

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

**AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS
IN SUPPORT OF THE DREES COMPANY**

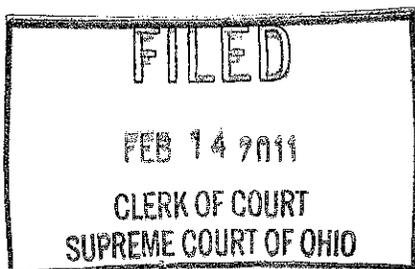
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I. INTERESTS OF AMICUS

The NAHB is a Washington, DC based trade association whose mission is to enhance the climate for housing in the building industry. Chief among NAHB's goals is providing for expanding opportunities for all consumers to have access to safe, decent and affordable housing. Founded in 1942, NAHB is a federation of more than 800 state and local associations, including the Ohio Home Builders Association and the Home Builders Association of Greater Cincinnati. About one-third of NAHB's 160,000 members are homebuilders and/or remodelers and its builder members construct about 80 percent of the new homes built each year in the United States. To effectuate its mission, NAHB strives to create an environment in which all Americans have access to the housing of their choice and builders have the freedom to operate as entrepreneurs in an open and competitive environment. Toward this end, NAHB is a vigilant advocate in the Nation's courts and it frequently participates as a party litigant and *amicus curiae* to safeguard the rights of its members under federal and state law. NAHB has participated as an *amicus* in several impact fee cases across the country including *Home Builders Ass'n of Dayton & The Miami Valley v. City of Beavercreek*, 729 N.E.2d 349 (Ohio 2000).

NAHB is well-positioned to track the effects of such local public policy measures as impact fees on long-term national policy goals, such as maintaining affordable housing. In the instant case, Hamilton Township, in Warren County, Ohio ("the Township"), has imposed an impact fee on new construction which adds substantial cost to the usual material, land and permitting costs. Any builder that continues to do new business in the Township will have to pass these costs on to consumers. This will price many buyers out of the market. Worse still, if the Ohio courts permit the Township's measure to stand, other townships will follow suit.

Ballooning regulatory costs will hamper any housing recovery, to the detriment of home builders, their employees and new home buyers alike.

II. INTRODUCTION

The Court of Appeals stated that it is a difficult task to determine whether a charge is a tax or a fee.¹ A divining rod, however, is not required in this case because the weight of authority shows that the Township's fee is, in fact, an unauthorized tax. It is not entirely surprising that the Court of Appeals failed to reach this conclusion because the court used the wrong analysis when it asked whether the Township's charges were actually taxes. If it had followed established case law, the court below could only have concluded that the charges are taxes. Under this authority, the proper analysis is whether the fee is an appropriately imposed administrative fee, or whether it is a tax-in-disguise. Because impact fees function as a tax, local governments cannot impose them without express authority from the state legislature.

Therefore, whether the Township has the power to tax is central to the fee's validity. Because townships in Ohio may only enact ordinances based on powers granted by the General Assembly, an explicit delegation of the power to tax is required in order for impact fees to be sustained. This has not occurred here. Because R.C. § 504.04 does not expressly grant either the power to tax or to impose exactions like impact fees, the Township simply cannot impose an impact fee.

The Court of Appeals, however, did not focus on either the tax versus fee issue or the town's underlying authority to enact the impact fee. Instead, the court put the cart before the horse and applied the dual rational nexus test articulated in *Home Builders Ass'n of Dayton and the Miami Valley et al., v. City of Beavercreek*, 729 N.E. 2d 349, 355 (Ohio 2000) (*Beavercreek*),

¹ *The Drees Co. et al. v. Hamilton Twp., Ohio, et al.*, No. CA200911150, Opinion, 2010 WL 2891746 at 6 (Ohio Ct. App. July 26, 2010).

without making a threshold determination of whether the Township ever had the underlying authority to impose the impact fee.

