

ORIGINAL

IN THE SUPREME COURT OF OHIO

THE DREES COMPANY, et al.,	:	CASE NO.10-1548
	:	
Plaintiffs-Appellants,	:	On Appeal from the Warren County Court of
	:	Appeals, Twelfth Appellate District
-vs-	:	
	:	Ct. of App. No. 2009-11-150
HAMILTON TOWNSHIP, OHIO,	:	
et al.,	:	
	:	
Defendants-Appellees.	:	

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... iii

STATEMENT OF FACTS ..... 1

    ORIGIN OF DISPUTE AND PROCEDURAL HISTORY ..... 2

**APPELLEES’ COUNTER-STATEMENT OF PROPOSITION OF LAW NO. 1 ..... 5**

**A LIMITED HOME RULE TOWNSHIP HAS THE STATUTORY AUTHORITY  
    TO IMPOSE AN IMPACT FEE ..... 5**

        A.    STANDARD OF ANALYSIS OF CONFLICT BETWEEN HOME RULE  
            TOWNSHIP RESOLUTION AND STATUTE ..... 7

        B.    NEITHER FIELD PRE-EMPTION NOR CONFLICT BY  
            IMPLICATION ARE APPLICABLE ..... 11

        C.    THE RESOLUTION DOES NOT CONFLICT WITH OHIO  
            GENERAL LAWS ..... 13

            1.    The Hamilton Township Impact Fee Is an Exercise  
                of Self-Government and the Police Power ..... 13

            2.    The Claimed Conflicting Statutes Are Not  
                General Laws ..... 16

            3.    There Is No Conflict Between the Resolution and  
                Any Ohio Statute ..... 19

        D.    THE RESOLUTION ENACTS A PROPER FEE, NOT AN IMPERMISSIBLE  
            TAX ..... 23

            1.    The Impact Fee Resolution Is Carefully Tailored to  
                Comply With the Factors Governing Fees ..... 24

            2.    The Resolution Impact Fee Does Not Have the  
                Attributes of a Tax ..... 29

            3.    The Impact Fee Does Not Impose a Duplicative  
                Charge for Duplicative Services ..... 34

4.	The Impact Fee Is Not a General Revenue-Raising Measure, but a Means to Provide a Specific Benefit to Payers of the Fee through Administration of the Separate Impact Fee Accounts .....	35
5.	Ohio Law Upholds Properly Ordered Impact Fees .....	37
E.	THE RESOLUTION DOES NOT ALTER THE STRUCTURE OF GOVERNMENT .....	42
F.	THE RESOLUTION DOES NOT ATTEMPT TO ESTABLISH SUBDIVISION REGULATIONS .....	44
	<b>APPELLEES' COUNTER-STATEMENT OF PROPOSITION OF LAW NO. 2 .....</b>	<b>44</b>
	<b>A PARTY'S STIPULATION OF FACT AS TO THE PURPOSE OF A TOWNSHIP RESOLUTION BINDS THE PARTIES TO THE FACTUAL NATURE OF THE STATED PURPOSE OF THE RESOLUTION .....</b>	<b>44</b>
	CONCLUSION .....	48
	PROOF OF SERVICE .....	51

## TABLE OF AUTHORITIES

### CASES

<i>American Landfill, Inc.</i> (6 <sup>th</sup> Cir. 1999), 166 F.3d 835 .....	33, 35
<i>Amherst Bldrs. Ass'n v. City of Amherst</i> (1980), 61 Ohio St. 2d 345, 402 N.E.2d 1181 .....	40
<i>Building Ass'n of Cleveland v. City of Westlake</i> (1995), 103 Ohio App. 3d 546, 660 N.E.2d 501 .....	13, 27, 32, 37
<i>Call v. City of West Jordan</i> (Utah 1979), 606 P.2d 217 .....	40
<i>Canton v. State</i> , 95 Ohio St. 3d 149, 2002-Ohio-2005, 766 N.E.2d 963 .....	12, 13, 15, 16, 17, 18, 19, 48
<i>City of Portsmouth v. McGraw</i> (1986), 21 Ohio St. 3d 117, 488 N.E.2d 472 .....	13
<i>Clark v. Stewart</i> (1933), 126 Ohio St. 263, 185 N.E. 71 .....	47
<i>Clermont Environmental Reclamation Co. v. Wiederhold</i> (1982), 2 Ohio St. 3d 44, 442 N.E.2d 1278 .....	18, 20
<i>Cleveland v State</i> , 128 Ohio St. 3d 135, 2010-Ohio-6318, 924 N.E.2d 370 .....	12, 13, 17
<i>Drees v. Hamilton Twp.</i> , 12 Dist. No. CA 2009-11-150, 2010-Ohio-3473 .....	45
<i>Dsuban v. Union Twp. Bd. of Zoning Appeals</i> (2000), 140 Ohio App. 3d 602, 748 N.E.2d 597 .....	10
<i>Eastern Diversified Properties, Inc. v. Montgomery Cty.</i> (1990), 319 Md. 45, 570 A.2d 850 .....	38, 39, 40
<i>Granzow v. Bureau of Support of Montgomery Cty.</i> (1990), 54 Ohio St. 3d 35, 560 N.E.2d 1307 .....	28, 32
<i>Hillis Homes, Inc. v. Snohomish Cty.</i> (Wash. 1982), 97 Wn. 2d 804, 650 P.2d 193 .....	36

*Home Builders Ass'n of Dayton & the Miami Valley v. City of Beavercreek*  
(Feb. 12, 1996) Green Cty. CCP, 1996 WL 812607 ..... 29, 39

*Home Builders Ass'n of Dayton & the Miami Valley v. City of Beavercreek*  
1998 WL 735931 (Ohio App. 2d Dist) ..... 39

*Homebuilders Ass'n of Dayton and Miami Valley v. City of Beavercreek* (2000),  
89 Ohio St. 3d 121, 2000-Ohio-115,729 N.E.2d 349 ..... 31, 32, 39

*Home Builders Ass'n of City of North Logan* (1999), 903 P.2d 561 ..... 32-33

*Homebuilders & Contractors Ass'n of Palm Beach City, Inc. v. Board of Cty.*  
*Comm'rs* (Fla. 4<sup>th</sup> App. Dist. 1984), 446 So. 2d 140 ..... 41

*Homebuilders Ass'n of Greater Des Moines v. City of West Des Moines*  
(Iowa 2002), 644 N.W.2d 339 ..... 30, 31, 35, 38

*Homebuilders Ass'n of Mississippi v. City of Madison, Miss.* (5<sup>th</sup> Cir. 1998),  
143 F.3d 1006 ..... 30

*Mayor and Bd. of Alderman, City of Ocean Springs v. Homebuilders*  
*Ass'n of Mississippi, Inc.* (2006), 932 So.2d 44 ..... 30, 33, 38

*Mendenhall v. Akron*, 117 Ohio St. 3d 33, 2008-Ohio-270,  
881 N.E.2d 255 ..... 7-8, 12, 13, 15, 16  
19, 20

*Salt Lake Ct. v. Board of Education* (Utah 1991), 808 P.2d 1056 ..... 29

*Singleton v. City of Hamilton* (1986), 33 Ohio App. 3d 187, 515 N.E.2d 8 ..... 20

*State ex rel Cydrus v. Ohio Public Employees Retirement System*, 127 Ohio St. 3d 257,  
2010-Ohio-5770 ..... 48

*State ex. rel. Petroleum Underground Storage Tank Release Comp. Bd. v.*  
*Withrow* (1991), 62 Ohio St. 3d 111, 379 N.E.2d 705 ..... 2-3, 29, 31, 33, 35  
41, , 42

*State ex rel. Waterbury Development Co. v. Witten* (1978), 54 Ohio St. 412,  
377 N.E.2d 505 ..... 37

*State v. Martin* (1958), 168 Ohio St. 37 ..... 17

<i>Superior Hauling, Inc. v. Allen Twp. Zoning Bd. Of Appeals</i> , 72 Ohio App. 3d 313, 2007-Ohio-3109, 874 N.E.2d 1216 .....	10-11
<i>West Chester Twp. Bd. of Trustees v. Speedway SuperAmerica, LLC</i> , 12 <sup>th</sup> Dist. No. CA 2006-05-104, 2007-Ohio-2844 .....	10
<i>Westfield Ins. Co. v. Michael Hunter</i> (Ohio App. 12 <sup>th</sup> Dist.), 2009 WL 3415894, 2009-Ohio-5642 .....	46
<i>Williams v. Goodwin</i> (3d App. Dist 1950), 90 Ohio App. 159, 104 N.E.2d 81. ....	47
<i>Yorkavitz v. Columbia Twp. Bd. of Trustees</i> (1957), 166 Ohio St. 349, 142 N.E.2d 655 .....	9, 10

#### STATUTES/CONSTITUTIONAL PROVISIONS

U.S. Const., VI, Clause 2 .....	8
Oh. Const., II, § 1 .....	17
Oh. Const., XVIII .....	17
Oh. Const., XVIII, § 3 .....	7, 9, 11, 13, 14
R.C. 351.06(J)(1) .....	8
R.C. Chapter 503 .....	7
R.C. 503.52(A) .....	8, 9
R.C. 503.60(A) .....	9
R.C. Chapter 504 .....	1, 5, 6, 7, 10, 12, 16, 19, 20, 48
R.C. 504.04 .....	1, 2, 5-6, 9, 10, 13, 14, 15, 16, 23, 24, 48
R.C. 504.04(A) .....	1, 6
R.C. 504.04(A)(1) .....	6, 23, 43, 44
R.C. 504.04(A)(2) .....	11
R.C. 504.04(B) .....	6, 14
R.C. 504.04(B)(3) .....	14, 44
R.C. 504.04(B)(4) .....	14
R.C. 504.04(B)(5) .....	14
R.C. 504.04(B)(6) .....	14
R.C. 504.04(B)(7) .....	14
R.C. 504.04(B)(4) .....	10
R.C. 504.06 .....	23
R.C. 504.07 .....	23
R.C. 504.21 .....	10

