

**IN THE SUPREME COURT OF OHIO**

<b>THE DREES COMPANY, et al.,</b>	)	<b>Case No. 10-1548</b>
	)	
<b>Plaintiffs-Appellants,</b>	)	<b>ON APPEAL from the Court of Appeals for</b>
	)	<b>the Twelfth Appellate District of Ohio</b>
<b>-VS-</b>	)	
	)	<b>Ct. of App. No. 2009</b>
<b>HAMILTON TOWNSHIP, OHIO, et al.,</b>	)	
	)	
<b>Defendants-Appellees.</b>	)	

**BRIEF OF AMICI CURIAE 1851 CENTER FOR CONSTITUTIONAL LAW AND THE TAX FOUNDATION IN SUPPORT OF APPELLANTS THE DREES COMPANY, et al.**

Joseph L. Trauth, Jr.  
Thomas M. Tepe, Jr.  
Charles M. Miller  
Keating, Muething & Klekamp PLL  
One East Fourth Street, Suite 1400  
Cincinnati, OH 45202  
Tel: (513) 579-6400  
Fax: (513) 579-6457

Wilson G. Weisenfelder, Jr.  
James J. Englert  
Lynne M. Longtin  
Rendigs Fry Kiely & Dennis, LLP  
One West Fourth Street, Suite 900  
Cincinnati, OH 45202  
Tel: (513) 381-9200  
Fax: (513) 381-9206

Richard A. Paolo  
Kevin L. Swick  
Aronoff Rosen & Hunt  
425 Walnut Street, Suite 2200  
Cincinnati, OH 45202  
Tel: (513) 241-0400  
Fax: (513) 241-2877

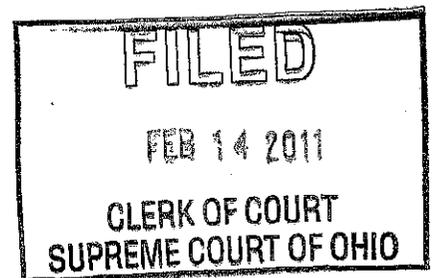
Warren J. Ritchie  
Thomas Keating  
Keating Ritchie  
5300 Socialville-Foster Rd.  
Mason, OH 45040  
Tel: (513) 891-1530  
Fax: (513) 891-1537

*Attorneys for Appellants*

*Attorneys for Appellees*

**Maurice A. Thompson (0078548)**  
**1851 Center for Constitutional Law**  
**208 E. State Street**  
**Columbus, Ohio 43215**  
**Tel: (614) 340-9817**  
**Fax: (614) 365-9564**

*Attorney for Amici Curiae 1851 Center for Constitutional Law and the Tax Foundation in support of Appellants*



**TABLE OF CONTENTS**

	<b>Page</b>
TABLE OF AUTHORITIES .....	iii
INTEREST OF <i>AMICI CURIAE</i> .....	1
STATEMENT OF THE CASE AND FACTS .....	3
A. Local Taxation in Ohio .....	3
B. Intrastate Migration Patterns and Settled Expectations of Millions of Ohioans.....	4
C. The Lower Courts’ Decisions .....	5
ARGUMENT.....	6
<u>Proposition of Law No. I:</u>	
Hamilton Township’s purported “impact fee” is an unlawful tax.....	6
<u>Proposition of Law No. II:</u>	
Hamilton Township’s purported “impact fee,” as a tax, results in a lack of uniformity in assessment of property, and is thus unconstitutional.....	11
<u>Proposition of Law No. III:</u>	
No deference is due to Hamilton Township’s (1) pretextual labeling of its tax as a “fee,” or (2) avowed purpose in imposing the tax.....	12
CONCLUSION.....	13
CERTIFICATE OF SERVICE .....	15

**TABLE OF AUTHORITIES**

**Cases**

*Amherst Builders Assn. v. Amherst* (1980), 61 Ohio St.2d 345 ..... 8

*Black v. Bd. Of Revision of Cuyahoga Cty.* (1985), 16 Ohio St.3d 11. .... 10

*Bldg. Industry Assn. of Cleveland v. Westlake* (1995), 103 Ohio App.3d 546 ..... 8, 9

*Cincinnati v. Roettinger* (1922), 105 Ohio St. 145, 153-54..... 7

*CSX Transportation, Inc. v. Georgia State Board of Equalization*, 128 S. Ct. 467 (2007)..... 2

*DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2005)..... 2

*Department of Revenue of Kentucky v. Davis*, 128 S. Ct. 1801 (2008)..... 2

*Home Builders Assn. of Dayton & the Miami Valley v. Beavercreek* (2000), 89 Ohio St.3d 121,  
729 N.E.2d 349. .... 11

*State ex rel. Petroleum Underground Storage Tank Release Comp. Bd. v. Withrow* (1991), 62  
Ohio St.3d 111, 579 N.E.2d 705..... 12

*State ex rel. Petroleum Underground Storage Tank Release Compensation Bd. v. Withrow*  
(1991), 62 Ohio St.3d 111, 113..... 7

*Town Properties, Inc. v. Fairfield* (1977), 50 Ohio St.2d 356..... 11

*Yorkavitz v. Bd. of Trustees of Columbia Twp.* (1957), 166 Ohio St. 349, 2 O.O.2d 255, 142  
N.E.2d 655. .... 6

**Constitutional Provisions**

Section 1 of the Fourteenth Amendment to the United States Constitution ..... 10

Section 2 of Article XII of the Ohio Constitution..... 10

**Ohio Revised Code**

R.C. 505.04 ..... 6

**Other Authorities**

*Growth and Change: Population Change in Ohio and its Rural-Urban Interface*, by Mark  
Partridge, ..... 4

*Rich States, Poor States, ALEC-Laffer State Economic Competitiveness Index*, by Arthur B. Laffer, Stephen Moore & Jonathan Williams. .... 3

## INTEREST OF AMICI CURIAE

Formed to support public policies that advance liberty, individual rights, and a strong economy in Ohio, the **1851 Center for Constitutional Law** is dedicated to protecting Ohioans' control over their lives, their families, their property, and thus, ultimately, their destinies. In doing so, the 1851 Center has developed particular expertise in Ohio constitutional law, has authored numerous publications on this topic, and has achieved favorable results for Ohioans in numerous state constitutional law cases.

More pointedly, the 1851 Center has an interest in protecting Ohioans' rights to retain the fruits of their labor, and be free from unlawful taxation. The Center also demands that governments of constitutionally-limited and delegated powers, such as Ohio Townships, not be given open-ended discretion to overwhelm the aforesaid rights.

The 1851 Center has a further interest in safeguarding the rule of law in Ohio, and protecting Ohioans from prosperity-inhibiting taxes and regulations. If not invalidated, Hamilton Township's "impact fee" resolution would usher in a new era of township taxing authority - - one that would imperil existing township residents' freedom from high taxation and investment-backed expectations, and prospective township residents' capacity to order their lives so as to avoid such taxation. *Amici* 1851 Center thus has a strong interest in this Court's ruling on whether an Ohioan has a right to be free from an Ohio Township's circumvention of the constitutional limits of its limited taxing authority.

Finally, the 1851 Center has a keen interest in this matter because it centers on two legal questions that touch on the central role of constitutionally-limited government, and pit the power of local governments against the rights of their free citizens: (1) where the line is to be drawn, in Ohio, between what constitutes a "tax" and what constitutes a "fee;" and (2) whether Ohio

townships have some form of inherent police powers beyond those specified in the Ohio Revised Code, or instead, are creatures of limited and defined powers.

**The Tax Foundation** is a non-partisan, non-profit research institution founded in 1937 to educate taxpayers on tax policy. Based in Washington, D.C., the Foundation's economic and policy analysis is guided by the principles of neutrality, simplicity, transparency, and stability. The Tax Foundation makes information about government finance more understandable, such as with its annual calculation of "Tax Freedom Day," the day of the year when taxpayers have earned enough to pay for the nation's tax burden and begin earning for themselves.

The Tax Foundation educates the legal community and the general public about economics and taxpayer protections and advocates that judicial and policy decisions on tax law promote principled tax policy. Recent federal and state tax-related cases in which the Tax Foundation has participated as *amicus curiae* include *Department of Revenue of Kentucky v. Davis*, 128 S. Ct. 1801 (2008); *CSX Transportation, Inc. v. Georgia State Board of Equalization*, 128 S. Ct. 467 (2007); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2005); *Heatherly v. State*, --- S.E.2d ----, 363 N.C. 115 (2009), and *Bonner v. Indiana*, No. 49S02-0809-CV-525 (Ind. 2008).