It is important that this Court clearly define the extent of limited home rule power under R.C. § 504.04. The Township is asking this Court to unilaterally amend this statute to grant the Township taxing power it lacks. This revision can only be made by the legislature, and it would be out of step with the national precedent.²

III. ARGUMENT

Proposition of Law No. I: The Township's Attempt to Impose an Impact Fee Resulted in an Unlawful Tax-in-Disguise

Impact fees are usually tax measures designed to fund infrastructure improvements for the general welfare. For this reason, courts have applied longstanding and fundamental tests to determine whether an impact fee is a valid regulatory fee or a tax. Generally:

This distinction emphasizes the fact that taxes may be imposed following criteria unrelated to service costs or harm mitigation. Income and property taxes provide common examples of this phenomenon where the obligatory charges are set solely with reference to income or wealth levels. More importantly, the regulatory fee/tax dichotomy relates more directly to identifying proper sources of authority for each form of action. In practice, state legislatures carefully limit the power of local governments to impose taxes much more restrictively than they do the allocation of planning and land use control power.

Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulations: Paying for Growth with Impact Fees*, 59 SMU L. Rev. 177, 218 (2006). Since raising revenue is the primary goal of most impact fees, many courts have concluded that such exactions are taxes imposed for the benefit of the general public. *See, e.g. Hillis Homes, Inc. v. Snohomish County*,

² Under this analysis, "the impact fee will be invalidated unless express and specific statutory authorization for the tax exists." Julian C. Juergensmeyer and Thomas E. Roberts, *Land Use Planning and Development Regulation Law* at 357 (2003).

650 P.2d 193, 195 (1982) (superseded by statute) (holding that development fees imposed on new residential construction were invalid taxes). However, “[T]he power [to tax] must be derived from the state, and a grant of it will be strictly construed, with doubts resolved against the existence of any particular aspect of the power.” Osborne M. Reynolds, Jr., *Local Government Law* at 335-37 (2d. ed. 2001). For this reason, a clear grant of power is required for local governments to lawfully enact an impact fee.

In Ohio, the state constitution provides *home rule* municipalities with taxing authority. In contrast, *limited home rule* townships in Ohio clearly do not have the power to enact taxes.³ R.C. § 504.04(A)(1). They are limited to the express grants of power contained in the statute, and additional grants of municipal authority cannot be implied by the courts. *E.g., Rispo Realty & Dev. Co. v. City of Parma*, 564 N.E.2d 425 (Ohio 1990). This Court’s approval, in *City of Beavercreek*, of a home rule municipality’s authority to impose an impact fee is inapposite. There, a home rule municipality’s authority to impose impact fees stemmed from its constitutional authority to impose exactions. *Beavercreek* at 353. The same implied constitutional authority analysis is not appropriate in this case.

Express grants of authority are vital because of what impact fees represent—an extension of the state’s general taxing power to the local level. This exception to the state’s inherent monopoly over taxation for general welfare has been recognized in other contexts, such as property taxes and special assessments.⁴

³ Ohio Const. Art. XVIII § 3.

⁴ See, e.g., *C & S Wholesale Grocers, Inc. v. City of Westfield*, 766 N.E.2d 63 (Mass. 2002) (upholding municipal property taxes as proper delegation of legislative authority to tax); *Waterhouse v. Bd. of President & Directors of the Cleveland Public Schools*, 68 Tenn. 398 (Tenn. 1876) (“The power of taxation is one that belongs to the State in its sovereign capacity. The exercise of the power is legislative.”).

1. The Court of Appeals Did Not Apply the Proper Tax Versus Fee Analysis.

When the Court of Appeals examined whether Hamilton County's impact fee amounted to a tax, it simply used the wrong analysis. Instead of first determining whether the county possessed the necessary authority, the court focused on the dual rational nexus test employed by this Court in *Beavercreek*.⁵ However, that test is only relevant in the context of determining whether an authorized impact fee is reasonable, as was the case in *Beavercreek*. Because there is no express authority for Hamilton Township's impact fee, the court should have determined if it is a tax or a regulatory fee. If it bears the indicia of a tax, then the charge is unlawful, even if it is "reasonable." Since most impact fees are, in reality, excise taxes, many courts have concluded that such charges are actually taxes.