R.C. Chapter 505 .....	14, 16
R.C. 505.03 .....	23
R.C. 505.39 .....	22
R.C. 505.511 .....	22-23
R.C. Chapter 511 .....	14, 16, 22
R.C. 511.27 .....	22
R.C. 511.33 .....	22
R.C. Chapter 571 .....	16
R.C. 711.10 .....	44
R.C. 715.44 .....	20
R.C. 4582.06 .....	9
R.C. 4582.31 .....	9
R.C. Chapter 5051 .....	22
R.C. Chapter 5517 .....	14
R.C. Chapter 5547 .....	12, 19
R.C. Chapter 5571 .....	12, 14, 19
R.C. 5571.15 .....	21
R.C. Chapter 5573 .....	12, 15, 16, 19
R.C. 5573.07 .....	21
R.C. 5573.07(B)(2) .....	21
R.C. 5573.10 .....	22
R.C. 5573.11 .....	22
R.C. 5573.21 .....	21
R.C. 5573.211 .....	21-22
126 H.B. 299 .....	3

#### ATTORNEY GENERAL OPINIONS

1997 Ohio Atty. Gen. Ops. No. 1997-022 .....	9, 10
--	-------

#### OTHER

Black's Law Dictionary, 5 <sup>th</sup> Ed. 1979 .....	2
Blaesser & Kentopp, <i>Impact Fees: The Second Generation</i> , 38 J. Urb. & Contemp. L. 55, 63 (1990) .....	29
Spitzer, <i>Taxes v. Fees: A Curious Confusion</i> , 38 Gonz. L. Rev. 335 (2003) .....	30

## **STATEMENT OF FACTS**

This case concerns the authority of an R.C. Chapter 504 Limited Home Rule Township to enact an impact fee Resolution imposing a one-time charge on new structures to provide new owners with the existing levels of service and infrastructure in the face of additional demand from those residents and users. Hamilton Township was given such authority under the RC § 504.04 grant of self-government and police powers. The Resolution is not in conflict with the general laws of Ohio. Further, Hamilton Township recognizes that it may not under § 504.04(A) impose a tax unless authorized by the legislature. The impact fee is a proper fee regulating growth in the Township, and not an improper tax.

Appellants' analysis of the authority issue is flawed by the consistent disregard of the particular authority granted to Home Rule Townships in Ohio. Appellants' argument frequently confuses the authority of a Home Rule Township with that of a traditional non-home rule township. In essence, Appellants ignore the grant of self-government and exercise of police powers set forth in Chapter 504; instead, Appellants repeatedly assert the need for a specific statute enabling a Home Rule Township to enact an impact fee. Appellants also mistakenly claim that Appellees seek to exercise the powers of a municipality, when Hamilton Township merely exercises its statutory powers of policing and self-government – powers that are analogous but not identical to the constitutionally-granted police powers and self-government powers of municipalities.

The difference between an impact fee and a tax is well developed in the case law: the Hamilton Township Resolution falls clearly in the impact fee category when analyzed under these factors. As the Court of Appeals correctly noted in its Opinion, 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.” (Appx. - 35, Stipulation ¶ 27) This purpose, as the Court of Appeals further analyzed, is carried out in the structure and operation of the Resolution, such that the Resolution is a proper impact fee.

#### **ORIGIN OF DISPUTE AND PROCEDURAL HISTORY**

Appellants’ brief is broadly accurate in its account of the factual and procedural background. However, exception must be taken as to the following matters:

Appellants mischaracterize a statement made by Hamilton Township in its Motion for Summary Judgment to make it appear that Hamilton Township made a judicial admission that the Resolution is a general revenue-raising measure in the nature of a tax. Appellants state, “The Township has admitted in this litigation that it enacted the fees to boost revenues.” (Appellants’ Merit Brief at 3) The actual statement in Hamilton Township’s Motion for Summary Judgment placed the monies, i.e., “revenues,” squarely in the framework of a regulatory measure:

[T]he Township developed the impact fee system as a way to fairly and reasonably raise revenues to maintain existing services and of roads, police protection, fire protection and parks, that would otherwise be compromised by the significant growth of new development in the Township. ( Hamilton Township Motion for Summary Judgment at 3, Appellees’ Supplement, hereinafter “Appellees’ Supp.” at 3)

“Revenue” is not a magic term which converts any government action raising monies into a tax. Black’s defines revenue as follows: “As applied to the income of a government, a broad and general term, including *all public monies which the state collects and receives, from whatever source and in whatever manner.*” Black’s Law Dictionary, 5<sup>th</sup> Ed. 1979. Taxes, fees, fines, assessments, duties, customs, excises, all raise monies, or revenues. As Ohio courts have repeatedly cautioned, the substance, not the form or name of a measure, controls whether it is a fee or a tax. *State ex. rel.*

*Petroleum Underground Storage Tank Release Comp. Bd. v. Withrow* (1991), 62 Ohio St. 3d 111, 117, 379 N.E.2d 705.

In a similar misdirection, Appellants point to the failure of House Bill 299 in the 126<sup>th</sup> General Assembly, which would have “authorized township trustees to collect impact fees.” (Appellants’ Merit Brief at 5, 22) H.B. 299 would have authorized not only townships, *but counties and even school districts*, to enact impact fees. As argued below, Home Rule Townships have such authority under R.C. 504.04 and do not need additional specific enabling legislation. Appellants speculate that the failure of the Bill indicates two “key points”:

First, absent legislative action, townships lack the authority to impose impact fees. Second, if it had passed, House Bill 299 would have enacted the proposed legislation under Title 57, the state taxation code.” (Appellants’ Merit Brief at 5)

Speculation as to the cause of the failure of a bill is notoriously unreliable. Other guesses can be made which are directly contrary to Appellants’ speculation. The failure of the Bill has no effect upon the R.C. 504.04 grant of self-government and police powers to Home Rule Townships.

Appellants’ Merit Brief introduces into this case, for the first time, new “factual” material concerning lien affidavits relating to the Impact Fee. (Appellants’ Merit Brief at 23) This factual matter and the dependent legal argument are not part of the record in this case, are not properly before this Court.

Appellant’s failure to distinguish between the powers of a Home Rule Township and a non-home rule township is evident in the following misquotation of the Trial Court Opinion that appears in the Merit Brief:

The Trial Court also ruled that even though the 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. (Appellants' Merit Brief at 5) (emphasis added)

However, the Trial Court does not state anywhere in the Opinion that the provisions in the Revised Code set forth "the exclusive means to generate" revenues for those purposes. Rather, the Trial Court stated that as a Home Rule Township, 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'" the general law. (Appx - 10, Entry at 7) The Trial Court analyzed the conflict issue and found 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," i.e., that the Resolution is not in conflict with the general law. (Appx. - 9-10, Entry at 6-7) The Trial Court never found that the provisions provide the "exclusive means" for such funding on the part of either a non-home rule township or a Home Rule Township. Rather, the Trial Court recognized, "Nothing in these sections expressly prohibits the use of alternative methods for funding road improvements" and further recognized that "the Supreme Court has declined to adopt a field pre-emption analysis for 'conflict' in these case, and this Court declines to adopt such an analysis here." (Appx. - 11, Entry at 8) Under the Trial Court's Opinion, other means of funding are available to a Home Rule Township in the exercise of its police powers. (Appx. - 10, 13, Entry at 7, 10) The Court of Appeals affirmed this analysis. (Appx. - 24, 27-28, Entry at 5, 8-9) Appellants' suggestion that the Trial Court Opinion is illogical arises only out of Appellant's refusal to recognize the grant of limited self-government and police powers to Home Rule Townships.

Appellants pay lip service to the fact that the Limited Home Rule Township powers are greater than those possessed by a traditional township. The statute authorizes "all powers of self-

government” and the power to adopt and enforce “local police, sanitary and similar regulations” so long as not “in conflict with general laws” or otherwise limited in Chapter 504. However, under Appellants’ tortured analysis, a Home Rule Township’s self-government and police power essentially evaporates under the weight of perceived limitations. While reluctantly conceding the concept of self-government and exercise of police power, Appellants’ argument in effect acknowledges no Home Rule Township power exists unless a given measure is enabled by a specific statute, as is necessary for traditional non-home rule townships. Home Rule Township self-government is “pre-empted,” under Appellants’ analysis, by the existence of specific statutes enabling traditional non-home rule townships to take certain measures. Appellants render Chapter 504 essentially superfluous.

**APPELLEES’ COUNTER-STATEMENT OF PROPOSITION OF LAW NO. 1.**

**A LIMITED HOME RULE TOWNSHIP HAS THE STATUTORY AUTHORITY TO IMPOSE AN IMPACT FEE.**

All parties in this dispute agree that a Limited Home Rule Township such as Hamilton Township may not impose a tax absent statutory authority. The Resolution is not a tax, as explained below. Appellants argue more fundamentally, however, that even if the Resolution should fall in the category of a fee rather than a tax, it is still invalid because Hamilton Township has no authority to enact even a proper impact fee.

Chapter 504 of the Revised Code which provides for the Limited Home Rule Township form of government, was created *not* through “a stroke of a pen,” as Appellants maintain, but through the constitutional process of legislation – the product, one might say, of a “general assembly” of pens wielded by state senators, representatives, and others engaged in the political process. R.C. 504.04

provides a broad grant of authority to a township that adopts a Limited Home Rule form of government. It may:

- 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 . . .;”  
and
- 2) “adopt and enforce . . . local police, sanitary and other similar regulations that are not in conflict with general laws.”

R.C. 504.04(A) and (B) also contain certain enumerated limitations upon the powers of self-government such as the prohibition upon taxes other than those authorized by general law. Nor is a Limited Home Rule Township allowed to create a criminal offense, impose civil fines, establish or revise subdivision regulations, road construction standards, building standards, building codes, water or sewer regulations, except as authorized elsewhere in Chapter 504, or establish regulations affecting hunting, fishing or use of firearms. See generally, R.C. 504.04.

