscaping, street lighting and other ancillary components of a capacity-expanding road improvement shall not be considered system improvements when not an integral part of a capacity-expanding improvement.

(16) *Park System:* Land, facilities and improvements to Township-owned or maintained land used for recreational purposes, and recreational facilities and improvements made or installed by the Township on non-Township property and available for public use.

(17) *Park System Improvements:* Capital improvements that result in a net expansion of the capacity of the park system to serve new development. Remodeling, replacement or maintenance of existing equipment or facilities do not constitute park system improvements.

(18) *Person:* An individual, corporation, governmental agency or body, business trust, estate, trust, partnership, association, two (2) or more persons having a joint or common interest, or any other entity.

(19) *Police Protection System:* Land, facilities, vehicles and capital equipment owned by the Township and used for providing police protection services, including police stations, police department administrative offices, training facilities, police vehicles and police equipment.

(20) *Police Protection System Improvements:* Capital improvements that result in a net expansion of the capacity of the police protection system to serve new development. Remodeling, replacement or maintenance of existing equipment or facilities do not constitute police protection system improvements, except to the extent that they have the net effect of adding capacity. For example, half of the cost of tearing down a 5,000 square foot police station and replacing it with a 10,000 square foot police station could reasonably be considered a system improvement.

(21) *Service Units:*

(a) For road impact fees, service units are the vehicle-miles of travel on the major roadway system;

(b) For fire and police impact fees, service units are functional population;

(c) For park impact fees, service units are park equivalent dwelling units.

(22) *System Improvements:*

- (a) For road impact fees, major roadway system improvements;
- (b) For fire and police impact fees, fire protection system improvements and police protection system improvements;
- (c) For park impact fees, park system improvements.

(23) *Vehicle-Miles of Travel (VMT):* The number of vehicles traveling during a given time period times the distance in miles that these vehicles travel.

(24) *Vehicle-Miles of Capacity (VMC):* The maximum number of vehicles that can be accommodated on a roadway times the length of the roadway in miles.

(25) *VMC/VMT Ratio:* The system-wide ratio of VMC to VMT in the major roadway system.

(26) *Zoning Certificate:* The document signed by the Zoning Inspector of Hamilton Township, Ohio which acknowledges that a proposed use, structure, building or lot either complies with or is legally nonconforming to the provisions of the zoning ordinance, or is an authorized variance, special use permit or modification therefrom.

### III. Time of Fee Obligation and Payment.

(1) On and after the effective date of this resolution, any person who causes the commencement of impact-generating development shall be obligated at that time to pay the impact fee, pursuant to the terms of this resolution. The obligation to pay the impact fees shall run with the land.

(2) The impact fee shall be determined and paid at the time of issuance of a zoning certificate for the development. The applicant for the zoning certificate shall be responsible for paying the fee.

(3) Once the Impact Fee Administrator has been provided with all of the necessary data in order to issue a zoning certificate for a development, the calculation and determination of the impact fee shall be completed no later than three business days after the data has been provided.

### IV. Impact Fee Determination.

Any person who commences an impact-generating development, except those exempted or preparing an independent fee calculation study, shall pay an impact fee in accordance with the following fee schedules. There shall be one, single fee imposed upon such person based upon the following three components.

(1) Road Impact Fee Component.

Land Use Type	Unit	Road Impact Fee
Single-Family Detached	Dwelling	\$3,964
Multi-Family	Dwelling	\$2,782
Hotel/Motel	Room	\$2,857
Retail/Commercial	1,000 sq. ft.	\$7,265
Office/Institutional	1,000 sq. ft.	\$4,562
Industrial	1,000 sq. ft.	\$3,512
Warehouse	1,000 sq. ft.	\$2,503
Church	1,000 sq. ft.	\$2,797
School	1,000 sq. ft.	\$3,237
Nursing Home	1,000 sq. ft.	\$1,871
Hospital	1,000 sq. ft.	\$7,212

The Trustees have determined that no road impact fee shall be utilized or collected to maintain State Route 48 or State Route 22.

(2) Fire Protection and Police Protection Impact Fee Component.