Regulatory fees are part and parcel of the broad police powers delegated to most municipalities, including Hamilton Township.⁶ The power to tax, however, has long been considered by state high courts as separate and distinct from the state's police power.⁷ A Maryland appeals court explained the threshold tax versus fee test in the context of an impact fee challenge:

[W]here the fee is imposed for the purpose of regulation, and the statute requires compliance with certain conditions in addition to the payment of the prescribed sum, such sum is . . . imposed by virtue of the police power; but where it is exacted solely for revenue purposes and its payment give[s] the right to carry on the business without any further conditions, it is a tax.

⁵ 729 N.E. 2d at 356 (where authority exists for an impact fee, the dual rational nexus test applies to determine its validity).

⁶ *E.g.*, *California Farm Bureau Fed'n v. State Water Res. Control Bd.*, 2011 WL 285189 (Cal. 2011) (fees may be imposed under the police power).

⁷ *Granzow v. Bureau. of Support of Montgomery County.*, 54 Ohio St.3d 35, 38 (1990); *Stewart v. Verde River Irrigation & Power Dist.*, 68 P.2d 329, 334-35 (Ariz. 1937) (explaining that fees bestow upon payee "a benefit not shared by other members of society.").

Eastern Diversified Properties, Inc. v. Montgomery County, 570 A.2d 850, 854 (Md. Ct. App. 1990) citing *Maryland Theatrical Corp. v. Brennan*, 24 A.2d 911 (Md. 1942). In other words, regulatory fees are based on an exchange where a municipality provides a specific benefit in exchange for the charge. As the court in *Mayor and Bd. of Alderman, City of Ocean Springs v. Homebuilders Ass'n of Miss., Inc., et al.*, 932 So. 2d 44 (Miss. 2006) similarly explained, "regulatory fees are charges to cover the cost of the state's use of its regulatory powers which can be allocated to those who are either voluntarily or involuntarily receiving special attention from government regulators." *Ocean Springs*, 932 So.2d at 55. The *Ocean Springs* court went on to explain that such costs are generally attributable to administrative expenses proportional to the cost of providing the fee payer with the special service. Courts nationwide have consistently applied these principals to determine whether an impact fee creates a tax rather than an administrative fee.

Eastern Diversified dealt with an impact fee for county-wide road improvements. The developer argued that, because the improvements were to be used broadly for the public at large, they amounted to an excise tax and could not be considered an administrative fee used to defray costs of the building permit application procedure. 570 A.2d at 853. Applying the above standard, the court determined that there was no evidence that the fees were used to defray expenses of the development regulatory process, and there were no additional conditions to be met after the impact fee was assessed. *Id.* at 855. The court concluded that the impact fee was "exactd solely for revenue purposes, is an involuntary payment of money, and the funds raised by the fee are used to finance road construction which benefit the general public." *Id.* Therefore, the fee could only be classified as a tax.

An Ohio appeals court used a similar analysis in *Building Indus. Ass'n of Cleveland and Suburban v. City of Westlake*, 660 N.E.2d 501 (Ohio Ct. App. 1995). The city enacted a park impact fee on new development for the construction of recreational facilities across the city. Acknowledging that it must first determine whether the charge was a tax, the court explained that general taxation has been imposed “to raise revenues to pay for the cost associated with providing general city services to the residents.” *Id.* at 504. The court determined that the charge was an unlawful tax because there was no mechanism for sharing the costs of new recreational facilities.⁸

In addition to state courts, the U.S. Court of Appeals for the Fifth Circuit has determined that impact fees function as tax measures rather than regulatory fees. For example, in *Home Builders Ass'n of Miss., Inc. v. City of Madison, Miss.*, 143 F.3d 1006, 1012 (5th Cir. 1998), the Fifth Circuit first determined that the charge was used to improve and maintain municipal services for all current and future residents. Because the primary purpose of the fee was to improve public facilities generally, the court explained that “it is difficult to imagine that an ordinance designed to protect and promote the public health, safety and welfare of an entire community could be characterized as anything but a tax.” *Id.* Because the city’s impact fee bore all of the indicia of a tax, the Fifth Circuit refused to exercise jurisdiction because the Tax Injunction Act bars federal courts from enjoining the collection of tax revenue by state and local governments. While this case did not reach the validity of the underlying impact fee, it stands for the proposition that impact fees are inherently revenue-raising measures.⁹

⁸ “Thus the cost associated with the affected residential facilities of Westlake is borne solely by the developers and purchasers of new construction without a share of the cost being borne by the present residents or purchasers of existing housing and commercial/industrial stock who would also be using the recreational facilities.” *Id.* at 506.