Subject to the limitations in Section 504.04, a Home Rule Township can self-govern and exercise police powers as it sees fit. Unlike a non-home rule township, a Home Rule Township does not require the enabling authority of a specific Ohio statute to allow it to take ordinary self-governing measures. There is no statute precluding a township from enacting an impact fee. Thus, the posture of a Home Rule Township with regard to a proper impact fee is different from its power of self-government with regard to a tax. Section 504(A)(1) limits a Home Rule Township’s power of self-government in that it “shall enact no taxes other than those authorized by general law.” Thus, a Home Rule Township may raise non-tax revenues without a specific authorizing statute. It is allowed to do so by the general grant of authority in R.C. 504.04, subject to the limitation that it is not in conflict with general law.

The Trial Court Opinion by Judge Flannery succinctly described the different powers of a traditional township, a Home Rule Township, and a municipality:

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.’ [quoting R.C. 504.01] Municipalities, in contrast, do not derive their authority from statutes, but from the Ohio Constitution. O. Const. XVIII, §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. Home Rule Townships, on the other hand, may find exercise of both police power and power of self-government circumscribed by ‘general laws.’ (Appx.- 7-8, Entry at 4-5).

The Chapter 504 Limited Home Rule Government provides Hamilton Township, like Ohio municipalities, but unlike traditional Chapter 503 townships, with the authority to enact an impact fee.

**A. STANDARD FOR ANALYSIS OF CONFLICT BETWEEN HOME RULE TOWNSHIP RESOLUTION AND STATUTE.**

Appellants’ challenge to Hamilton Township’s enactment of the impact fee presents a straightforward issue regarding Hamilton Township’s authority: whether this exercise of its police powers (or self-government) conflicts with “the general laws” of Ohio. Appellants’ conflict and pre-emption argument, as well as the suggestion that the Court should “adopt a different standard of review” for analysis of conflict between township resolutions and Ohio general law, unnecessarily complicates and confuses a straightforward conflict analysis. The Trial Court and Court of Appeals applied the uncomplicated “contrary directives” test used by this Court to determine whether an ordinance conflicted with a statute, in *Mendenhall v. Akron*, 117 Ohio St. 3d 33, 40, 2008-Ohio-270,

881 N.E.2d 255, 262: “whether the [resolution] permits or licenses that which the statute forbids and prohibits, and vice versa.” (Appx. - 10, Entry at 7) Appellants, however, avoid this straightforward test.

Appellants assert that there are three kinds of conflict analysis in Ohio case law, because there are three areas of conflict between laws of separate governmental entities. (Appellants’ Merit Brief at 9-10) Thus, federal law may pre-empt state law under Article VI, Clause 2, of the Constitution, that is, the Supremacy Clause. And municipal law may conflict with state law, though Appellants warn that Supremacy Clause pre-emption is “incongruent with” municipal Home Rule amendment conflict analysis. (Appellants’ Merit Brief at 10) The present matter, as trumpeted by Appellants, begins “a third strand of conflict analysis” between state law and Home Rule Township resolutions and begs for some kind of “differing standard of review.” (Appellants’ Merit Brief at 10) Appellants do not indicate whether additional strands of conflict analysis should be fabricated for the interplay between non-home rule township resolutions and state law, or between county resolutions and state law, or charter cities and state law, nor do Appellants indicate what standard of review might apply.

How many “strands” of conflict analysis should there be? Title 3 of the Revised Code allows county commissioners to create a convention facility’s authority which is empowered to “adopt rules, *not in conflict with general law*, governing the use of its property . . . and the conduct of its employees and the public.” R.C. 351.06(J)(1) (emphasis added). Title 5 provides non-home rule townships with the authority to “exercise all powers of local self-government regarding the operation of adult entertainment establishments . . . and to adopt and enforce . . . any local police, sanitary and similar regulations regarding the operation of adult entertainment establishments *that are not in*

*conflict with general laws.*” R.C. 503.52(A) (emphasis added). See also R.C. 503.60(A) providing townships with similar authority with regard to all powers of local self-government and police regulations regarding the residency of sexually-oriented offenders “that are not in conflict with general laws.” In R.C. 4582.06, multi-jurisdictional port authorities are given the power to “adopt rules, *not in conflict with general law,*” governing the use and safeguarding of their property, conduct of employees, etc., and in 4582.31 may “adopt rules, *not in conflict general laws,*” relating to the performance of duties and execution of their powers (emphasis added).

Appellants’ lengthy and taxing conflict analysis is an attempt to establish greater deference toward municipal police powers in possible conflicts with state law, and less deference to Hamilton Township’s exercise of police powers. The municipal police power exercise is derived from the Constitution, with a limitation that the exercise not be “in conflict with the general laws.” Oh. Const., Article XVIII, Sec. 3. Appellants contrast this with the grant of the police power exercise to townships, confusing the very different powers of Home Rule Townships and non-home rule townships. Thus, Appellants state, “a Limited Home Rule Township depends exclusively on legislative grant for all its powers.” (Appellants’ Merit Brief at 11) Appellants curiously cite as authority for this proposition the 1957 non-home rule case of *Yorkavitz v. Columbia Twp. Bd. of Trustees* (1957), 166 Ohio St. 349, 351, 142 N.E.2d 655. *Yorkavitz* was decided almost 45 years prior to the creation of the Limited Home Rule Township form of government! (See R.C. 504.04, effective date 9-5-2001) Appellants also ignore that a legislative grant of Home Rule self-government has been made.

Similarly, Appellants cite Ohio Attorney General Opinion No. 1997-022 for the proposition that absent specific enabling legislation, a township may not charge impact fees to recoup costs of

damage from drainage and soil erosion, or by implication, to recoup costs of infrastructure for new development. (See Appellants' Merit Brief at 20-21) Appellants entirely ignore that the OAG Opinion is necessarily limited to non-home rule townships, since it was issued four years prior to the Home Rule grant of powers that obviates the need for specific enabling legislation. Directly contrary to Appellants' argument is the inclusion in R.C. 504.04 of a limitation upon the plenary grant of power for precisely the matter addressed by Opinion 1997-022. R.C. 504.04(B)(4) precludes a Home Rule township resolution from "establish[ing] or revis[ing] . . . urban sediment rules, or storm water and drainage regulations, except as provided in section 504.21 of the Revised Code." The specific limitations in R.C. 504.04 are the only exceptions to the general grant of self-government and police power made in the statute. The power to enact an impact fee is part of the R.C. 504.04 grant of power to Home Rule Townships.

Further, Appellants fail to distinguish between the plenary grant of police power to Home Rule Townships in Chapter 504 and the measure-by-measure enablement that exists for non-home rule townships to exercise a given police power. Thus, Appellants cite the proposition that "township police powers are limited to those the General Assembly expressly delegates by statute," again citing the *Yorkavitz* case, which necessarily addresses *only* traditional non-home rule townships. (See Appellants' Merit Brief at 12) In fact, none of the township cases cited by Appellants in their discussion of the "road to challenging Limited Home Rule Township actions" (Appellants' Merit Brief at 11) involve the exercise of a Home Rule power by a township. See *West Chester Twp. Bd. of Trustees v. Speedway SuperAmerica, LLC*, 12<sup>th</sup> Dist. No. CA 2006-05-104, 2007-Ohio-2844 (Appellants' Merit Brief at 12); *Dsuban v. Union Twp. Bd. of Zoning Appeals* (2000), 140 Ohio App. 3d 602, 608-609, 748 N.E.2d 597 (Appellants' Merit Brief at 12); *Superior*

*Hauling, Inc. v. Allen Twp. Zoning Bd. Of Appeals*, 72 Ohio App. 3d 313, 2007-Ohio-3109, 874 N.E.2d 1216 at ¶ 18. (Appellants' Merit Brief at 12)

Traditional townships can exercise a given police power only when specifically delegated by statute. But that is not true of Home Rule Townships, which have a plenary grant of police powers and self-government not in conflict with the general laws. R.C. 504.04(A)(2). The Home Rule Township statutory grant is analogous to the municipal constitutional grant to exercise police powers so long as not "in conflict with the general laws." Oh. Const., Article XVIII, Sec. 3. Appellants' conflicts analysis ignores the general power possessed by Home Rule Townships and forces the conclusion that successful challenges to (non-home rule) township are in "sharp contrast with the deference given to cities" and "is the starting point for this analysis." (Appellants' Merit Brief at 12) That is simply incorrect. Appellants have made a wrong turn on the "road to challenging Limited Home Rule Township" action. (Appellants' Merit Brief at 11) While the power of Home Rule Government by Townships is subject by statute to certain limitations not contained in the constitutional Home Rule Government by municipalities, the source of the grant of power does not itself affect the exercise of the respective powers.

**B. NEITHER FIELD PRE-EMPTION NOR CONFLICT BY IMPLICATION ARE APPLICABLE.**

Appellants' conflict analysis argues that field pre-emption or implied conflict is the proper method of analysis in determining whether the impact fee Resolution conflicts with the general laws. (Appellants' Merit Brief at 19-20) Appellants suggest that the statutes which enable action by non-home rule townships are "the only authority under which a township may act" and therefore "form a comprehensive, field occupying structure of law that dictates the means by which townships may

permissibly raise revenue for road, park, police and fire improvements.” (Appellants’ Merit Brief at 20)

Appellants misapprehend their two principal cases cited in support of this argument. First, in *Mendenhall v. City of Akron*, 117 Ohio St. 3d 33, 2008-Ohio-270, 881 N.E.2d 255, citing *Canton v. State*, 95 Ohio St. 3d 149, 2002-Ohio-2005, 766 N.E.2d 963, the Supreme Court expressly declined to apply this analysis of whether an ordinance (or resolution) “will *indirectly* prohibit what a state statute permits or vice-versa.” 117 Ohio St. 3d at 40, 881 N.E.2d at 263 (emphasis added). The Court examined whether the General Assembly indicated that the relevant state statute is to control a subject exclusively and concluded that it does not, because, first, the statute does not expressly signal state exclusivity, and second, there is no indication that the state intended to reserve to itself enforcement of traffic laws through a civil process, which was the matter at issue. *Id.* at 41, 881 N.E.2d at 264.

