

ORIGINAL

IN THE SUPREME COURT OF OHIO

THE DREES COMPANY, et al.

Plaintiffs-Appellants,

-v-

HAMILTON TOWNSHIP, OHIO, et al.

Defendants-Appellees.

)
)
) Case No. 2010-1548
)
) ON APPEAL from the
) Warren County Court of Appeals,
) Twelfth Appellate District
)
)
) Ct. of App. No. 2009-11-150

**BRIEF OF *AMICUS CURIAE* OHIO HOME BUILDERS ASSOCIATION, INC. IN
SUPPORT OF APPELLANTS**

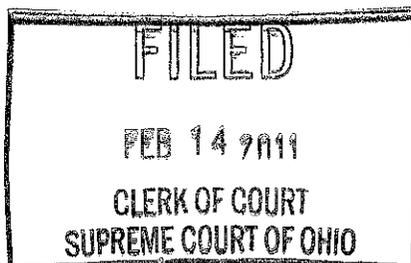
Robert N. Eshenbaugh Jr.
Ohio Home Builders Association
17 S. High Street
Suite 700
Columbus, OH 43215
Tel: (614)228-6647
Fax: (614) 228-5149
reshenbaugh@ohiohba.com

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

Christopher Whitcomb (pro hac vice)
National Association of Home Builders
1201 15th Street, NW
Washington DC 20005
Direct: (202) 266-8329
Tel: (800) 368-5242 x8329
Fax: (202) 266-8161
cwhitcomb@nahb.org
Attorney for Amicus Curiae
National Association of Home Builders
in support of Appellants

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

Attorneys for Appellees,
Hamilton Township, Ohio et al.



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

and

Richard A. Paolo (0022506)
Kevin L. Swick (0023149)
E. Peter Akin (074357)
ARONOFF ROSEN & HUNT
425 Walnut Street, Suite 2200
Cincinnati, Ohio 45202
Tel: (513) 241-0400
rapaolo@arh-law.com
klswick@arh-law.com
epakin@arh-law.com

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

Maurice A. Thompson (0078548)
1851 Center for Constitutional Law
208 E. State Street
Columbus, Ohio 43215
Attorney for Amicus Curiae 1851 Center for Constitutional Law in support of Appellants

R. Mike DeWine
Ohio Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
Attorney for the State of Ohio

Table of Contents

	<i>Page</i>
TABLE OF AUTHORITIES	4
INTEREST OF AMICUS CURIAE	5
ARGUMENT	7
<i>I. Approval of the Impact Fee in Hamilton Township will result in the unintended consequences of creating country clubs in Ohio's townships</i>	<i>7</i>
<i>II. Ohio law does not grant a limited home rule township the power to levy an impact fee on new development.</i>	<i>9</i>
<i>III. Hamilton Township's impact fee violates Ohio law because the amount of the fee is not proportional to the need created by new development</i>	<i>12</i>
CONCLUSION	17

Table of Authorities

Cases

Home Builders Ass'n of Dayton & the Miami Valley v. Beavercreek
89 Ohio St.3d 121, 729 N.E.2d 349, Ohio, 2000.....8

Primary Authorities

Ohio Constitution Article XVIII § 3.....9
R.C. § 504.04. 10,11,12
Hamilton Township Amended Resolution No. 2007-0418*passim*

Secondary Authorities

Hamilton Township Impact Fee Study – Duncan Associates15

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae Ohio Home Builders Association, Inc. (OHBA) is a 5,500 member trade association representing home builders, land developers and their associate vendors in a legislative and regulatory capacity on a statewide basis. OHBA serves its membership by taking a proactive approach to state issues and legislation to promote the residential construction business. As Ohio's premier home building industry representative, OHBA represents an industry that creates significant economic growth in Ohio while also advocating for statewide policies that foster the public's ability to obtain affordable housing.

As the only statewide association representing the residential construction and land development industry, OHBA has unique insight and perspective in determining what impact Ohio's existing land use, planning, and zoning laws have on its membership and their ability to provide affordable housing opportunities in Ohio. The goal of our membership is to provide safe, quality, affordable housing to all of the citizens of this great state. OHBA has experience examining local government issues such as impact fee legislation and regulation. Such land use planning and zoning regulations have a direct impact on affordable housing in Ohio.