Land Use Type	Unit	Fire Protection Fee	Police Protection Fee
Single-Family Detached	Dwelling	\$335	\$206
Multi-Family	Dwelling	\$187	\$115
Hotel/Motel	Room	\$160	\$98
Retail/Commercial	1,000 sq. ft.	\$432	\$265
Office/Institutional	1,000 sq. ft.	\$244	\$150
Industrial	1,000 sq. ft.	\$153	\$94
Warehouse	1,000 sq. ft.	\$97	\$60
Church	1,000 sq. ft.	\$91	\$56
School	1,000 sq. ft.	\$138	\$85
Nursing Home	1,000 sq. ft.	\$244	\$150
Hospital	1,000 sq. ft.	\$244	\$150

The fire protection fee and police protection fee are separate fees that cover distinctly different facilities.

(3) Parks Impact Fee Component.

Land Use Type	Unit	Park Impact Fee
Single-Family Detached	Dwelling	\$1,648
Multi-Family	Dwelling	\$921

No park component of the impact fee shall be assessed for land use types other than single-family detached and multi-family.

#### V. Administration of Impact Fees.

~~(1) The full impact fee amounts shall be phased in over an 820-day period after the effective date of this resolution, as follows:~~

(a) No fee shall be charged for zoning certificates issued within the first 90 days after the effective date of this resolution.

(b) Following the first 90-day period, the fees shall go into effect at one-third of the rates shown in the Fee Determination Schedules of Sections IV (1), IV (2) and IV (3) above, rounded to the nearest dollar.

(c) Following 455 days after the effective date of this resolution, the fees shall be increased to two-thirds of the rates shown in the Fee Determination Schedules in Sections IV (1), IV (2) and IV (3) above, rounded to the nearest dollar.

(d) Following 820 days after the effective date of this resolution, the fees shall be increased to the full amounts of the rates shown in the Fee Determination Schedules in Sections IV (1), IV (2) and IV (3) above, rounded to the nearest dollar.

(2) If the type of impact-generating development is not specified on the above schedule, the impact fee administrator shall determine the fee on the basis of the fee applicable to the most nearly comparable type of land use on the fee schedule. The impact fee administrator shall be guided in the selection of a comparable type of land use by trip generation rates contained in the most current edition of the report titled *Trip Generation*, prepared by the Institute of Transportation Engineers (ITE), or articles or reports appearing in the ITE Journal.

(3) In general, impact fees shall be paid based on the principal use of a building or lot. For example, a warehouse that contained a small administrative office would be assessed at the warehouse rate for all of the square footage. Shopping centers are assessed at the retail/commercial rate, regardless of the type of tenants. For a true mixed-use development, such as one that includes both residential and nonresidential development, the fee shall be determined by adding up the fees that would be payable for each use as if it was a free-standing land use type pursuant to the fee schedule.

(4) If the type of impact-generating development is for a change of land use type or for the expansion, redevelopment, or modification of an existing development, the fee shall be based on the net increase in the fee for the new land use type as compared to the previous land use type.

(5) In the event that the proposed change of land use type, redevelopment, or modification results in a net decrease in the fee for the new use or development as compared to the previous use or development, there shall be no refund of impact fees previously paid.

(6) Square feet in the fee schedule refers to gross floor area as herein defined.

## VI. Exemptions.

The following shall be exempt from the terms of this resolution and shall pay no impact fee. An exemption must be claimed at the time of application for a zoning certificate.

- ~~(1) Alterations of an existing dwelling unit where no additional dwelling units are created.~~
- (2) Replacement of a destroyed, partially destroyed or moved residential building or structure with a new building or structure of the same use and with the same number of dwelling units as the original building or structure. This exemption shall not apply in the case of a destroyed, partially destroyed or moved structure which contains an illegal nonconforming use under the zoning regulations of Hamilton Township, Ohio.
- (3) Replacement of a destroyed, partially destroyed or moved nonresidential building or structure with a new building or structure of the same use and not exceeding the gross floor area of the original building or structure.
- (4) Any development for which a completed application for a zoning certificate was submitted prior to the effective date of this resolution, provided that the construction proceeds according to the provisions of the building permit for which the zoning certificate was issued and the permit does not expire prior to the completion of the construction. In the event that the building permit does expire before completion of construction, then the provisions of this impact fee shall apply to the development. In such case, the zoning certificate shall not be issued without the payment of the impact fee. In the event that the developer contends that the development has been completed to an extent that only insignificant construction remains, such as minor punch list items, such developer may apply for relief from the imposition of this fee pursuant to Section 26.01(B) hereunder as an appeal to the Hamilton Township Board of Zoning Appeals. ¶
- (5) The impact fee administrator shall determine the validity of any claim for exemption pursuant to the criteria set forth in this resolution. In the event that the developer contends that the determination of the Impact Fee Administrator is not correct, such developer may appeal within thirty days of the determination by the Impact Fee Administrator to the Hamilton Township Board of Zoning Appeals pursuant to provision 26.01 (A).
- (6) In the event that the Township participates in a joint economic development district project, or participates in a County-wide economic development project, or through the exercise of its Home Rule or statutory powers, the Township participates in economic development projects, the Trustees may agree to pay some or all of the impact fees imposed on a proposed development or redevelopment from other funds of the Township. The Trustees may consider promoting the economic development of the Township through the economic development project. The right of the Trustees to participate in the economic development project is independent from the duty to administer the impact fee collection as herein described.