Appellants cite Ohio Revised Code Chapters 504, 5547, 5571 and 5573 regarding funding and maintenance of roads, parks, police and fire protection as being in conflict with the Resolution. None of these statutes expressly state that the state has exclusivity in those areas. Indeed, Chapter 504 expressly states the contrary, that is, it gives a Limited Home Rule Township express authority to self-govern and exercise its police powers. Nor is there any indication that the state intends to reserve to itself funding for roads, parks, and police and fire protection, as there is no state property tax, nor any state impact fee.

The second case misunderstood by Appellants is *Cleveland v State*, 128 Ohio St. 3d 135, 2010-Ohio-6318, 924 N.E.2d 370, where the Supreme Court found a conflict between a municipal firearms ordinance and a state statute which constituted a “comprehensive statewide legislative

enactment.” Id. at ¶ 17. However, contrary to Appellants’ suggestion, the finding of a statewide comprehensive legislative enactment was not, in itself, a finding that pre-emption existed so as to displace the municipal ordinance. Rather, the comprehensive legislative enactment satisfied one prong of the *Canton-Mendenhall* conflict test, that is, that the statute be “a general law.” It is simply not accurate to state, as Appellants do, that the “*Cleveland* standard” indicates, with regard to the present matter, that “extensive regulation by the Revised Code of the manner in which a township may fund roads, parks, police and fire protection pre-empts the field.” (Appellants’ Merit Brief at 20) As shown below, the purportedly conflicting statutes do not approach the degree of comprehensiveness of the firearm legislation, and do not satisfy the four prongs of the *Canton-Mendenhall* test of a “general law.”

**C. THE RESOLUTION DOES NOT CONFLICT WITH OHIO GENERAL LAWS.**

**1. THE HAMILTON TOWNSHIP IMPACT FEE IS AN EXERCISE OF SELF-GOVERNMENT AND THE POLICE POWER.**

An impact fee related to increased costs for government services as a result of development is an exercise of that political subdivision’s self-government and police powers. See, e.g., *Building Ind. Ass’n of Cleveland v. City of Westlake* (1995) 103 Ohio App. 3d 546, 660 N.E.2d 501 (“it is unquestioned that the provision of recreation services and their facilities is a proper utilization of a municipality’s police powers”); *City of Portsmouth v. McGraw* (1986), 21 Ohio St. 3d 117, 488 N.E.2d 472, syllabus (fee for collection of residential garbage). Home Rule Townships under R.C. 504.04, like municipalities under Article XVIII, Sec. 3 of the Constitution, both have the authority to adopt within their limits “local police, sanitary, and other similar regulations” which “are not in

conflict with general laws.”<sup>1</sup> Neither a municipality nor a Home Rule Township require any further specific statutory provision to enable it to exercise a specific police power. Neither is prevented from acting because there may be other specific statutes allowing a municipality or a Home Rule Township to raise revenue for the exercise of police powers.

A municipality or Home Rule Township has the authority to act so long as it is not in conflict with Ohio’s “general laws;” Home Rule Townships are also subject to the limitations in Section B of R.C. 504.04, which are instructive. There are seven categories which a resolution may not address. The first two relate to criminal offenses and civil fines. The remaining five all involve police power measures which are traditionally the subject of statewide comprehensive legislative enactment, or where the legislature has specifically retained power to itself, or specifically limited the Home Rule Township’s authority in conjunction with existing law: subdivision regulations, road construction standards, storm water and drainage regulations (R.C. 504.04(B)(3)); building standards, building codes and other standard codes (504.04(B)(4)); modifying the powers of a township under any statute pertaining to agriculture or the conservation or development of natural resources (504.04(B)(5)); regulations affecting hunting, trapping, fishing or the possession, use or sale of firearms (504.04(B)(6)); or establishing or revising water or sewer regulations (504.04(B)(7)).

Several of those provisions – those relating to firearms regulations; hunting and fishing regulation; agriculture and natural resources – are in the nature of the comprehensive, field occupying regulatory enactments which Appellants purport to find in Chapters 505, 511, 5517, 5571,

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<sup>1</sup> The language in the township Home Rule provision tracks the language in the municipal Home Rule amendment. R.C. 504.04 does not contain the word “the” before “general laws.” It also provides the additional provision that the police regulation shall not be “otherwise prohibited by Division B” of 504.04

and 5573 as the only means by which a Home Rule Township or non-home rule township may fund improvements to roads, parks, police or fire service. It is notable that in enacting the Home Rule Township law, the legislature did not see fit to prohibit a Home Rule Township from taking action with regard to funding of roads, parks, police and fire protection, other than as set forth in the already existing statutes relating to township funding of improvements. Nor did the legislature limit the self-government or police power authority of a Home Rule Township to already existing township statutes. Of course, such a prohibition would be absurd, since it would negate the Home Rule powers authorized by R.C. 504.04. Yet, that is Appellants' wish.

Appellees argue, in Section A above, that the same standard for conflict analysis should be used for municipal police power issues and Home Rule Township issues. *Mendenhall*, following the Supreme Court case of *Canton v. State, supra*, sets forth a three-part test to evaluate whether a municipality has exceeded powers under the Home Rule Amendment. Under the *Mendenhall* statement of the test, a state statute takes precedence over a local 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.” 117 Ohio St. 3d at 36-37, 881 N.E.2d at 260.

The first factor's distinction between a police power and self-government is only necessary for municipalities since only municipal police power, not self-government, is subject to the provision that it not conflict with general laws.

2. THE CLAIMED CONFLICTING STATUTES ARE NOT GENERAL LAWS.

The second factor in the *Mendenhall* test inquires whether the claimed conflicting statute is a “general law.” General law has a clear meaning in the *Mendenhall-Canton* test to determine conflicts between a municipal ordinance and a state statute. The *Canton* definition of “general laws” should also apply to determine whether a Home Rule Township resolution conflicts with state statute. Under the *Canton* test, none of R.C. Chapters 504, 505, 511, 571, and 5573 are general laws. The Trial Court rejected the application of the *Canton* definition of general law as applicable to a conflict between a Home Rule Township resolution and a statute, and concluded instead that “a general law, for purposes of R.C. 504.04, is any enactment of the Ohio General Assembly.” Appx.-10, Entry at 7) The Court of Appeals did not analyze the meaning of the term “general laws,” but implicitly accepted the Trial Court’s approach when it examined the enumerated statutes for conflict, and found, as did the Trial Court, that there was no conflict. Hamilton Township, while maintaining that the enumerated statutes are not general laws, which would thereby end the conflict analysis, nevertheless, in the alternative, found that there is no conflict between the Resolution and any statute of the Revised Code.

The Supreme Court set forth the factors which must be met for a statute to constitute “a general law” for purposes of municipal Home Rule analysis. The 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 only to grant or limit legislative power of a municipal corporation to set forth police, sanitary or similar regulations*, and (4) proscribe a rule of conduct upon citizens generally.” *Canton*

*v. State*, 95 Ohio St. 3d 149, 2002-Ohio-2005, 766 N.E.2d 963, syllabus, quoted in *City of Cleveland v. State of Ohio*, 2010 WL 539219, 2010-Ohio-6318 at ¶ 13 (emphasis added). This definition of general laws, rather than a definition of any enactment of the General Assembly, applies in municipal ordinance conflict because of the plenary grant of police powers to municipalities under Article XVIII of the Constitution.

The *Canton* definition should also apply to Home Rule Township resolution conflicts because Home Rule Townships have also been provided a plenary grant of police powers under the Home Rule Township statute. The fact that municipalities have their grant of police power through the Constitution, while the Home Rule Townships have their police powers through statute, is not significant. Article II, Sec. 1 of the Ohio Constitution places the police power of the State of Ohio with the General Assembly, such that the legislature may pass laws providing “for the common welfare of the governed.” See *State v. Martin* (1958), 168 Ohio St. 37, 40. See also *Dsuban v. Union Twp. Bd. Of Zoning Appeals* (2000), 140 Ohio App. 3d 602, 608, 748 N.E.2d 597, 601. In Chapter 504, the legislature delegated to Home Rule Townships its power of exercising police powers, within the limits of the township. The Ohio Constitution similarly delegates the exercise of the police power to municipalities, within their limits. Both grants are subject to the limitation that they not conflict with “the general laws.”

The *Canton* definition of general laws recognizes the interests of the largest political entity, that is, the state, in making uniform statewide police regulation enactments with which a municipality or Home Rule Township cannot make conflicting enactments. It also preserves the ability of a Home Rule political subdivision, whether a municipality or township, to enact within its

territorial limits, regulations which may conflict with isolated statewide police regulations which do not form part of a comprehensive, field occupying regulation.

In *Canton*, the Supreme Court looked in particular at the matter of uniform application of a law or statutory scheme throughout the state, examining four Ohio Supreme Court cases – including one township case – where the local enactment was tested against a state statute. 95 Ohio St. 3d at 152-153, ¶¶ 16-19. In one of those cases, *Clermont Environmental Reclamation Co. v. Wiederhold*, the exercise of police power before the court was a *township resolution* prohibiting private landfills in the township. (1982), 2 Ohio St. 3d 44, 45, 442 N.E.2d 1278. The township resolution was tested against an Ohio statute prohibiting the regulation of licensed waste disposal facilities by any political subdivision within the state. *Id.* at 45. The township challenged the constitutionality of the statute on the basis the statute was in conflict with home rule powers granted to municipalities under the Constitution (which the Supreme Court indicated the township would not have standing to raise), and also on the basis that purporting to be a general law, the statute must have uniform application. *Id.* at 48. The Supreme Court found the township did have standing to contest the constitutionality of the law on that basis of uniform application. *Id.* at 48. The Supreme Court held the statute was enacted pursuant to the state’s own police power, and was a general law which “had uniform operation throughout the state” and was therefore constitutional. *Id.* at 50.