When coupled with the poor economic conditions that continue to persist in Ohio, permitting a township to levy an impact fee will be very detrimental to the residential construction industry, not just in Hamilton Township, but throughout the state of Ohio. An approval by the Court in this case will undoubtedly lead to other townships across Ohio adopting similar policies to impose an impact fee. Such an approval will certainly

stifle the little growth we do have in this state and make housing less affordable in desirable communities.

Appellee Hamilton Township passed Amended Resolution 2007-0418 on May 2, 2007 permitting the township to charge impact fees for new development. The resolution imposing impact fees is in direct conflict with our goals as an industry and association. OHBA has a compelling interest in the outcome of this controversy for a very basic and simple reason – a finding of Hamilton Township’s impact fee to be legally enforceable will have an extremely negative impact on the ability of OHBA members to provide affordable housing opportunities in townships throughout Ohio.

ARGUMENT

I. Approval of the Impact Fee in Hamilton Township will result in the unintended consequences of creating country clubs in Ohio's townships

For over 200 years of statehood, Ohioans have had the ability to freely move from one community to the next without paying an initiation fee like the one passed by Hamilton Township. Citizens moving into this desirable community now have to pay an initiation fee any time they want to build a new house in that community. This resolution is discriminatory on its face and a direct attack on affordable housing. It pits new residents of the township against the old residents and wealthy people against middle and lower income earners. Such a policy should not be endorsed here in Ohio.

In the last decade, land development and residential construction has increased in rural townships for a variety of reasons, notably affordability. Some townships have welcomed development by viewing it as an overall boon to the local economy. However, other township governments have not welcomed this economic growth. Although most Townships that have welcomed development generally view it as a positive, some simply view it as a cash cow for the local government.

On May 2, 2007, Appellee Hamilton Township passed Amended Resolution 2007-0418 (Resolution) permitting the township to charge impact fees for new development.¹ This impact fee resolution begs the question of whether Ohio should be a state that allows local townships to become exclusive country clubs or to continue as all inclusive communities. In Hamilton Township, if you want to live there as a new resident, one must pay an entrance fee to the community in the form of an impact fee. That entry fee is

¹ Hamilton Township Amended Resolution No. 2007-0418 at 4.

\$6,153.00 for a single family detached dwelling and \$4,005.00 for a multi-family dwelling. Only a wealthy homeowner can afford an additional \$6153 in entrance fees to the community. Unfortunately, impact fees will ultimately divide our local communities for the minimal benefit of providing very little financial assistance to Ohio's few thriving and growing communities.

Impact fees will also add to the difficulty of passing local school, fire or police levies because new residents will be reluctant to vote for a levy having just paid for a new resident impact fee. The stigma created by the fee will leave new residents disgruntled and with the feeling that they have already paid their fair share and do not need to contribute to operating levies. In fact, the Resolution specifically requires \$335 to go to fire protection fees and \$206 of each fee to go to police fees.² None of these fees take into account the fact that each new homeowner will be paying annual property taxes that would be dedicated to such services. It means essentially that the impact fee is a tax on top of the property taxes. If operating levies begin to fail, all of the township residents will suffer the consequences of imposing an impact fee on new residents. Again, this will result in a disproportionate effect on the lower income areas of the community.

Along with concerns about dividing a community, permitting townships to levy impact fees will hold those local governments less accountable to be fiscally responsible. There will be no incentive to control costs on new capital projects if money is coming from new residents and not the traditional tax revenue. Local governments will use the additional revenue collected through impact fees as a windfall and an opportunity to

² *Id* at 7.

spend lavishly. Such a disincentive to be fiscally prudent is especially troublesome in this current economy.

Finally, this Court must consider the strained economic times of the day. Sanctioning a local government to extract extra fess/taxes from an industry that is struggling when new development brings so many benefits to the local government is not good public policy for the Ohio economy. Such a policy will result in local governments telling poor people to stay out by imposing impact fees. Only the rich will be able to enter into this country club which, by its nature, excludes people. This policy adopted by Hamilton Township is no different.