The determination of the economic development project will be determined, on a case-by-case basis, on new or expanding businesses engaged in:

- (a) Warehouse development;

- (b) Manufacturing;
- (c) Office;
- (d) Distribution, or
- (e) Technology research and development.

The criteria for determining which projects qualify for an economic development grant includes the number and quality of jobs the project will generate and maintain, the ad valorem taxes the project will generate and whether the project is in compliance with the current version of the Hamilton Township Land Use Plan.

To be eligible for incentive consideration the business must:

(a) Create at least 15 qualifying jobs to Hamilton Township or Warren County within 24 months of building construction. A qualifying job is defined as a new, full-time job, guaranteed to last at least four years, which did not exist during the prior two years, and has a salary that exceeds the annual average wage in Hamilton Township, Warren County, Ohio, according to credible, public data as may be available.

(b) Make a minimum investment or expansion of \$700,000 in the building and/or equipment during the calendar year in which application is made for the grant or if less, 100% of its investment in the original facility before expansion.

(c) Provide evidence that the proposed use or expansion is in compliance with the Hamilton Township Land Use Plan and will meet the provisions of the Hamilton Township Zoning Code.

(d) Provide on-going company information for monitoring purposes.

Upon the grant approval by the Hamilton Township Trustees, the applicant will be required to enter into an Economic Development Agreement with the Township which provides for such conditions as the Trustees determine at such time, including the ability to recover Township paid impact fees as determined by the Trustees.

Any such decision to pay impact fees on behalf of an applicant shall be at the discretion of the Trustees and shall be made pursuant to goals and objectives articulated by the Trustees. Said goals and objectives are completely independent from the impact fee methodology.

#### VII. Independent Fee Calculation.

(1) In the event that the proposed development does not comprise a land use type which is identified under the land use types above, then the impact fee shall be computed by the use of an independent fee calculation study at the election and at the cost of the applicant, or at the cost of the Township in the event that the impact fee administrator determines that it shall be appropriate to conduct such an independent study to determine the appropriate fee. The independent study shall be initiated by the impact fee administrator any time that he or she determines that, due to the nature, the timing or the location of the proposed development, as well as the actual usage of the property and the likely impact it will have upon the usage of roadways, police and fire protection and parks,

that the development will be likely to generate impacts which are significantly more or significantly less than the amount which the impact fee would generate through the use of the schedules above.

(2) The preparation of the independent fee calculation study shall be the sole responsibility and cost of the applicant, unless the impact fee administrator determines that it would be appropriate for the Township to undertake the independent fee calculation study, and in such case, the cost shall be born by the Township.

(3) Any person who requests to perform an independent fee calculation study shall pay an application fee for administrative costs associated with the review and decision on such study, which shall be \$250.00.

(4) The independent fee calculation study, whether initiated by the developer or by the Township, shall be based on the same service standards and unit costs for facilities used in the impact fee study, and shall document the methodologies and assumptions used.

(5) An independent fee calculation study submitted for the purpose of calculating a road impact fee, a police and fire impact fee, or a park impact fee shall be based on data, information and assumptions from identified, reputable sources, provided that:

(a) The independent source is an accepted standard source of transportation engineering and planning data; or

(b) The independent source is a local study on trip characteristics carried out by a qualified transportation planner or transportation engineer pursuant to an accepted methodology of transportation planning or engineering.

(6) The road impact fee component shall be calculated according to the following formula.