In *Clermont Environmental*, which was relied upon by *Canton*, the Supreme Court tested the constitutionality of a statute against a township resolution on exactly the same test of uniform application as was applicable to a municipality. Subsequently, in *Canton*, the Supreme Court adopted the statewide uniform application factor as one part of its definition of “general law.” 95 Ohio St. 3d at 153. Given the origin of the *Canton* test derives from a case testing the

constitutionality of a statute against a conflicting township resolution, the *Canton* definition of “general law” should apply when determining a conflict between a Home Rule Township Resolution and “general law.”

Applying *Canton*, none of the statutes cited by Appellants is in fact a general law. Chapter 504, as Appellants described at length in their Brief, grants and limits the powers of a Limited Home Rule Township. (See Appellants’ Merit Brief at 7) Chapter 5547, 5571, and 5573 address the matter of road improvements, park improvements and creation and maintenance of police and fire protection within the Township. For example, under Chapter 5571, a township may “construct, reconstruct, resurface or improve any public road or part thereof under its jurisdiction.” Chapter 5573 provides the means for the Township to fund such improvements. None of these statutes satisfies prongs (3) and (4) of the *Canton* test. Chapter 504 does not set forth police, sanitary, or similar regulations. Rather, it “grant[s] or limit[s] legislative power of a [Home Rule Township] to set forth police, sanitary or similar regulations.” The statutes for improving and funding road and park improvements and police and fire protection do not themselves set forth police regulations, but grant and limit the Township the power to set forth police regulations. The fourth factor is not satisfied, since plainly, these statutes set forth powers of Home Rule Townships and non-home rule townships, rather than proscribing a “rule of conduct upon citizens generally.”

3. THERE IS NO CONFLICT BETWEEN THE RESOLUTION AND ANY OHIO STATUTE.

But even under the broader definition of “any enactment of the Ohio General Assembly,” there is no conflict per the third *Mendenhall* factor, when applying the test of “contrary directives” employed by the Trial Court: “Does the impact fee resolution permit that which is forbidden by a

statute? Or does it forbid what is expressly allowed by a statute?” *Mendenhall v. Akron*, 117 Ohio St. 3d 33, 40, 2008-Ohio-270. Appellants’ contention that the various statutes, in particular those regarding funding road improvements, are the “only mechanisms” by which Hamilton Township may act in that regard, entirely disregards the self-governing and police power authority of Home Rule Townships to act without specific enabling legislation, as discussed above. The legislature has granted, in R.C. 504, broad authority to Home Rule Townships. The statutory expression of authority to traditional townships to take certain measures does not exclude Home Rule Townships from taking other, not specifically expressed, measures.

The statutes discussed below repeatedly employ the term “*may*” in authorizing township actions. As the Twelfth District Court of Appeals has noted in a case addressing precisely the same issue of possible conflict between a home rule ordinance (municipal) and general law, “When the term ‘may’ is used in a statute, it *generally means that the duty is optional, permissive, or discretionary, and not mandatory.*”<sup>2</sup> *Singleton v. City of Hamilton* (1986), 33 Ohio App. 3d 187, 193, 515 N.E.2d 8 (emphasis added). That meaning applies and is determinative in all the statutes below, which all use the permissive language.

Appellants’ interpretation of the purportedly conflicting statutes for funding of roads, parks, police and fire protection has repeated errors. First, there is the fundamental premise that Chapter 504, in effect, does not exist, and that a Home Rule Township may act only through the “conflicting”

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<sup>2</sup>The rule of construction arose regarding a potential conflict between a home rule municipal ordinance regulating hazardous waste and general state law. The Court characterized the statutes as providing that “a municipality may abate, regulate or prohibit a nuisance within its boundaries.” The Court found, “Because R.C. 715.44 uses the word ‘may’ and in light of *Wiederhold, supra*, we find any duty it imposes on appellee [City of Hamilton] is not mandatory.”

enabling statutes. Second, Appellants ignore the consistent use of the term “may” in the statute, such that a permissive grant of power becomes a mandatory and exclusive grant. Third, Appellants ignore recurrent reference to use of “other funds” which may be used for improvements – an explicit statement by the legislature that there are other methods in addition to the one at issue.

All of these mistakes are particularly apparent in Appellants’ analysis of statutes regarding road improvement funding permitted to townships, whether Home Rule or non-home rule. Appellants argue R.C. §§ 5571.15 and 5573.07 are the “only mechanisms” Hamilton Township may employ. But nothing in the language supports that. The language in R.C. 5571.15 is permissive, not preclusive: “The Board of Township Trustees *may* . . . take the necessary steps to construct . . . or improve roads” and “[t]he cost thereof *may* be paid by any of the methods provided in § 5573.07.” R.C. 5571.15 (emphasis added). The referenced road payment statute, R.C. § 5573.07, provides a range of methods, including assessments, levies, as well as the additional source of payment “[f]rom *any funds* in the township treasury available therefor.” R.C. 5573.07(B)(2) (emphasis added). While the Home Rule statute does not expressly refer to an impact fee as another source of funding, the express language may *not* be read to prohibit the use of other funding, such as an impact fee. The Trial Court correctly concluded there was no conflict, stating: “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.”

Nor do R.C. 5573.21, allowing a township to create a road district, and R.C. 5573.211, providing that costs of road improvement to a district be paid out of “*any road improvement fund* available therefor,” conflict with the Resolution. R.C. 5573.211 also provides that a township “may levy” a tax to fund improvements. Appellants simply misstate the statutes in declaring: “R.C.

5573.211 only allows the road improvement funds to be funded through a three mill or less tax on all taxable property in the district.” Another statute, R.C. 5573.10, provides for the county engineer to assess real estate to be charged for road improvement costs, and R.C. 5573.11 provides how those assessments shall be paid. But nothing in these statutes regarding the assessment of real property taxes is either mandatory or exclusive. None of these statutes present any conflict with the resolution.

Similarly, nothing in the language of R.C. 511.27 and 511.33 supports Appellants’ statement that taxes or unappropriated township funds are the *only* means by which a township may fund park operation. R.C. 511.27 provides a board of park commissioners “*may levy*” a tax to defray township park district costs, and R.C. 511.33 provides that the Board of Township Trustees “*may appropriate*” funds from the township treasury for park management and improvements. As the Trial Court and Court of Appeals found, taxes that are levied must be levied in accordance with Chapter 511, but Chapter 511 neither mandates such a tax levy nor defines the exclusive means for funding the township treasury for park purposes. The Resolution is not in conflict with those statutes.

Regarding fire and police funding statutes, R.C. 5051 provides that a township “*may levy*” a tax upon all of the taxable property in the township police district . . . “to defray *all or a portion of expenses of the district in providing police protection.*” (emphasis added) R.C. 505.39 similarly provides that the township “*may, in any year, levy a sufficient tax upon all taxable property in the township*” for protection against fire. (emphasis added) The express language in both statutes is permissive; it is not mandatory and not exclusive. As the Trial Court pointed out with regard to R.C. 505.511, “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 non-exclusivity of the funding method in R.C. 505.511 is explicitly part of the statute. Since neither statute provides an exclusive method of funding police or fire protection, a Home Rule Township may exercise its police powers under Chapter 504 and enact additional or other funding methods.

Appellants argue also that because the impact fees “run with the land,” they are a tax or fine, or means of enforcement not permitted and therefore in conflict with R. C. 504.04. First, Appellants argue that the Resolution does not follow the enforcement provisions of R.C. 504.06 and R.C. 504.07, which provide notice and an opportunity to be heard upon an ordinance violation. But the impact fees are not fines, and therefore are not governed by these statutes.

Further, they are not taxes or assessments simply because they run with the land. Other provisions of the Code allow a township to attach delinquent fees to the tax duplicate without adherence to the enforcement provisions or classification as a tax. For example, under R.C. 505.03, the township can charge delinquent waste disposal services to the tax duplicate for collection. There is no requirement for an adjudication of the delinquency, or a notice to be heard on the arguments. Thus, contrary to Appellants’ arguments, the fact that the fees run with the land does not render them in conflict with any provision of the Revised Code.

**D. THE RESOLUTION ENACTS A PROPER FEE, NOT AN IMPERMISSIBLE TAX.**

In enacting the Resolution, Hamilton Township was acutely aware that the proposed impact fee could not offend the guidelines separating a permissible regulatory fee from an impermissible tax. A Home Rule Township may not impose a tax that is not “authorized by general law.” R.C. 504.04(A)(1). That limitation is expressly contained in the provision granting Home Rule Townships such as Appellee, its power to self-govern. As the Trial Court stated, “There is no

provision of general law granting Hamilton Township authority to impose taxes in the manner proposed in the impact fee resolution.” (Appx. - 14, Entry at 11) It should be noted that this restriction in the grant of self-government from taxing argues strongly that a Home Rule Township’s powers of self-government and policing *include* the power to pass an impact fee. There is no limitation in 504.04 on any other method of raising funds. If the measure is not a tax but a fee, it is permitted to Home Rule Townships in the grant of self-government.

1. THE IMPACT FEE RESOLUTION IS CAREFULLY TAILORED TO COMPLY WITH THE FACTORS GOVERNING FEES.

The Resolution is specifically structured so that the impact fee avoids the attributes of a tax. The Trial Court observed that “[i]f the fee is merely a tax by another name, then it is not a permissible enactment.” (Appx. - 14, Entry at 11) The language of Amended Resolution 2007-0418, implementing the impact fees, is instructive when considering the above factors. In its factual findings, the Township Trustees determined:

(2) 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 service such development.