⁹ Similarly, a federal district court in Alabama determined that sewer tap fees were taxes, declining jurisdiction under the Tax Injunction Act. *Hard-Ing Builders, LLC, et al. v. City of Phenix City, Ala.*, 2009 WL 2591131 (M.D. Ala. Aug. 20, 2009).

In contrast to these decisions, the Supreme Court of Alabama recently classified sewer and water impact fees as true regulatory fees rather than taxes. *St. Clair County Home Builders Ass'n v. City of Pell City, et al.*, No. 1080403, 2010 WL 3518657 (Ala. Sept. 10, 2010). However, this case is distinguishable on several grounds. The court acknowledged that in order for the charges to be true regulatory fees, they must “defray the cost of providing residents with a specific service.” *Id.* at *8. The court then concluded that, because the fees were used to defray the cost of providing water and sewer services to its residents, they constituted a valid fee. *Id.* at *9. Even if this was true in St. Clair County, it is not true in Hamilton Township—where the fee is clearly being used for purposes beyond cost recovery.¹⁰ This case is also an outlier as compared to how other courts have analyzed the tax versus fee issue. Specifically, the Supreme Court of Alabama ignored the fact that the fees at issue were not only used to recover costs from applicants, but were also used to expand water and sewer for the general welfare.

These cases are emblematic of the tax versus fee distinction that the Court of Appeals below should have used. The court below should have focused on these fundamental distinctions between taxes and regulatory fees. If it had, it would have been clear that Hamilton Township’s charges, which were meant to improve infrastructure unassociated with new development, truly functioned as a tax. In addition, there is no evidence that the charges were limited to defraying administrative costs for project approvals. Once the Township collects the fees, it simply spends them on general infrastructure improvements.¹¹

Instead of conducting the tax versus fee analysis used by the courts in *Eastern Diversified* and *City of Westlake*, the Court of Appeals assumed Hamilton Township’s charges were not

¹⁰ This was precisely the distinction in *State, ex rel. Petroleum Underground Storage Tank Release Comp. Bd. v. Withrow*, 579 N.E.2d 705 (Ohio 1991), where the court determined that underground storage tank fees were directly related to the costs they aimed to address.

¹¹ Hamilton Twp., Ohio Amended Resolution No. 2007-0418, Part VIII.

taxes and wrongly analyzed whether the impact fee was administered correctly under Ohio's dual rational nexus test. If the Court of Appeals had used the correct analysis, it would have determined that the Township's charges were, in fact, taxes. Based on this determination, substantial authority dictates that such taxes cannot be levied without express authority from the state. This element is also missing from Hamilton Township's impact fee scheme.

2. Courts Nationwide Have Invalidated Impact Fees as Unlawful Taxes in the Absence of Express Delegation of Taxation Authority.

When it can be shown—as it can here—that a fee is properly classified as a tax, an express delegation of taxation authority from the state is required. It is troubling that the Court of Appeals failed to address the substantial body of case law from other states striking down impact fees as unauthorized taxes. In an early Florida case, a court struck down an impact fee because it amount to an unauthorized tax. *Broward County et al. v. Janis Dev. Corp. et al.*, 311 So.2d 371 (Fla. Dist. Ct. App. 1975). The court explained that the fee was clearly a tax because it simply used the revenue collected to expand road capacity at a future time. *Id.* at 376. Because the state legislature had not delegated the power to tax to counties, the court explained that “the enactment of the ordinance is unauthorized because such land use charges are not sanctioned by general law.” *Id.* Subsequent state courts have consistently used this analysis to invalidate such impact fees.

In *Ocean Springs*, 932 So. 2d 44 (Miss. 2006), the Supreme Court of Mississippi surveyed how authority is granted for impact fees in other states, including Ohio. The court concluded that either express statutory or implied constitutional authority was required to impose what bears all of the hallmarks of a tax. The *Ocean Springs* court zeroed in on the fundamental purpose of the impact fees, which was to pay for services “traditionally . . . funded by tax

revenues.” *Id.* at 56. Because the city had not been delegated such sweeping powers of taxation by the state, the court invalidated the impact fee.