II: Ohio law does not grant a limited home rule township the power to levy an impact fee on new development

Ohio townships are a creature of statute with powers established throughout the years by the General Assembly. Generally, townships are governed by Title 5 of the Revised Code. Approximately twenty years ago, the Legislature created a new political subdivision that is a hybrid of a municipality and a township: a Limited Home Rule Township. Chapter 504 governs the powers and operations of a limited home rule township. Such a township is granted some powers that were traditionally reserved for a municipality and stretch beyond the powers of a normal township. Limited home rule townships view themselves on par with municipalities regarding powers of local government. However, there is one big difference between the two entities that is at the center of this impact fee dispute; Townships derive their power by pure statutory delegation rather than the Ohio Constitution as in a municipality.

A municipality is granted powers of local government through the Ohio Constitution and specifically through what is commonly called the Home Rule Amendment. It states in 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.³

Because the powers of a municipality are conferred upon them by the Constitution, the General Assembly cannot infringe upon that authority. In other words, there are no restrictions on the powers of local self-government. There are, however, restrictions upon regulations adopted regarding police, sanitary and other similar regulations as a municipality cannot adopt such regulations if they are in conflict with the general laws of this state. Such general laws are all of the provisions of the Ohio Revised Code.

In contrast, since a township is a creature of statute and not the Constitution, its powers can be limited by the General Assembly. Limited home rule townships have been granted certain powers of local self-government and most importantly have restrictions on that power. In determining whether or not a limited home rule township may levy an impact fee on new development, this Court must first consider whether or not the township has the statutory authority to levy such a fee. There must be some express authority given to the township in order for such a fee to be valid.

An examination of the Revised Code § 504.04 identifies such powers and restrictions in relevant part:

(A) A township that adopts a limited home rule government may do all of the following by resolution, provided that any of these resolutions,

³ OH. CONST., Art. XVIII, § 3.

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;⁴

Unlike a municipality's powers of local self-government, the powers of local self government in a limited home rule township are qualified. Since the powers are conferred upon a township via statute, a limited home rule township in Ohio may only enact resolutions based on powers granted by the General Assembly. The power to levy a tax or an impact fee must be explicitly stated in the Revised Code in order for a township to validly enact such a tax. The statute clearly prohibits the township's ability to enact a tax and there is no grant of authority to levy an impact fee. The Resolution fails to comply with the Revised Code because the powers established in the statute do not specifically permit Hamilton Township to levy impact fees on new development and the impact fee is an illegal tax masked as an impact fee which is prohibited under Revised Code 504.04.⁵

The Township's impact fee resolution violates the limits under Chapter 504 because it enacts a power of local self government that has not been conferred upon a limited home rule township. A plain reading of the statute reveals that the township has not been expressly granted the ability to levy an impact fee. Since there is no express

⁴ Ohio Revised Code § 504.04 (A)(1) (Emphasis Added).

⁵ *Id.*

grant of authority in the statute, the township cannot levy an impact fee. The second part of the argument is slightly more complicated, but yields the same results.

A tax is a tax. Everyone knows a tax when they see one. This situation is no different. Hamilton Township has cloaked the new tax permitted by the Resolution in the name of an impact fee. Impact fees are attractive to both long-time residents and local governments so it is not surprising the Township decided to use the term “impact fee” as a euphemism for a tax. It is much easier for the local public to understand and support. If it was called a tax, it would be unpopular and not many would support it. Thus the Impact Fee Resolution was a perfect way to raise revenue for the township without raising too many eyebrows around the community.

In addition to not wanting to draw the ire of the local public as a result of the tax increase, the township had to comply with the Ohio Revised Code. Since a limited home rule township cannot levy a tax under Section 504.04, it had to call the tax an impact fee.⁶ Generally, a fee is charged in exchange for a service provided by the government. A fee also is generally based on the cost of the service to the government. Hamilton Township did not subscribe to these general rules. The impact fees obviously went far beyond the value of the services provided by the government. The developer, under this Resolution, is paying both an application fee for a zoning permit and the impact fee on top of that fee. The double fee is a tax on new development and should not be considered valid because it goes well beyond the value of service.