This case involves an important issue of tax policy. By addressing the proper definitions what constitutes a "tax" and what constitutes a "fee" as applied in this case, the opinion of this Court will not only have an impact on Ohio taxes, but its rationale will likely aid other states confronting similar questions. Therefore this decision and the rationale behind it will have a large impact upon deciding the legality of taxes throughout the country.

The Tax Foundation is in a unique position to aid this Court because it has conducted extensive research into taxes in general and tax-fee distinctions in particular, and the approaches

taken by various courts, the academic community, and various legislative bodies. Accordingly, the Tax Foundation has an institutional interest in this case.

### **STATEMENT OF THE CASE AND FACTS**

*Amici* hereby incorporate the statement of the case and facts rendered by Counsel of Record, the trial court, and the Court of Appeals. However, *Amici* believe that the following concise facts and timeline of events will be helpful to the Court.

#### **A. Local Taxation in Ohio**

The effects of monetary impositions such as Hamilton Township's hidden tax upon citizens and businesses are considerable for Ohio's entire economy. Ohio's cumulative state and local tax burdens are amongst the highest in the nation, and this widely acknowledged to suppress economic growth and opportunity. The Tax Foundation's 2011 State Business Tax Climate Index ranks Ohio 46<sup>th</sup> in the nation, noting that Ohio's current policies are "inhospitable to economic growth." This is the result of a state tax climate whereby Ohio's state and local governments impose income, corporate, property, sale and estate tax burdens that are all amongst the nation's worst.<sup>1</sup> "At the heart of Ohio's fiscal problems is a tax system and business climate that has been driving people out of the state for more than 15 years, resulting in a shrinking economy and a smaller tax base. \* \* \* Ohio taxpayers now have one of the highest tax burdens in the nation."<sup>2</sup>

---

<sup>1</sup> See *Rich States, Poor States, ALEC-Laffer State Economic Competitiveness Index*, by Arthur B. Laffer, Stephen Moore & Jonathan Williams.

<sup>2</sup> <http://www.taxfoundation.org/research/show/25674.html>. From a regional competitiveness standpoint, Ohio is surrounded by states that, generally speaking, have much lower tax burdens. Michigan, Indiana, Kentucky, and West Virginia are all clustered in the middle of the national rankings (27th, 28th, 25th and 29th respectively), while Pennsylvania's tax burden is 11th highest in the nation, but still lower than Ohio's.

This is more than quaint theory: as state and local cumulative government taxes and fees have risen, Ohio ranked near the bottom in all economic measures: The state's population grew by 0.2 percent, for a rank of 46; Total personal income grew by 2.8 percent, for a rank of 50; Per capita personal income grew by 2.6 percent, for a rank of 49; Earnings by place of work grew by 2.3 percent, for a rank of 50; Total full- and part-time employment grew by 0.3 percent, for a rank of 50; And earnings per job grew by 2.9 percent, for a rank of 49.<sup>3</sup> Because policies like this one influence job growth, personal income, and migration patterns, the adjudication of their lawfulness is of paramount importance to all Ohioans.

### **B. Intrastate Migration Patterns and Settled Expectations of Millions of Ohioans**

The stakes of this case are considerable, both in scope and effect, since, to avoid the onslaught of local taxes specified above, four million Ohioans, or 35 percent of the state's population, now reside in townships.<sup>4</sup> This continually-increasing number reflects a "substantial population redistribution within the state," whereby Ohioans have moved from municipalities to townships.<sup>5</sup> While many citizens may make the move merely because they prefer a more rural lifestyle, it cannot be denied that many others do so to protect themselves from municipal income taxation (which, as noted above is amongst the highest in the nation), and many of the other governmental impositions and expenses associated with municipal life. The outcome of this case is likely to impact the settled expectations of the millions of Ohioans who have moved to townships, and who do business in townships. Moreover, the lending of this degree of taxing or quazi-taxing authority townships is likely to alter migration patterns within the state.

---

<sup>3</sup> <http://cincinnati.bizjournals.com/cincinnati/stories/2010/08/23/daily37.html>

<sup>4</sup> *Growth and Change: Population Change in Ohio and its Rural-Urban Interface*, by Mark Partridge, found at [www.ag.ohio-state.edu/](http://www.ag.ohio-state.edu/)

<sup>5</sup> Id.