(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. (Appx.- 41-42, Resolution at 1-2)

The fees do not resemble a tax in form or substance. They are voluntary, required to be paid only upon an application for zoning for an impact-generating development. The fee is a one-time charge, not a continuing tax. The funds are segregated from the general fund of the Township into

four separate impact fee accounts to be used solely for the construction of roads, police and fire capital improvements, and park capital improvements made necessary by the new developments. (Appx. - 55, Resolution at 15) The four accounts are to contain only impact fees collected under the Resolution. (Appx. - 55, Resolution at 15) The fees cannot be used for reconstruction or maintenance of existing facilities, for ongoing operational costs, or to service debt for past improvements. (Appx. - 57, Resolution at 15) Monies in each impact-fee account are to be used on projects initiated within three years of collection and are considered to be spent in the order collected or accrued on a first-in/first-out basis. (Appx. - 55, Resolution at 15) On an annual basis, the impact fee administrator is to propose a capital improvements program which assigns monies from the respective funds to specific projects related to the impact fee. (Appx. - 59) The fees are to be refunded to the current owner of the property if not used within a specified period for projects generated to maintain existing levels of services of the impact-generating projects. (Appx. - 57, Resolution at 17) Reimbursements for contributions toward the cost of major roadway systems guarantee that fees are proportionate to the need for improvements generated by the impact-generating development. (Appx. - 58, Resolution at 18)

A telling feature of the Resolution is the provision for a property owner to propose a fee for that property different than the default impact fee table set forth in the Resolution (Appx. 46-48, Resolution, Section IV at 6-8) and summarized in Chart 1 in the parties' Stipulation (Appx. - 31, Stipulation ¶ 7). The Resolution allows for an "Independent Fee Calculation if the nature of the development is such that the standard fee would not reflect the true impact of that particular development." (Appx. 50-51, Resolution Section VII, 1-5) For example, a car dealership might demonstrate that it generates many fewer trips than does a Walmart, and that the standard Road

Impact Fee would be inappropriate. This provision demonstrates that the Resolution is structured to tie the cost closely to the benefit provided, and that the service provided is a benefit to the particular property paying the fee. This independent fee calculation does not make the impact fee procedure vague. It makes it fair. Trip-generation is objective and reliable.

Appellants' characterization of the impact fees is simply mistaken when it claims that the impact fees simply pay for general expansion of infrastructure, benefitting all township residents generally. Rather, there is a one-time fee to fund the proportionate amount of the improvement that will serve the new development. Appellants have stipulated that the impact fee pays for the increment of new demand from development, rather than general use:

The Resolution assesses an impact fee to previously undeveloped property, and property redevelopment, to offset increased services and improvements needed because of the development. (Appx. - 35, Stipulation 28)

Existing property owners continue to pay, through taxes, their proportionate share of future capital improvements and ongoing operational and maintenance costs. It is worth pointing out that newly-developed properties, after construction, themselves become subject to tax assessment to pay for the great remaining balance of capital improvement, maintenance and operation of the pre-existing facilities. The parties have also stipulated:

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." (Appx. - 35, Stipulation 27)

Particular note should be made of the effort in the Resolution to structure the amount of the fee so that it "does not exceed the cost of providing facilities to the development that paid the fee." (Appx. - 41-42, Resolution, Factual Findings, Section I(2) The Resolution contains formulas to

calculate each of the four components of the impact fee. (See Appx. - 52-55, Resolution at Sections VI-VIII) The road impact fee formula may serve as an example. Duncan Associates, the consultant that prepared the Impact Fee Study and the road impact fee formula, explained that the road formula “simply charges a new development the cost of replacing the capacity that it consumes on the major road system.” (Supp. - 76, Hamilton Township Impact Fee Study (“Study”) at 11) The formula takes into account numerous factors, including the number of trips during an average weekday; the percent of those trips which are primary trips; the average length of the trip on the major roadway system; an allowance so as to avoid double counting trips for origin and destination; the average cost to add a new daily vehicle mile of capacity; the system-wide ratio of capacity to demand in the major roadway system; and the revenue credit per daily vehicle mile of travel. (Appx. - 25, Resolution, Section VII(6)) As explained by the Impact Fee Study, “for every vehicle-mile of travel (VMT) generated by the development,” the road impact fee formula “charges the net cost to construct an additional vehicle-mile of capacity (VMC).” (Supp. - 76, Study at 11) While the formula itself is arithmetically complicated, it simply captures the traffic impact generated by a given structure.

Similarly, the formulas for police protection, fire protection, and parks are structured so that the charge “does not exceed the cost and expense to the government of providing the service in question.” *Building Ass’n of Cleveland v. Westlake* (1995), 103 Ohio App. 3d 546, 551, 660 N.E.2d 501. See the formula for the police impact fee at Appendix - 53, the formula for the fire protection component at Appendix - 54, and the formula for the park impact fee component is found in the Resolution at Appendix - 55.

In the Duncan Associates Impact Fee Study, the park impact fee formula first considers the impact on the parks of a typical single-family dwelling, designated a “service unit.” (Supp. - 88,

Study at 23) The Study explains the formula in general terms: “The basic formula for determining the park impact fees to be paid by a development project is to multiply the service units generated by the project by the net cost per service unit to maintain the existing level of service.” (Supp. - 89, Study at 12) The Study states with regard to both the fire impact fees and police fees, that they are “designed to charge new developments the cost of providing the same level of service that is provided to existing development” and bases the existing level of services for fire and police facilities on “the replacement cost of existing facilities, vehicles and equipment.” (Supp. - 93, 100, Study at 28, 35)

Regarding the impact fee amounts, the Trial Court noted, “The fees are ostensibly set at a level that will allow new residents to enjoy the same level of police and fire protection as existing residents. (Appx.- 16-27, Entry at 13-14 ) The Court further noted, significantly, that “Plaintiffs *have not shown* that the fees will enhance the value to existing residents of those same services.” (Id. (emphasis added)). Appellants correctly quote Ohio case law to the effect that “A ‘fee’ is in fact a ‘tax’ if it exceeds the ‘cost and expense’ to government of providing the services in question,” *Granszow v. Bureau of Support of Montgomery Cty.* (1990), 54 Ohio St. 3d 35, 38, 560 N.E.2d 1307, quoted in Appellants’ Merit Brief at 30. However, Appellants *have not shown*, or even attempted to show that the impact fee formulas do not satisfy their stated goals of “charging new development the cost of providing the same level of service that is provided to existing development.” (Supp. - 93, Study at 28) Nothing *in the record* supports Appellants’ broad contentions that the impact fees benefit the public generally rather than the new residents; that the amount of the impact fee exceeds the cost of providing the service, or that benefits are not provided to those paying the impact fee.

2. THE RESOLUTION IMPACT FEE DOES NOT HAVE THE  
ATTRIBUTES OF A TAX

It is well settled in Ohio that in making a determination between a tax and a fee, courts are to look at “the substance of the assessments, and not merely their form.” *State ex rel. Petroleum Underground Storage Tank Release Comp. Board v. Withrow* (1991), 62 Ohio St. 3d 111, 117, 579 N.E.2d 705. This Court has stated that it is improper to exercise “a single test that will correctly distinguish a tax from a fee in all situations where the words ‘tax’ and ‘fee’ arise.” *Id.* Rather, this Court has held that the inquiry must be conducted on a “case-by-case basis dependent upon the facts and circumstances of the enactment.” *Id.*, 62 Ohio St. 3d at 115. In *Withrow*, the circumstances examined by the Court were (1) whether the charges imposed are for government service; (2) whether the charges generated excess funds that are placed in a general fund tax rather than being segregated and used for purposes related to the fee; (3) whether a direct benefit is provided to the public; and (4) whether the measure is regulatory as opposed to revenue-generating.<sup>3</sup> The trial court judgment was eventually upheld by this Court in 89 Ohio St. 3d 121, 729 N.E.2d 349.

This Court has further held, “A tax for one inquiry is not necessarily a tax under other circumstances.” *Withrow* at 117. Many of the cases cited by Appellants finding that fees were

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<sup>3</sup>The trial court in *Beavercreek* cited the “key definitional elements of impact fees which distinguish them from a tax: (1) impact fees in the form of a pre-determined money payment; (2) they are assessed as a condition to the issuance of a building permit, or plat approval; (3) they are made pursuant to local government powers to regulate new growth and development and to provide for adequate public facilities and services; (4) they are levied to fund large-scale, off-site public facilities and services necessary to serve new development; and (5) they are in an amount proportionate to the need for public facilities generated by the new development.” *Home Builders Ass’n of Dayton & the Miami Valley v. City of Beavercreek* (Feb. 12, 1996) Green Cty. CCP, 1996 WL 812607 at \*12, citing *Salt Lake Ct. v. Board of Education* (Utah 1991), 808 P.2d 1056, 1058, quoting Blaesser & Kentopp, *Impact Fees: The Second Generation*, 38 J. Urb. & Contemp. L. 55, 63 (1990).

actually taxes involved inquiries with circumstances very different from the Hamilton Township Resolution. And cases from other jurisdictions involve “tests” of an entirely different nature than is employed in the Ohio Supreme Court analysis. Thus, for example, in two cases strongly relied upon by Appellants, the permissible scope of an impact fee in those jurisdictions was essentially limited to administrative costs. In *Mayor and Bd. of Alderman, City of Ocean Springs v. Homebuilders Ass’n of Mississippi, Inc.* (2006), 932 So.2d 44, the Mississippi Supreme Court quoted and followed the proposition stated by the U.S. Fifth Circuit Court of Appeals: “The classic tax is designed to provide benefit for the entire community, while the classic fee is designed to raise money to help defray an agency’s regulatory expenses.” 932 So.2d at 54, quoting *Homebuilders Ass’n of Mississippi v. City of Madison, Miss.* (5<sup>th</sup> Cir. 1998), 143 F.3d 1006, 1011. The Mississippi Supreme Court also quoted and applied the statement that regulatory fees “cover public expenditures on inspection, record-keeping, and processing, and are correctly limited to the proportionate cost of giving the fee payer that special attention.” *Id.* at 55, quoting Hugh Spitzer, *Taxes v. Fees: A Curious Confusion*, 38 Gonz. L. Rev. 335, 353 (2003).