This Court must consider in these difficult economic times that local governments will continue to try to push the limits of the law when it comes to imposing taxes as fees.

⁶ *Id.*

Most local government budgets are strained and many will be looking for new sources of revenue. If the source of revenue is a tax, then it should be levied in accordance with Ohio law. Local governments should not be allowed to tax new development as a revenue source without first complying with the Revised Code.

The analysis here comes down to a simple conclusion. The General Assembly did not confer the power to levy an impact fee on a limited home rule township. Second, and the impact fee permitted by the Resolution is a tax prohibited by Revised Code § 504.04, and must be invalidated by this Court.

III. Hamilton Township's Impact fee violates Ohio law because the amount of the fee is not proportional to the need created by new development

Even if one were to assume that Hamilton Township has been granted the authority to impose an impact fee under the Revised Code, the amount of the fee in this instance is not proportional to the need created by new development, therefore it violates Ohio law. Hamilton Township has relied on "The Impact Fee Study" (the methodology) which was 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 2007.⁷ The methodology upon which the Township relied is flawed because it does not demonstrate the requisite reasonable relationship between the impact fee and the benefit to the developer.

This Court has previously established a dual rational nexus test to determine whether or not an impact fee levied by a city is valid.⁸ Although that case involved only

⁷ *Supra* at 4.

⁸ *Home Builders Ass'n of Dayton & the Miami Valley v. Beavercreek* 89 Ohio St.3d 121, 729 N.E.2d 349, Ohio, 2000.

a roadway impact fee the rationale and the test for a valid impact fee is analogous to police and fire, and park impact fees. Likewise, if this Court determines a limited home-rule township has the power to levy an impact fee, the same dual nexus test applied to the city of Beavercreek should apply to Hamilton Township.

In applying the test to Hamilton Township, the township's impact fee methodology fails the dual nexus test. Specifically, the test requires the township to first demonstrate that there is a reasonable relationship between the township's interest in constructing new roadways and parks and providing police and fire service in the new developments and if a reasonable relationship exists, it must then be demonstrated that there is a reasonable relationship between the impact fee imposed by the township and the benefits accruing to the developer from the construction of new roadways, parks and the police and fire service. The first prong of the test determines whether the Resolution is an appropriate method to address the township's stated interests, and the second prong assures that the city and developers are paying their proportionate share of the cost of new construction.⁹

Hamilton Township's Resolution violates both prongs of the dual nexus test. First, the resolution is not an appropriate method to address the township's stated interest because the methodology is wholly flawed. It does not account for any benefits received by the township as a result of the new development. A common argument for impact fees is that residential development does not create enough tax revenue to cover the cost of additional infrastructure and maintenance. This argument is false. New residential development brings with it many financial benefits to a local government.

⁹ Id at 9.

The methodology does not account for any benefits to the local government. It fails to take property taxes that will be generated by the new development into consideration when determining the appropriate amount for an impact fee. In addition to the tax revenue, development brings jobs and ongoing revenue generated by the construction of single family homes. For example, it is estimated that in the first twelve months after purchasing a newly built home, owners contribute to the local economy by furnishing, decorating and otherwise improving their homes. The methodology used by the township is not appropriate because it does not account for any of these factors when determining the correct amount of an impact fee for Hamilton Township. The methodology uses a fancy formula and purported equitable analysis, but property taxes or other sources of income to the township, as a result of new development, are conspicuously absent from the formula. Such omissions can only result in one self-serving conclusion. That impact fees to be charged can be very high and be considered an appropriate method to address the Township's stated needs. Since the methodology is inherently flawed for the above reasons and Hamilton Township has relied upon the methodology in enacting its Resolution, the impact fee fails the first prong of the test.