### C. The Lower Courts' Decisions

The Court of Appeals for the Twelfth District of Ohio erred in adopting the September 30, 2009 entry granting partial summary judgment to Hamilton Township, where the Trial Court mistakenly characterized an unconstitutional back-door tax on new homeowners and developers as a permissible “fee.” Specifically, the Trial Court upheld that Hamilton Township’s May 2007 Amended Resolution, entitled “Amended Resolution Implementing Impact Fees within the Unincorporated Areas of Hamilton Township, Ohio for Roads, Fire, Police, and Parks.”<sup>6</sup>

However, both Courts failed to account for a myriad of attributes that render this assessment a tax:

- The assessment applies to all who apply for a zoning certificate for new construction or redevelopment.<sup>7</sup>
- Factual Findings (5), (6), (7), and (8) of the Resolution indicate that the purpose of the tax on developers and new homeowners is “to benefit one of the fastest growing townships in the state of Ohio;” “to protect \* \* \* the community;” and to protect “the citizens and property owners of the Township.”<sup>8</sup>
- Factual Findings (5), (6), (7), and (8) of the Resolution further indicate that, in spending the taxes collected from new developers and homeowners, the “entire township” will be treated as “one single service area”<sup>9</sup>
- Revenues are spread out over all improvements to parks, roadways, fire, and police in Hamilton Township, irrespective of whether the improvements are related to new residential construction.
- Present residents of Hamilton Township receive the benefit of the improvements without any obligation to share in the costs.

---

<sup>6</sup> September 30, 2009 Entry Granting Partial Summary Judgment to Defendants, p. 2.

<sup>7</sup> Id.

<sup>8</sup> See Hamilton Township, Ohio Amended Resolution No. 2007-0418.

<sup>9</sup> Id., at Factual Finding (13).

- There is no evidence in the record demonstrating that new residential construction so overburdens existing parks as to require additional park space, which would be available to all Hamilton Township residents, but funded solely by new construction.

In other words, the purpose and effect of the Resolution is plainly to collect revenues that are used “for the equal benefit of all of the people” of Hamilton Township. As articulated more thoroughly below, when such is the case, an assessment constitutes a tax. Accordingly, both Courts erred in permitting Hamilton Township to circumvent the Ohio Revised Code’s proscription against township taxation.

### **ARGUMENT**

#### **Proposition of Law No. I: Hamilton Township’s purported “impact fee” is an unlawful tax.**

Though labeled as such, Hamilton Township’s “impact fee” is an unlawful tax. Townships of Ohio have no inherent or constitutionally-granted police power. Whatever police power townships of Ohio have is that delegated by the General Assembly, and “it follows that such power is limited to that which is expressly delegated to them by statute.”<sup>10</sup> R.C. 505.04 plainly provides that an Ohio township “shall exact no taxes other than those provided for by general law.”

Having not found the authority “provided for by general law,” Hamilton Township has simply levied a tax on new homeowners and homebuilders, and labeled it a “fee.” In light of speciousness of this designation, and the danger it poses to the four million Ohioans who reside in townships, Plaintiffs arguments on this point warrant some elaboration.

---

<sup>10</sup> *Yorkavitz v. Bd. of Trustees of Columbia Twp.* (1957), 166 Ohio St. 349, 2 O.O.2d 255, 142 N.E.2d 655.

Ohio law is clear on this matter. Although Defendants' label their tax a "fee," a fee is "a charge imposed by a government in return for a service."<sup>11</sup> "Taxation," meanwhile, "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."<sup>12</sup>

Federal precedent on the tax-fee distinction supplies equivalent guideposts this Court, and is helpfully summarized by Tax Foundation experts as follows:

The paramount difference between a tax and a fee is based upon the purpose of the charge. A charge that covers the cost of providing a service to the payer or regulates the payer's conduct is a fee. A charge that raises revenue for general spending without conferring any exclusive benefit to the payer is a tax... Examples of charges accurately described as fees include filing fees paid to a court, tolls paid to drive on a government-operated road, user charges paid to a government-operated utility, or licensing fees paid to engage in a regulated occupation. These examples share two features: (1) provision of a service to a particular user, independent of society at large; and (2) the revenue is used to cover costs of that program, not transferred to other governmental programs.<sup>13</sup>

By any of the standards above, this "impact fee" amounts to a tax.

Here, Factual Findings (5), (6), (7), (8) of Hamilton Township Resolution No. 2007-0418 (hereinafter "the Resolution") speak to its taxing character: they indicate that the purpose of this tax on developers and new homeowners is "to benefit one of the fastest growing townships in the state of Ohio;" "to protect \* \* \* the community;" and to protect "the citizens and property

---

<sup>11</sup> *State ex rel. Petroleum Underground Storage Tank Release Compensation Bd. v. Withrow* (1991), 62 Ohio St.3d 111, 113.