FEE	=	VMT x NET COST/VMT
<u>Where:</u>		
VMT	=	TRIPS x % NEW x LENGTH + 2
NET COST/VMT	=	COST/VMC x VMC/VMT - CREDIT/VMT
TRIPS	=	Trip ends during an average weekday
% NEW	=	Percent of trips that are primary trips, as opposed to pass-by or diverted-link trips
LENGTH	=	Average length of a trip on the major roadway system
+ 2	=	Avoids double-counting trips for origin and destination
COST/VMC	=	Average cost to add a new daily vehicle-mile of capacity
VMC/VMT	=	The system-wide ratio of capacity to demand in the major roadway system (assumed 1.0)
CREDIT/VMT	=	Revenue credit per daily VMT

(7) The police and fire impact fee component shall be calculated according to the following formula.

(a) For Police:

<b>FEE</b>	=	<b>FPOP x NET COST/FPOP</b>
<b>Where:</b>		
<b>FPOP</b>	=	<b>UNITS X FPOP/UNIT</b>
<b>UNITS</b>	=	Number of dwelling units of each housing type in the development or thousands of square feet of nonresidential buildings of each land use type
<b>FPOP/UNIT</b>	=	Functional population represented by one dwelling unit of a given housing type or 1,000 square feet of nonresidential floor area of a given land use type. For residential development, functional population per unit is 60% of the average household size for that housing type. For nonresidential development, the functional population per unit is determined by the following formula:  $\text{Functional population/1000 sf} = (\text{employee hours/1000 sf} + \text{visitor hours/1000 sf}) \div 24 \text{ hours/day}$ <p>Where:</p> $\text{Employee hours/1000 sf} = \text{employees/1000 sf} \times 8 \text{ hrs/day}$ $\text{Visitor hours/1000 sf} = \text{visitors/1000 sf} \times 1 \text{ hour/visit}$ $(1/2 \text{ hour for industrial and warehousing uses})$ $\text{Visitors/1000 sf} = \text{weekday ADT/1000 sf} \times \text{avg. vehicle occupancy} - \text{employees/1000 sf}$ $\text{Weekday ADT/1000 sf} = \text{one-way average daily trips} \div 2$
<b>NET COST/FPOP</b>	=	<b>NET COST/SF x SF/FPOP</b>
<b>NET COST/SF</b>	=	Total replacement cost of existing police facilities and equipment less outstanding debt divided by building square feet of existing police stations
<b>SF/FPOP</b>	=	Total building square feet of existing police stations divided by total existing residential and nonresidential development in the township, expressed in terms of functional population

(b) For Fire:

FEE	=	FPOP x NET COST/FPOP
Where:		
FPOP	=	UNITS x FPOP/UNIT
UNITS	=	Number of dwelling units of each housing type in the development or thousands of square feet of nonresidential buildings of each land use type
FPOP/UNIT	=	Functional population represented by one dwelling unit of a given housing type or 1,000 square feet of nonresidential floor area of a given land use type. For residential development, functional population per unit is 60% of the average household size for that housing type. For nonresidential development, the functional population per unit is determined by the following formula:  $\text{Functional population/1000 sf} = (\text{employee hours/1000 sf} + \text{visitor hours/1000 sf}) \div 24 \text{ hours/day}$ <p>Where:</p> $\text{Employee hours/1000 sf} = \text{employees/1000 sf} \times 8 \text{ hrs/day}$ $\text{Visitor hours/1000 sf} = \text{visitors/1000 sf} \times 1 \text{ hour/visit (1/2 hour for industrial and warehousing uses)}$ $\text{Visitors/1000 sf} = \text{weekday ADT/1000 sf} \times \text{avg. vehicle occupancy} - \text{employees/1000 sf}$ $\text{Weekday ADT/1000 sf} = \text{one-way average daily trips (total trip ends} \div 2)$
NET COST/FPOP	=	NET COST/SF x SF/FPOP
NET COST/SF	=	Total replacement cost of existing fire department facilities and equipment less outstanding debt divided by building square feet of existing fire stations
SF/FPOP	=	Total building square feet of existing fire stations divided by total existing residential and nonresidential development in the area served by the fire department, expressed in terms of functional population

(8) The park impact fee component shall be calculated according to the following formula.