Similarly, in *Homebuilders Ass’n of Greater Des Moines v. City of West Des Moines* (Iowa 2002), 644 N.W.2d 339, a case which was discussed at length and followed by the Mississippi Supreme Court in *City of Ocean Springs*, the Iowa Supreme Court stated that fee payments of \$100 per acre to be used for park site acquisition or physical improvement of the park system “were not based on the cost of regulating development or issuing building permits, but rather are based on the impact the development of the property owner’s land will have on the public infrastructure. Because

the fee has no relation to the expenses of the City in approving subdivision plats or building permits, it cannot be justified as an incident of the exercise of its police powers.” 644 N.W.2d at 348.<sup>4</sup>

Ohio law recognizes that fees are properly fees and not taxes even where the fees go well beyond simply covering the administrative expenses involved in the exercise of police powers. In *Withrow*, this Court held that assessments collected from owners of underground storage tanks (USTs) were fees rather than taxes. The fees were intended to “protect Ohio’s water resources and reduce pollution by creating a fund to reimburse owners of USTs for the costs of corrective actions in the event of a release of petroleum into the environment and to compensate third parties for bodily injury or property damage resulting from such occurrences.” *Id.* at 111. The Court rejected the argument that because there was a direct benefit to the public, the fee was necessarily a tax. The Court held that even though “the program does benefit the public by maintaining a clean environment and compensating individuals for damages caused by leaking USTs,” nevertheless, the Court stated: “We can see no reason to hold that an exaction is a tax simply because the public is benefitted.” *Id.* at 115. Even though the public was benefitted, the fees are used “for narrow and specific purposes, all directly related to UST problems.” *Id.* at 116-117. Also relevant was the consideration that the fees were “regulatory measures enacted to deal with the environmental problems caused by leaking USTs. *Id.* at 116. The Court found it persuasive as well that the fees are never placed in the general fund. In addition, in *Homebuilders Ass’n of Dayton and Miami Valley v. City of Beavercreek* (2000), 89 Ohio St. 3d 121, 2000-Ohio-115, 729 N.E.2d 349, this

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<sup>4</sup>The Iowa Supreme Court also considered the factor of whether the fee provides a service to the citizen charged, another circumstance under which the city could legitimately charge the fee. The Court found (unlike the present case) that the provision of a neighborhood park was available for general public use and benefitted the entire community, rather than being a direct service to the developer or homebuilder paying the fee.

Court, though not employing a tax/fee analysis, upheld an impact fee where it bore a reasonable relationship between the city's interest in constructing new roadways and the increase in traffic generated by new developments, as well as a reasonable relationship between the impact fee and the benefits from the construction of new roadways. *Id.*, syllabus (“dual rational nexus test”).

Appellants suggest that any amount of the fee which is in excess of the cost and expense to the government of providing a zoning certificate fee is impermissible. (Appellants' Merit Brief at 30-31) But this is mixing apples and oranges; the amount of the impact fee is not related to the amount of the zoning certificate. Hamilton Township agrees with the proposition that the charge in a fee “must not exceed the cost and expense of the government of providing the service in question. See *Building Ass'n of Cleveland v. Westlake* (1995), 103 Ohio App. 3d 546, 551, 660 N.E.2d 501; *Granszow v. Bureau of Support of Montgomery Cty.* (1990), 54 Ohio St. 3d 35, 38, 560 N.E.2d 1307. However, with regard to the Resolution, the “service in question” provided by Hamilton Township is capital improvement of roads, parks, police and fire capital structures offsetting the additional demand occasioned by new development. See Appx. - 35, Stipulations 27 and 28; and Appx. - 41-42, Resolution Factual Findings 2 and 3.

The complex formulas discussed above establishing the amount of the four impact fees were specifically formulated in order to reflect the impact of new development on the demand for the particular services and improvement used by the new development. Appellants have asserted that the fee exceeds the government's cost of providing the service – an assertion contradicting Stipulation 28 – but have offered no such evidence in the entire course of this litigation. Indeed, the Trial Court noted in its Opinion, “Plaintiffs do not argue that the impact fees are excessive compared to the cost of making the proposed improvements.” (Appx. - 16, Entry at 13) See *Home Builders*

*Ass'n of City of North Logan* (1999), 903 P.2d 561, where the Utah Supreme Court, applying the Utah reasonableness standard to impact fees, found as a matter of evidence that the Home Builders Association did not show that the impact fee actually charged was unreasonable. *Id.* at ¶¶ 14-19.

Appellants cite *American Landfill, Inc.* (6<sup>th</sup> Cir. 1999), 166 F.3d 835, as providing well-settled guidelines for determining whether a fee is a tax. (Appellants' Merit Brief at 30-31) This case was decided under federal law, not Ohio law; no Ohio cases are cited, including the earlier-decided *Withrow* case. The relevant factor in *American Landfill* was "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." 166 F.3d at 837. While the factor is not inconsistent with *Withrow*, it is tempered by *Withrow's* observation that "we can see no reason to hold that an exaction is a tax simply because the public is benefitted." 62 Ohio St. 3d at 115.

In *American Landfill*, revenue from solid waste disposal assessment collected by solid waste districts was ultimately held to be a benefit shared by the public and not just the waste disposal facilities' users. This was logically determined to be a tax, not a fee, because all of the expenditures, such as the development of recycling programs, road and public facility maintenance, and emergency services, were spent region-wide as a general benefit. 166 F.3d at 839. By contrast, the impact fee in Hamilton Township is formulated and devised solely to pay for increased infrastructure costs and services related to the new development, and does not pay for infrastructure and services for the existing general public, nor for maintenance.

3. THE IMPACT FEE DOES NOT IMPOSE A DUPLICATIVE CHARGE FOR DUPLICATIVE SERVICES.

Appellants claim that the impact fee serves the same purpose as taxes in paying for services traditionally funded by tax revenues. Appellants offer the example of an empty lot valued at \$35,000 which pays \$43.22 in EMS/fire property taxes, and when improved and sold for \$200,000, would likely pay six times as much in its improved state as when empty in EMS/fire taxes. See Supp. 150-152. Appellants claim that the homeowner is taxed twice for the same EMS/fire service – once when it pays the impact fee, and again when it pays the property tax for what Appellants claim is the same service.

The example, while full of figures, entirely omits the critical calculation and thereby proves nothing. For Appellants' example to make sense, it would have to show the amount necessary to fund that property's share of the total cost of providing EMS/fire service. The Township's studies indicate that the cost of providing EMS/fire service infrastructure to new developments at the existing levels is far greater than the existing property tax for EMS/fire service infrastructure. It is this difference between keeping existing services for the existing population and providing the same level of service to new population, which the fire protect impact fee captures in the formula contained in the Resolution. See Appx. - 54, Resolution at 14. Appellants state: "This is a duplicative tax for the same service." (Appellants' Merit Brief at 32) It is not a duplicative charge to the new property because the new property places additional demand upon existing infrastructure service, and it is not the "same service" because the impact fee pays for the cost of keeping existing infrastructure service at the same level in the face of new demand.

Appellants argue the provision of roads or parks or police and fire protection is a traditional government service which would not be permitted in Mississippi or Iowa under the standard in *City of Ocean Springs* or *City of West Des Moines*. Those cases disallowed impact fees greater than the cost of the “administrative expense” incurred inspecting, licensing or permitting. But, Ohio law does not similarly limit the scope of impact fees. *Withrow* allowed a fee to cover the cost of “traditional government services” such as “maintaining a clean environment” and “protecting Ohio’s water resources and reduc[ing] pollution.” 62 Ohio St. 3d at 115.

4. THE IMPACT FEE IS NOT A GENERAL REVENUE-RAISING MEASURE, BUT A MEANS TO PROVIDE A SPECIFIC BENEFIT TO PAYERS OF THE FEE THROUGH ADMINISTRATION OF THE SEPARATE IMPACT FEE ACCOUNTS.

Each of the four Hamilton Township impact fees are placed in special funds separate from the Township’s General Fund, and are to be spent for the specific purposes set forth in the Resolution, as well as being subject to the time limitations and provisions for refunding if not spent within the allotted time. The General Fund is not subject to such limitations. Were the segregation into separate funds simply a matter of form, such that the funds really “served public purposes benefitting the entire community,” *American Landfill, Inc.*, 166 F.3d at 839, then the separate funding would not be indicative of a fee, rather than a tax. That was the case, as Appellants point, in *American Landfill, Inc.*, where the waste management fee, even while placed in a separate fund, paid for such things as the development of recycling programs, the maintenance of public facilities, and provision of emergency services, that is, matters which “relate directly to the general welfare of the citizens of Ohio” rather than the entities disposing of solid waste and paying the fee. *Id.* at 839.

By contrast, the Hamilton Township road impact fee goes into a road impact fee account so as to “acquire and construct major roadway improvements” and service the debt thereupon, based upon the increased use by new development of the existing level of road service.” (Appx. - 56, Resolution at 16; see also Appx. 35, Stipulation 28) Specifically, the fees in the road impact fee account pay for the cost of construction of an additional vehicle-mile of capacity for every vehicle mile of travel *generated by the new development*. (Appx. - 52, Resolution at 12; Supp. - 76, Study at 11) The road impact fee account *does not pay* for every vehicle mile of capacity for every vehicle mile of travel generated by the *general public of the Township*. Similar considerations apply for the other three impact fee accounts. In the Hamilton Township Impact Fee Resolution, the separate funds ensure that substance prevails over form, and that the fees are used to benefit the owners of properties which paid the fees.

The expenditure of funds from a particular impact fee account, e.g., the road impact fee account, specifically regulates road improvement according to the rate of travel generated by new development, as discussed above. As such, the Hamilton Township Impact Fee is distinguishable from that in the case *Hillis Homes, Inc. v. Snohomish Cty.* (Wash. 1982), 97 Wn. 2d 804, 650 P.2d 193, discussed by Appellants. (Appellants’ Merit Brief at 34) In *Hillis Homes*, the Washington Supreme Court found that while impact fees were deposited in special accounts, nevertheless the primary or only purpose was “to raise revenues rather than to regulate residential developments.” *Id.* at 810. By contrast, the Hamilton Township Resolution raises funds, or “revenues,” which are not placed in a general fund for the benefit of the Township general public, but to regulate the demand created by new residential development upon existing roads and government services.