<sup>12</sup> *Cincinnati v. Roettinger* (1922), 105 Ohio St. 145, 153-54.

<sup>13</sup> Joseph D. Henchman and Travis Greaves, "Charging Taxpayers for Tax Collection Is a Tax: *Weisblat v. City of San Diego*", *Fiscal Fact No. 160*, Tax Foundation, available at <http://www.taxfoundation.org/research/show/24309.html>, citing *inter alia*, *San Juan Cellular Tel. Co. v. Pub. Serv. Comm'n of Puerto Rico*, 967 F.2d 683 (1st Cir. 1992), and its progeny.

owners of the Township.”<sup>14</sup> They further indicate that, in spending the taxes collected from new developers and homeowners, the “entire township” will be treated as “one single service area”<sup>15</sup> In other words, the purpose of the Resolution is plainly to collect revenues that are used “for the equal benefit of all of the people” of Hamilton Township.

Further, the Supreme Court of Ohio has 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>16</sup> By failing to distinguish between improvements in park, police, fire and roadway services caused by the development on one hand, and routine improvements on the other, the Resolution utterly fails to create an intelligible mechanism for ensuring that the revenue collected will actually reflect additional governmental expenses caused by new residential construction in Hamilton Township.

In fact, pursuant to the clear expressions of Ohio’s courts, Hamilton Township’s “impact fee” scheme does not operate as a fee in return for a service at all.<sup>17</sup> *Bldg. Industry Assn. of Cleveland v. Westlake*, for instance, found that a nearly identical ordinance was not a fee, but a tax.<sup>18</sup> The *Westlake* court found the purported impact fee resolution before it amounted to a tax because it (1) permitted the use of “impact” revenues collected on facilities which were also used by, and presumably supported by property and income taxes of, then-present residents of the city; (2) shifted, unfairly and unreasonably, the funding from the general public to the developers

---

<sup>14</sup> See Hamilton Township, Ohio Amended Resolution No. 2007-0418.

<sup>15</sup> *Id.*, at Factual Finding (13).

<sup>16</sup> *Granzow v. Bur. of Support of Montgomery Cty.* (1990), 54 Ohio St.3d 35, 38.

<sup>17</sup> Compare *Amherst Builders Assn. v. Amherst* (1980), 61 Ohio St.2d 345, syllabus (“[A] municipality, pursuant to Section 4, Article XVIII of the Constitution of Ohio, may impose upon new users a tap-in or connection fee which bears a reasonable relationship to the entire cost of providing service to those new users.”).

<sup>18</sup> *Bldg. Industry Assn. of Cleveland v. Westlake* (1995), 103 Ohio App.3d 546

and purchasers of new construction without requiring a matching amount on present residents; (3) it was impossible to ascertain whether the relationship was substantial between the charge and the burden to the recreation system of existing parks caused by new development; and (4) although the city speculated that there was a nexus between the charges and the burden in that the purchasers of new construction will actually burden the existing parks through additional use, there was no guarantee that these new construction purchasers will in fact use the existing park system, let alone cause a need for building new facilities, as opposed to unlike the certainty of new users using and burdening a local sewage system.<sup>19</sup>

Each of the above is true of Hamilton Township's Resolution. First, Revenues are spread out over all improvements to parks, roadways, fire, and police in Hamilton Township, irrespective of whether the improvements are related to new residential construction. Secondly, present residents of Hamilton Township receive the benefit of the improvements without any obligation to share in the costs. Finally, there is no reason to believe that new residential construction so overburdens existing parks as to require additional park space, which would be available to all Hamilton Township residents, but funded solely by new construction.

Instead, as Hamilton Township repeatedly emphasizes in the Resolution, "impact fees" will be collected and spent to benefit the entire township. Consequently, this court must conclude, as the *Westlake* court concluded, "[w]hile it is laudable to seek such a recreational program for the city and its residents, costs associated with that program should be borne by all residents, not merely those purchasing new construction, for the benefits of such a program run

---

<sup>19</sup> Id.

to all residents.”<sup>20</sup> Clearly then, the Resolution is a tax. Since Ohio townships have not been delegated the authority to tax in this manner, the tax must be stricken.