FEE	=	EDUs x NET COST/EDU
Where:		
EDUs	=	UNITS X EDUs/UNIT
UNITS	=	Number of dwelling units of each housing type in the development
EDUs/UNIT	=	Number of Equivalent Dwelling Units represented by one dwelling unit of a given housing type
NET COST/EDU	=	NET COST/ACRE x ACRES/EDU
NET COST/ACRE	=	Total replacement cost of existing park facilities less outstanding debt divided by existing park acres
ACRES/EDU	=	Existing park acres divided by total existing housing units in the township, expressed in terms of Equivalent Dwelling Units

(9) The impact fees calculated pursuant to the independent fee calculation shall apply only to the development being considered for which the study is based. It shall have no bearing upon prior and subsequent impact fees calculated pursuant to this resolution unless the unique usage, the nature of the property, the timing or the location of the development is nearly identical to that which was determined in the independent study. Further, the Trustees shall utilize such independent studies in making their re-determination of the methodology and administration of this fee pursuant to Section XI (5) hereunder.

**VIII. Use of Fees.**

(1) A road impact fee account, a fire impact fee account, a police impact fee account, and a park impact fee account that are distinct from the general fund of the Township, are hereby created, and the impact fees received shall be deposited into the appropriate interest-bearing account. The impact fee administrator, in conjunction with the Township Chief Fiscal Officer, shall obtain approval for the establishment and maintenance of these accounts by the State Auditor.

(2) Each separate account established above shall contain only those impact fees collected pursuant to this resolution, plus any interest that may accrue from time to time on such accounts. Any accrued interest shall be subject to the same restrictions as other funds in the account.

(3) Monies in each impact fee account shall be used for authorized purposes under the Resolution on projects which are to be initiated within three years of their collection date and are to be considered to be spent in the order collected or accrued, on a first-in/first-out basis.

(4) The monies in each impact fee account shall be used only for the following:

(a) In the case of road impact fees:

(i) To acquire and construct major roadway system improvements as identified in the Township Land Use Plan or as specifically determined by the Hamilton Township Trustees;

(ii) To pay debt service on any portion of any current or future general obligation bond or revenue bond used to finance major roadway system improvements that were not part of the existing level of service at the time of the last impact fee calculation and that still provide capacity to serve new development;

(iii) As described in subsection IX, Refunds; or

(iv) As described in subsection X, Reimbursements.

(b) In the case of fire impact fees:

(i) To acquire and construct fire system improvements;

(ii) To pay debt service on any portion of any current or future general obligation bond or revenue bond used to finance fire system improvements that were not part of the existing level of service at the time of the last impact fee calculation and that still provide capacity to serve new development;

(iii) As described in subsection IX, Refunds; or

(iv) As described in subsection X, Reimbursements.

(c) In the case of police impact fees:

(i) To acquire and construct police protection system improvements;

(ii) To pay debt service on any portion of any current or future general obligation bond or revenue bond used to finance police protection system improvements that were not part of the existing level of service at the time of the last impact fee calculation and that still provide capacity to serve new development;

(iii) As described in subsection IX, Refunds; or

(iv) As described in subsection X, Reimbursements.

(d) In the case of park impact fees:

(i) To acquire and construct park system improvements;

(ii) To pay debt service on any portion of any current or future general obligation bond or revenue bond used to finance park system improvements that were not part of the existing level of service at the time of the last impact fee calculation and that still provide capacity to serve new development;

~~(iii) As described in subsection IX, Refunds; or~~

(iv) As described in subsection X, Reimbursements.

(5) The monies in the road impact fee account, the fire impact fee account, the police impact fee account, and the park impact fee account shall not be used for the following:

(a) Rehabilitation, reconstruction, replacement or maintenance of existing facilities;

(b) Ongoing operational costs; or

(c) Debt service for any portion of any past general obligation bond or revenue bond that was used to finance major roadway system improvements that were part of the existing level of service at the time of the last impact fee calculations, or that were not used to finance major roadway system improvements, the debt service for any portion of the past general obligation bond or revenue bond that was used to finance fire protection or police protection system improvements that were part of the existing level of service at the time of the last impact fee calculation, or that was not used to finance fire or police protection system improvements, or the debt service for any portion of the past general obligation bond or revenue bond that was used to finance park improvements.