The methodology also fails the second prong of dual nexus test: the city and developer are paying their proportionate share of the cost of new construction. In the methodology, Duncan Associates explains in great detail how much a road (\$3964), police and fire (\$541) and a park (\$1648) costs per residential unit.¹⁰ Even if the Court accepts these numbers to be valid or reasonable, the study fails to account for a portion to be paid by the township. The township, as a local government, is responsible for at least

¹⁰ Duncan Associates Hamilton Township Impact Fee Study at Page 1.

a portion of the costs to build a road or a park and to provide police and fire service to all residents, even new ones. The second prong of the test requires that there is a reasonable relationship between the impact fee imposed by the township and the benefits accruing to the developer from the construction of new roadways, parks and the police and fire service. The developer is not receiving any benefit. The developer is shouldering the entire cost of the impact fee. Justice Pfeifer, in his dissent in *Beavercreek*, stated: “Even though this is an incredibly light standard, it is not clear that developers will receive any benefit. After all, Beavercreek is not obligated to contribute any of its own money and the impact fee money alone is insufficient to pay for the entire cost of the roadway improvements. How can there be a reasonable relationship between certain impact fees and uncertain benefits?”¹¹ Justice Pfeifer’s question was poignant and is applicable to the current case. There is no benefit to the developer in the township resolution. If there is no benefit, then it fails the second prong of the dual nexus test and is therefore invalid.

In its resolution, Hamilton Township attempted to confer a benefit upon the developer in the form of credits given to the developer against the impact fee. These credits are not a benefit for a couple of reasons. Hamilton Township provides that credits will be given for contributions to major roadway system improvements. However, in the same section, the resolution states “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.”¹² Here, the Township attempts to give a credit to the developer, maybe as a way to

¹¹ *Home Builders Ass'n of Dayton & the Miami Valley v. Beavercreek* 89 Ohio St.3d 121, 729 N.E.2d 349, Ohio, 2000, Pfeifer, J., dissenting.

¹² Hamilton Township Amended Resolution No. 2007-0418 at 18.

contribute to the development. However, a developer would only receive credit if it made improvements outside of the development area. Normally, a developer would not make such an improvement unless it was required to do so by the local government. No credit is given if a developer makes improvements on a highway that may be affected by the development if the developer desired to earn a credit. Under this scenario, not only is the township not contributing its proportionate share to the development, it actually would benefit from improvements to roadways not affected by the development. The credit system set up in the resolution is basically a way for the township to appear to be contributing to the development in the form of a credit, when in reality it is not contributing at all. In fact, it is gaining something. Since the township is essentially benefitting twice from the developer and not conferring a benefit to the developer, it fails the second prong of the dual nexus test and is therefore invalid.

IV. Conclusion

For the foregoing reasons, OHBA urges this Court to invalidate Hamilton Township Amended Resolution No. 2007-0418 permitting the township to levy impact fees on new development.

Respectfully submitted,


ROBERT N. ESHENBAUGH JR. (0078179)

Ohio Home Builders Association

17 S. High St., Suite 700

Columbus, OH 43215

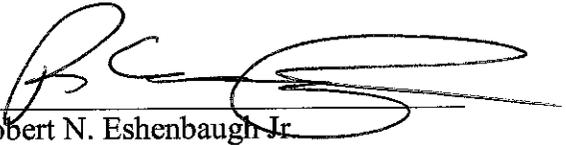
(614) 228-6647

reshenbaugh@ohiohba.com

Counsel for Amicus Curiae Ohio Home Builders Association, Inc.

CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing was served by regular U.S. Mail this 14th day of February, 2011, on the following:


Robert N. Eshenbaugh Jr.

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

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

and

and

Richard A. Paolo (0022506)
Kevin L. Swick (0023149)
E. Peter Akin (074357)
ARONOFF ROSEN & HUNT
425 Walnut Street, Suite 2200
Cincinnati, Ohio 45202
Tel: (513) 241-0400
rapaolo@arh-law.com
klswick@arh-law.com
epakin@arh-law.com

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

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

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

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

Attorney for Amicus Curiae 1851 Center for Constitutional Law in support of Appellants

Christopher Whitcomb (pro hac vice)
National Association of Home Builders
1201 15th Street, NW
Washington DC 20005
Direct: (202) 266-8329
Tel: (800) 368-5242 x8329
Fax: (202) 266-8161
cwhitcomb@nahb.org

Attorney for Amicus Curiae National Association of Home Builders in support of Appellants

R. Mike DeWine

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

Attorney for the State of Ohio