Nevertheless, the trial court found this tax to be a “fee,” and thus permissible. It did so by concluding that (1) the impact fees did not exceed the cost of making any particular improvement; (2) it is not apparent that the fees are inflated to cover services that are used by un-assessed residents; (3) there are “sufficient benefits provided to those who pay the impact fee;” and (4) there has been no showing that the fees will enhance the value of existing services to existing residents.<sup>21</sup> However, these factors are not determinative of whether the assessment is a tax or a fee.

The determinative factors are articulated above, and they establish the following: when one is assessed for the benefit of the community, that assessment is a tax. To the extent that the court’s decision could be read to have addressed this factor through its conclusion that there is now showing that the fee benefit existing residents, the Court’s conclusion is utterly false. First, the Resolution is replete with language indicating that the entire township will benefit from the assessments. Secondly, it is *self-evident* that existing residents benefit from the lessened strain on township facilities and services, which means greater availability of those services to each of

---

<sup>20</sup> Id.

<sup>21</sup> September 30, 2009 Entry Granting Partial Summary Judgment to Defendants, pp. 13-14. The Court may have also relied on the fact that revenue collected from the assessments is not kept in the township’s general fund. However, this issue should not be dispositive - - otherwise townships could simply tax citizens and avoid constitutional scrutiny through imaginative account management. Moreover, the collections DO actually appear to inure to ostensibly general funds: for example the parks fund is not the township’s general treasury, but is a fund that is spread throughout the township, without regard to where the money comes from. This is tantamount to a “general fund for parks.” Put another way, even if the nominal purpose of the fund is to build new parks “to serve the new population,” the township may build new parks somewhere where there is no new population. At that point, the assessment take the form of a redistributive tax, paid for by A for the benefit of B, rather than that of a user fee.

them. Consequently, when the curtain is pulled back on Hamilton Township, its nominally-labeled impact fee is, in fact and law, an unlawful tax.

**Proposition of Law No. II: Hamilton Township’s purported “impact fee,” as a tax, results in a lack of uniformity in assessment of property, and is thus unconstitutional.**

Due to its lack of uniform application, Hamilton Township’s tax violates the Ohio Constitution. State and federal constitutional provisions, viz. Section 2 of Article XII of the Ohio Constitution and Section 1 of the Fourteenth Amendment to the United States Constitution, require uniformity in the mode of assessment. Pursuant to these provisions, real property must be assessed on the basis of the same uniform percentage of actual value.<sup>22</sup> Citizens already in the township have an impact, but are not required to pay, since the tax only applies to new development after the date of its passage.<sup>23</sup> Meanwhile, holding aside Hamilton Township’s convoluted and non-obligatory leviathan of potential credits, under the Resolution, a single family homeowner who has participated new residential construction is taxed the remarkable total of \$6,153 beyond what is paid by a preexisting resident.<sup>24</sup> Thus the “impact fees” are not applied uniformly to all citizens.

In *Town Properties, Inc. v. Fairfield*, the Supreme Court of Ohio found a recreational tax on building permits constitutional because the *existing* residents in Fairfield were also charged with an equal share of the cost for the acquisition, development, maintenance and operation of publicly owned recreation sites and facilities.<sup>25</sup> The statutory scheme in *Fairfield* required “\* \* \*

---

<sup>22</sup> *Black v. Bd. Of Revision of Cuyahoga Cty.* (1985), 16 Ohio St.3d 11.

<sup>23</sup> *Id.*, at Section III(1).

<sup>24</sup> \$3,964 (roads), \$335 (fire), \$206 (police), \$1,648 (parks).

<sup>25</sup> *Town Properties, Inc. v. Fairfield* (1977), 50 Ohio St.2d 356.

an appropriation equal to the revenue derived from the subject tax to be made annually from the general fund to the recreational capital improvement fund.”<sup>26</sup>

Accordingly, absent a matching amount on present residents, the township’s Park and Recreational Improvement Fee places an unfair and unreasonable burden on developers and purchasers of new construction. Therefore, the resolution is not only impermissible as one township’s back door attempt at taxation, but even if the township had such taxing authority, the mode of assessment is anything but uniform.

In conclusion, Justice Pfeiffer’s commentary on this exact subject rings true:

Here, however, [the government] is attempting to force developers to pay for improvements or additions to infrastructure as *quid pro quo* for developing a site, even when the improvements or additions occur beyond the property lines of the development. This strikes me as a tax, and since it is not applied uniformly, as an unconstitutional tax.<sup>27</sup>

With respect to Hamilton Township’s assessment, this Court must concur, and accordingly, it must strike the “impact fee” tax, due to its failure to uniformly apply.