#### IX. Refunds.

(1) All funds collected by the impact fee shall be spent on projects which are initiated within three years of the collection of such fees as provided in Section VIII, paragraph 3 above. Any monies in the impact fee fund that have not been spent within seven (7) years after the date on which such fee was paid shall be returned to the current owners with interest since the date of payment. These payments shall be made to the owners at the time that the refund is issued regardless of the ownership at the time that the impact fee was calculated and collected.

(a) Notice of the right to a refund, including the amount of the refund and the procedure for applying for and receiving the refund, shall be sent or served in writing to the present owners of the property within thirty (30) days of the date the refund becomes due. The sending by regular mail of the notices to all present owners of record shall be sufficient to satisfy the requirement of notice.

(b) The refund shall be made on a pro rata basis, and shall be paid in full within ninety (90) days of the date upon which the refund becomes due.

(2) A refund shall be available to the applicant if, after obtaining the zoning certificate and paying the impact fee, the applicant determines not to build, construct or create the Impact-Generating Development, and has not commenced work or caused improvements thereon.

## X. Reimbursements.

(1) Credit for reimbursements from impact fees collected by the Township shall be provided for contributions toward the cost of major roadway system improvements.

~~(a) Approved credits shall generally become effective when the improvements have been completed and have been accepted by the Township.~~

(b) No credit will be applied to the road impact fee for dedication of right-of-way, since no right-of-way costs were included in the calculation of the road impact fee. No credit will be applied to the road impact fee for 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.

(2) In order to receive credit for system improvements, the developer shall submit complete engineering drawings, specifications, and construction cost estimates to the impact fee administrator. The impact fee administrator shall determine the amount of credit due based on the information submitted, or where such information is inaccurate or unreliable, then on alternative engineering or construction costs acceptable to the impact fee administrator.

(3) To qualify for an impact fee reimbursement credit, the developer must enter into an agreement with the Township. At a minimum, the developer agreement shall specify the amount of the credit, and within how many years the developer will be reimbursed from impact fees collected by the Township, assuming adequate funds are available for such repayment.

(4) The Township will allocate a maximum of 75 percent of annual impact fees collected to reimburse developers for eligible improvement credits. If the amount allocated for reimbursements is not sufficient to make all payments due to developers for that year, each developer will receive a pro rata share of the amount owed, and the unpaid amount will added to the amount owed for the following year. If less than 75 percent of annual impact fee collections is required for reimbursements in any given year, the remainder may be used for public project expenditures.

(5) Credits provided pursuant to this resolution shall be valid from the effective date of such credits until ten (10) years after such date. The effective date of the credit shall be documented as follows: The date the Development Agreement required in Section X (3) is executed.

(6) Developers may obtain impact fee offsets for system improvements completed prior to the effective date of this resolution. Application for such offsets must be made, on forms provided by the Township, within one (1) year after the effective date of this resolution. In the event that the subdivision for which the offsets are claimed is partially completed, the amount of the offsets shall be reduced by the amount of the impact fees that would have been charged for the completed portion of the subdivision had this resolution been in effect. In the event that the subdivision has been fully completed, no offsets shall be issued. If some offsets are warranted, the impact fees otherwise due for zoning certificates issued within the subdivision shall be waived or reduced until the amount of the offset for the subdivision has been exhausted. In no case shall any such offsets be transferable to zoning certificates issued outside the subdivision for which the system improvement was made.

## XI. Miscellaneous Provisions.

(1) Nothing in this resolution shall restrict the Township from requiring the construction of reasonable project improvements required to serve the development project, whether or not such improvements are of a type for which credits are available under subsection X, Reimbursements.

(2) The impact fee administrator shall maintain accurate records of the impact fees paid, including the name of the person paying such fees, the project for which the fees were paid, the date of payment of each fee, the amounts received in payment for each fee, and any other matters that the Hamilton Township Board of Trustees deems appropriate or necessary to the accurate accounting of such fees. Records shall be available for review by the public during normal business hours and with reasonable advance notice.

(3) Annually, the impact fee administrator shall present to the Hamilton Township Board of Trustees a proposed capital improvements program that shall assign monies from each impact fee fund to specific projects and related expenses for eligible improvements of the type for which the fees in that fund were paid. Any monies, including any accrued interest, not assigned to specific projects within such capital improvements program and not expended pursuant to subsection IX, Refunds, or subsection X, Reimbursements, shall be retained in the same impact fee fund until the next fiscal year.

(4) If an impact fee has been calculated and paid based on a mistake or misrepresentation, it shall be recalculated.