Similarly, New Jersey’s high court struck down an impact fee that exceeded a municipality’s express statutory grant of authority. In *New Jersey Builders Ass’n v. Mayor and Twp. Comm. of Bernards Twp., Somerset County*, 528 A.2d 555, 561 (N.J. 1987), the court struck down an impact fee that charged road impact fees based on anticipated, rather than proportional, impact exceeded the authority granted by state statute.¹² When delegated authority to impose impact fees does not exist or has been exceeded, the fees must be invalidated.¹³

In *Idaho Building Contractors Ass’n v. City of Coeur D’Alene*, 890 P.2d 326 (Idaho 1995), the Supreme Court of Idaho used this analysis to invalidate an impact fee ordinance that charged developers for additional services made necessary by growth and development. The court first examined existing municipal authority for the assessment of charges by municipalities. The court determined that the city had specific legislative authority to regulate under the police power, but no statutory authority to permit the assessment of a tax to improve public facilities. *Id.* at 328. The court concluded that the fee (to be spent on a wide variety capital improvements) was in reality a tax because it benefited not only the developer’s property, but also current and future property owners in the city. The court explained that “the reasonableness of the fee is not an issue in this case. In order for the tax to be effective, the city must be empowered by the legislature or our constitution.” *Id.* at 330.

The circumstances here are very similar to those at issue in *Idaho Building Contractors Ass’n*. The limited home rule statute in Ohio expressly *prohibits* Hamilton Township from

¹² The statute allowed municipalities to require a developer to pay his pro rata share of costs necessitated by construction within the developer’s subdivision or development. *Id.*

¹³ See also, *Nolte v. City of Olympia*, 982 P.2d 659, 665 (Wash. Ct. App. 1999) (city had no authority to impose impact fee under enabling statute).

assessing taxes—to improve public facilities or otherwise. The township’s fees (to be spent on a wide variety of capital improvements) benefit not only the assessed home builders, but also all other current and future property owners in the city. For example, the ordinance allows for road impact fees to be used to acquire, construct and pay debt service on major roadway improvements throughout the Township.¹⁴ When examined in the context of the Supreme Court of Idaho’s analysis, it is clear that Hamilton Township has attempted to impose a development tax without the required authority.

Courts in Iowa, Massachusetts, and North Carolina and other jurisdictions have also invalidated impact fees that lack an express delegation of taxing authority.¹⁵ Taken together, these decisions represent overwhelming authority that unauthorized impact fees are unlawful taxes. The analysis employed by a wide variety of state and federal courts is remarkably consistent. The Court of Appeals below is far outside of this established authority by upholding an impact fee without any express authority. Therefore, the court below is simply countenancing a disguised tax targeted to a specific group.

¹⁴ Hamilton Twp., Ohio Amended Resolution No. 2007-0418, Part VIII(4)(a)(i)-(ii).

¹⁵ See also, *Home Builders Ass’n of Greater Des Moines v. City of West Des Moines*, 644 N.W. 2d 339, 347 (Iowa 2002) (holding that “statute does not expressly permit local government to require payment of a tax as a condition of subdivision approval); *Greater Franklin Developers Ass’n, Inc. v. Town of Franklin*, 730 N.E.2d 900, 902 (Mass. App. Ct. 2009) (invalidating impact fee because “towns do not have the power to tax.”); *Durham Land Owners Ass’n v. County of Durham*, 630 S.E.2d 200 (N.C. Ct. App. 2006) (counties require express legislative authority from the General Assembly to enact impact fees).

IV. CONCLUSION

Amicus NAHB requests the Court reverse the Court of Appeal's decision due to its unjustifiable expansion of powers granted to Limited Home Rule Townships.

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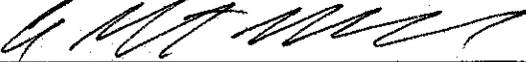
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I hereby certify that a copy of the foregoing *Amicus Curiae* Brief of the National Association of Home Builders was served by ordinary mail this 14th day of February, 2011 on:


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