**Proposition of Law No. III: No deference is due to Hamilton Township’s (1) pretextual labeling of its tax as a “fee,” or (2) avowed purpose in imposing the tax.**

Finally, Hamilton Township masquerades its tax on new developers and homeowners by indicating that it has performed studies and used engineers to establish an impact fee system. Apparently based on these studies, the Township concludes that “there is both a rational nexus and a rough proportionality between the development impacts created by each type of new

---

<sup>26</sup> Id.

<sup>27</sup> *Home Builders Assn. of Dayton & the Miami Valley v. Beavercreek* (2000), 89 Ohio St.3d 121, 729 N.E.2d 349.

development covered by this resolution and the impact fees that such a development will be required to pay.”<sup>28</sup>

These studies and their findings are entitled to no deference, since the question of whether this assessment is a tax or a fee is a legal issue. As the Ohio Supreme Court has observed, “[w]e must examine the substance of the assessments and not merely their form.”<sup>29</sup>

As just one example, the disingenuousness of the Resolution’s claim to be an “impact fee” is exhibited by Section VI(6) of the Resolution, which exempts “tax-revenue generating enterprises” from the fee. That section permits the township itself to pay the fee out of its general revenue (revenue that will come, in part from the impact fees on new homeowners and developers). This arrangement plainly illustrates the Resolution to be a revenue-generating mechanism, rather than a system of fees to account for the impact of new development.

Rubber-stamping Hamilton Township’s legislative findings would effectively invite every township in Ohio to levy unconstitutional taxes against their residents by merely labeling the taxes “impact fees.” The Court must instead lend Hamilton Township’s unconstitutional tax the scrutiny it deserves. Upon doing so, it should conclude that the Resolution levies a tax, and an unconstitutional one at that.

### **CONCLUSION**

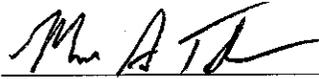
Based on the foregoing, Hamilton Township’s tax, paraded as an “impact fee,” is invalid, and this Court must reverse the lower courts decisions.

---

<sup>28</sup> Id., at Factual Finding (14).

<sup>29</sup> *State ex rel. Petroleum Underground Storage Tank Release Comp. Bd. v. Withrow* (1991), 62 Ohio St.3d 111, 579 N.E.2d 705.

Respectfully submitted,



Maurice A. Thompson (0078548)  
1851 Center for Constitutional Law  
208 E. State St.  
Columbus, Ohio 43215  
Tel: (614) 340-9817  
Fax: (614) 365-9564  
[MThompson@OhioConstitution.org](mailto:MThompson@OhioConstitution.org)

Tax Foundation  
2001 L Street, N.W., Suite 1050  
Washington, DC 20036  
Tel: (202) 464-6200  
Fax: (202) 464-6201  
[www.TaxFoundation.org](http://www.TaxFoundation.org)

*Amici Counsel for Appellants*

**CERTIFICATE OF SERVICE**

A copy of the foregoing was served upon the following this 14<sup>th</sup> day of February, 2011.

Joseph L. Trauth, Jr.  
Thomas M. Tepe, Jr.  
Charles M. Miller  
Keating, Muething & Klekamp PLL  
One East Fourth Street, Suite 1400  
Cincinnati, OH 45202  
Tel: (513) 579-6400  
Fax: (513) 579-6457

Richard A. Paolo  
Kevin L. Swick  
Aronoff Rosen & Hunt  
425 Walnut Street, Suite 2200  
Cincinnati, OH 45202  
Tel: (513) 241-0400  
Fax: (513) 241-2877

*Attorneys for Appellants*

Wilson G. Weisenfelder, Jr.  
James J. Englert  
Lynne M. Longtin  
Rendigs Fry Kiely & Dennis, LLP  
One West Fourth Street, Suite 900  
Cincinnati, OH 45202  
Tel: (513) 381-9200  
Fax: (513) 381-9206

Warren J. Ritchie  
Thomas Keating  
Keating Ritchie  
5300 Socialville-Foster Rd.  
Mason, OH 45040  
Tel: (513) 891-1530  
Fax: (513) 891-1537

*Attorneys for Appellees*



Tyler W. Kahler (0085932)  
1851 Center for Constitutional Law