(a) Any amounts overpaid by an applicant shall be refunded by the impact fee administrator to the applicant within thirty (30) days after the acceptance of the recalculated amount, with interest since the date of such overpayment.

(b) Any amounts underpaid by the applicant shall be paid to the impact fee administrator within thirty (30) days after the acceptance of the recalculated amount, with interest since the date of such underpayment.

(c) In the case of an underpayment to the impact fee administrator, the Township shall not issue any additional permits or approvals for the project for which the impact fee was previously underpaid until such underpayment is corrected, and if amounts owed to the Township are not paid within such thirty (30) day period, the Township may also rescind any permits issued in reliance on the previous payment of such impact fee.

(5) The impact fees and the administrative procedures established by this resolution shall be reviewed by the Hamilton Township Board of Trustees within three (3) years of the effective date of this resolution, and then at least every five (5) years thereafter.

## XII. Appeals.

Any determination made by the impact fee administrator charged with the administration of any part of this resolution may be appealed to the Township Board of Zoning Appeals within thirty (30) days from the date of the decision appealed. In the event that the determination of the Board of

Zoning Appeals is questioned or challenged by either the developer or the impact fee administrator, the right to appeal to the judicial system shall be governed by Revised Code Section 2506.

**XIII. Violation.**

~~Furnishing false information on any matter relating to the administration of this resolution, including without limitation the furnishing of false information regarding the expected size, use, or impacts from a proposed development, shall be a violation of this resolution.~~

**XIV. Severability.**

If any section or component of this Resolution is held to be invalid by the final decision of any Court of competent jurisdiction, such decision shall not affect the validity of the remaining sections and components of this Resolution. The Hamilton Township Board of Trustees declares that it would have adopted this Resolution and each section and component thereof despite the fact that one or more sections or components would be declared invalid.

Read on the following dates: April 18, 2007; May 2, 2007.

Mr./Ms. \_\_\_\_\_ moved adoption of the foregoing Amended Resolution, being seconded by Mr./Ms. \_\_\_\_\_. Upon call of the roll, the following vote resulted:

Mr. Bishop - Aye \_\_\_\_\_ Nay \_\_\_\_\_  
Ms. Ehling - Aye \_\_\_\_\_ Nay \_\_\_\_\_  
Mr. Munoz - Aye \_\_\_\_\_ Nay \_\_\_\_\_

The original Resolution was published by summary on the following dates: March 29, 2007 and April 5, 2007 in the Western Star and Pulse Journal newspapers.

This Amended Resolution adopted this \_\_\_\_\_ day of \_\_\_\_\_, 2007 to take effect on \_\_\_\_\_, 2007.

\_\_\_\_\_  
Jacqueline Terwilleger, Chief Fiscal Officer

I, Jacqueline Terwilleger, Chief Fiscal Officer of Hamilton Township, Warren County, Ohio, hereby certify that the foregoing is taken and copied from the record of the proceedings of said Township Trustees of Hamilton Township, and that it is a true and accurate representation thereof.

Witness my signature this \_\_\_\_\_ day of \_\_\_\_\_, 2007.

\_\_\_\_\_  
Jacqueline Terwilliger, Chief Fiscal Officer

Approved as to form:

\_\_\_\_\_  
Law Director

This Amended Resolution was published by summary in the Western Star and Pulse Journal newspapers on the following dates: \_\_\_\_\_, 2007, \_\_\_\_\_, 2007.

\_\_\_\_\_  
Jacqueline Terwilliger, Chief Fiscal Officer



1 of 1 DOCUMENT

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\*\*\* CURRENT THROUGH LEGISLATION PASSED BY THE 128TH OHIO GENERAL ASSEMBLY AND FILED  
WITH THE SECRETARY OF STATE THROUGH FILE 58 \*\*\*  
\*\*\* ANNOTATIONS CURRENT THROUGH OCTOBER 1, 2010 \*\*\*  
\*\*\* OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH OCTOBER 1, 2010 \*\*\*

TITLE 5. TOWNSHIPS  
CHAPTER 504. LIMITED HOME RULE GOVERNMENT

Go to the Ohio Code Archive Directory

ORC Ann. 504.04 (2011)

§ 504.04. Exercise of home rule powers; limitations; officers; conflicts with municipal or county laws

(A) A township that adopts a limited home rule government may do all of the following by resolution, provided that any of these resolutions, other than a resolution to supply water or sewer services in accordance with *sections 504.18 to 504.20 of the Revised Code*, 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 with the requirements and prohibitions of this chapter, and shall enact no taxes other than those authorized by general law, and except that no resolution adopted pursuant to this chapter shall encroach upon the powers, duties, and privileges of elected township officers 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;

(3) Supply water and sewer services to users within the unincorporated area of the township in accordance with *sections 504.18 to 504.20 of the Revised Code*;

(4) Adopt and enforce within the unincorporated area of the township any resolution of a type described in *section 503.52 or 503.60 of the Revised Code*.

(B) No resolution adopted pursuant to this chapter shall do any of the following:

(1) Create a criminal offense or impose criminal penalties, except as authorized by division (A) of this section or

## ORC Ann. 504.04

by *section 503.52 of the Revised Code*;

- (2) Impose civil fines other than as authorized by this chapter;
- (3) Establish or revise subdivision regulations, road construction standards, urban sediment rules, or storm water and drainage regulations, except as provided in *section 504.21 of the Revised Code*;
- (4) Establish or revise building standards, building codes, and other standard codes except as provided in *section 504.13 of the Revised Code*;
- (5) Increase, decrease, or otherwise alter the powers or duties of a township under any other chapter of the Revised Code pertaining to agriculture or the conservation or development of natural resources;
- (6) Establish regulations affecting hunting, trapping, fishing, or the possession, use, or sale of firearms;
- (7) Establish or revise water or sewer regulations, except in accordance with *section 504.18, 504.19, or 504.21 of the Revised Code*.

Nothing in this chapter shall be construed as affecting the powers of counties with regard to the subjects listed in divisions (B)(3) to (5) of this section.

(C) Under a limited home rule government, all officers shall have the qualifications, and be nominated, elected, or appointed, as provided in Chapter 505. of the Revised Code, except that the board of township trustees shall appoint a full-time or part-time law director pursuant to *section 504.15 of the Revised Code*, and except that a five-member board of township trustees approved for the township before September 26, 2003, shall continue to serve as the legislative authority with successive members serving for four-year terms of office until a termination of a limited home rule government under *section 504.03 of the Revised Code*.

(D) In case of conflict between resolutions enacted by a board of township trustees and municipal ordinances or resolutions, the ordinance or resolution enacted by the municipal corporation prevails. In case of conflict between resolutions enacted by a board of township trustees and any county resolution, the resolution enacted by the board of township trustees prevails.

**HISTORY:**

144 v H 77 (Eff 9-17-91); 145 v H 579 (Eff 7-13-94); 148 v H 187 (Eff 9-20-99); 149 v H 94, Eff 9-5-2001; 150 v H 95, § 1, eff. 9-26-03; 150 v H 411, § 1, eff. 5-6-05; 151 v H 23, § 1, eff. 8-17-06; 152 v S 97, § 1, eff. 1-1-08.

**NOTES:****Section Notes**

The effective date is set by § 3 of 152 v S 97.

The effective date is set by section 179 of H.B. 95 (150 v --).

**EFFECT OF AMENDMENTS**

152 v S 97, effective January 1, 2008, corrected internal references.

151 v H 23, effective August 17, 2006, added (A)(4); added "or by *section 503.52 of the Revised Code*" to the end

of (B)(1).

Related Statutes & Rules

Cross-References to Related Statutes

Advising of prosecuting attorneys, township law directors, *RC § 109.14.*

Clerk of court, *RC § 1901.31.*

Costs and receipts of county-municipal courts, *RC § 1901.02.4*

Jurisdiction over violations of township resolutions, *RC § 1901.18.2.*

Legal adviser; additional counsel; exceptions, *RC § 309.09.*

Municipal or township prohibition of businesses, *RC § 3730.11*

Removal of area of municipal corporation from township, *RC § 709.50.*

Violations of township resolutions, *RC § 1907.01.2.*

Case Notes & OAGs

LEGAL COUNSEL.

The board of township trustees of a township that has adopted the limited self-government form of township government under RC Chapter 504. may not enter into a contract with the prosecuting attorney of the county for the purpose of employing the prosecuting attorney as additional legal counsel to represent the township and its officers in their official capacities and to advise them on legal matters: OAG No. 94-085 (1994).