5. OHIO LAW UPHOLDS PROPERLY ORDERED IMPACT FEES.

Courts have struck down cases where the impact fee is improperly crafted, for example so as to benefit the entire population. And, as pointed out above, some states restrict impact fees to the administrative costs involved in providing a licensing or permit fee. In *Building Ass'n of Cleveland v. Westlake*, the Eighth District found a park impact fee ordinance used the impact revenues solely for “the operation and maintenance of *existing* recreational facilities which are also used, and presumably presently supported by property and income taxes, by the present residents of the city.” (1995), 103 Ohio App. 3d, 546, 552, 660 N.E.2d 501, 505. The Court found the ordinance “shift[ed] the funding of the present recreation system from the general public to the developers and purchasers of new construction.” 103 Ohio App. 3d, 546, 551, 552, 660 N.E.2d 501, 504. The “undefined program” in the Westlake ordinance did not direct impact fees to “expanded park facilities made necessary by new home construction.” *Id.*

By contrast, the Hamilton Township Resolution precludes use of impact fees to operate and maintain existing facilities and rather directs their use to capital improvements that are proportionate to the increased use caused by the development, and maintaining existing levels of service in the Township. The impact fees benefit not the general public, but the new population paying the impact fee. As such, the impact fee is properly a fee, and not a tax.

Similarly, the 1978 Ohio Supreme Court case, *State ex rel. Waterbury Development Co. v. Witten* (1978), 54 Ohio St. 412, 415, 377 N.E.2d 505 involved water tap and park impact fees which were held to be taxes because the entire burden of future infrastructure improvement was placed on the new development. By contrast, the Hamilton Township Resolution is structured so that only the improvements to infrastructure necessary to maintain existing levels of services, caused by the

increased demand of new development, are funded by the impact fee. (Appx. - 35, Stipulation 27-28) Impact fees under the Resolution are not to be used for “[r]ehabilitation, reconstruction, replacement or maintenance of existing facilities.” (Appx. - 57, Resolution, Section VIII(5)(a))

Cases cited by Appellants from foreign jurisdictions striking down impact fees are distinguishable because of the different application of the impact fees. In *City of Ocean Spring v. Homebuilders Ass’n of Mississippi* (Miss. 2006), 932 So.2d 44, 57 and *Homebuilders Ass’n of Greater Des Moines v. City of West Des Moines* (Iowa 2002), 65 N.W.2d 339, 348, the courts applied a very narrow scope to impact fees to cover only administrative costs. The fees were also analyzed as a matter of compensation for a specific benefit or service conferred on those paying the fee. The feature of the impact fee enactments in those cases which caused them to be struck down was the benefit to the population as a whole, rather than to those assessed the impact fee. That is fundamentally different from the Hamilton Township impact fee, which by its terms is constructed to match the cost of providing that increment of services generated by new development. (See Appx. - 35, Stipulation 27, 28; Appx. - 41-43, Resolution, Factual Findings 2, 3, 11, 12, 14, 15) The Resolution does not pretend to fund, nor could it possibly fund, all roads, parks, fire and police protection for the entire Township. See Appx. - 59, Resolution XI(3) at 19.

Appellants rely strongly upon the Maryland appellate case of *Eastern Diversified Properties, Inc. v. Montgomery Cty.* (1990), 319 Md. 45, 570 A.2d 850, which, while superficially similar, is fundamentally distinguishable from the Hamilton Township Resolution. The Maryland tax/fee test itself is notable. In distinguishing between a fee (a regulatory measure) and a tax (a revenue measure), the court stated: “A regulatory measure may produce revenue, but in such a case the amount must be reasonable and have some definite relation to the purpose of the act.” *Id.* at 53, 570

A.2d at 854. hence, the Maryland test essentially incorporates the second prong of the dual rational nexus test under which this Court determines the constitutionality of an exaction fee under the Takings Clause. In *Homebuilders Ass'n of Dayton and Miami Valley v. City of Beavercreek* (2000), 89 Ohio St. 3d 121, 2000-Ohio-115, 729 N.E.2d 349, this Court applied the dual rational nexus test to an impact fee structured almost identically to the Hamilton Township impact fee.<sup>5</sup> This Court found in *Beavercreek* that a fee structured such as the one at issue in *Beavercreek* bore a reasonable relationship between the amount of the fee and the benefit provided, unlike the fee in *Eastern Diversified*. Because the Hamilton Township impact fee is so similar to the *Beavercreek* fee, it implicitly satisfies the *Eastern Diversified* reasonableness test.

The other factor critical to the *Eastern Diversified* analysis was the total amount of the fees collected. In *Eastern Diversified*, this factor revealed the primary revenue-raising purpose, in that “the projected total revenue of \$108,723,000 from impact fees and the anticipated expenditure of \$227,483,000 on highway construction.” *Id.* at 55, 570 A.2d at 855. In other words, the impact fee raised almost half the funds needed for new highway development. Nothing in the record before the Court suggests that the Hamilton Township impact fees similarly fund road infrastructure in Hamilton Township; nor could the structure of the Resolution allow for that proportion of funding.

The Maryland court further found, “Nothing in [the impact fee ordinance] suggests that impact fees are charged solely on the basis of service provided to the property owner, or to defray expenses of the development regulatory process,” – in the absence of which, raising revenue was the primary purpose of the Maryland impact fee. 319 Md. at 54-55, 570 A.2d at 855. The Hamilton

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<sup>5</sup>See Trial Court Opinion in *Beavercreek*, Green Cty. CCP 1996, WL 812607 (Feb. 12, 1996) and Court of Appeals Opinion, 1998 WL 735931 (Ohio App. 2d Dist.) for details of *Beavercreek* impact fee ordinance.

Township Resolution and impact fee is specifically formulated so as to provide a benefit to the property owner, unlike the Maryland fee, defraying that owner's portion of the expense to regulate new development. Other provisions of the Hamilton Township Resolution which are not found in the Maryland ordinance, further tailor the fee to the benefit of the owner; e.g., funds are refunded if not used within three years; an owner can make an individual fee calculation if the default amount is not appropriate to the uses of that property; fees cannot be used for reconstruction or maintenance of existing facilities, for ongoing operational costs or to service debt for past improvements; contributions by the developer or owner for the cost of major roadway systems are reimbursed. None of the factors above were part of the Maryland impact fee, and the holding in *Eastern Diversified* is not applicable to the very different Hamilton Township Resolution.

Where the fee is tied to the provision of additional services caused by new development, it has been upheld by Ohio courts. Thus, in *Amherst Bldrs. Ass'n v. City of Amherst* (1980), 61 Ohio St. 2d 345, 402 N.E.2d 1181, the Ohio Supreme Court upheld an ordinance imposing a fee on new users to reimburse the community for the fair share of the construction costs incurred in originally constructing a sewage system. The Court stated that a municipality could "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." 61 Ohio St. 2d at 345, 402 N.E.2d at 1182 (syllabus). Those fees could not be used for general revenue purposes, but segregated into a specific fund for the specific purpose. *Id.*

Foreign jurisdictions have also upheld properly-tailored impact fees. In *Call v. City of West Jordan* (Utah 1979), 606 P.2d 217, the Utah Supreme Court upheld a challenge by developers to an ordinance which required developers to dedicate seven percent of the land to be developed to the

city, or to pay the equivalent of the land value, for provision of flood control, parks, and recreation facilities serving the newly-developed land. In *Homebuilders & Contractors Ass'n of Palm Beach City, Inc. v. Board of Cty. Comm'rs* (Fla. 4<sup>th</sup> App. Dist. 1984), 446 So. 2d 140, the court upheld an ordinance imposing an impact fee on new development to construct roads made necessary by increased traffic generated by the new development.

In the *Withrow* case, this Court upheld a fee charged to owners and operators of underground storage tanks as part of a regulatory scheme for managing environmental problems caused by leakage. *Withrow, supra*, fn. 52, 63 Ohio St. 3d 111, 579 N.E.2d 705. As the Trial Court noted about the *Withrow* decision, the fees were not placed in a general fund, but used for specific cleanup purposes. 62 Ohio St. 3d at 116-117, 579 N.E.2d at 709, discussed in Appx. - 14, Entry at 11. While the public benefitted from the cleanup, that limited benefit did not convert the fee into a tax. Rather, the fee provided a specific benefit to the payers by providing a quasi-insurance fund for protection in the event of environmental mishap, in exchange for the payment of the fee. That protection was the service provided by the government. "A fee is a charge imposed by a government in return for a service it provides. A fee is not a tax." *Withrow, supra*, 62 Ohio St. 3d at 113.

The Hamilton Township impact fee allows the Township to provide new residents with the existing level of services provided to the general public. The fee funds the increased demand, not the pre-existing demand on services. (Appx. - 35, Stipulation 28) If there can be said to be a "benefit" to the general public from the impact fee, it is that the public does not suffer decreased services as a result of increased use by new development, although merely maintaining the status quo is not ordinarily regarded as a benefit. In fact, such "benefit" provided to the general public is no different than in the case of a fee for a fishing permit paid by a fisherman, where the general public

“benefits” by *not* paying a small additional percentage of taxes. Moreover, the Supreme Court has expressly stated in *Withrow* that some measure of public benefit does not turn a fee into a tax. 62 Ohio St. 3d at 115, 579 N.E.2d at 708-09. The Trial Court correctly found:

There are sufficient benefits provided to those who pay the impact fee to conclude that they are receiving a service in exchange for each charge. The fees are ostensibly set at a level that will allow new residents to 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. (Entry at 13-14)

The Hamilton Township impact fee follows the *Withrow* factors and enacts a fee, not a tax:

(1) the fee is imposed to maintain existing levels of government services of new development in the Township; (2) fees are directed towards segregated funds, are used on a first-in/first-out basis for projects initiated within three years of collection, as assigned annually by the Township acting on proposals by the impact fee administrator, and are refunded to property owners if not used within seven years; (3) new development is benefitted because the existing government services are provided to meet the increased demand of new development, and funds are not used for operational services, or replacement or maintenance of existing facilities; (4) the measure is regulatory rather than revenue-generating because the fee allows new development to be coordinated with maintenance of existing Township services. It is important to note the parties have stipulated that the studies which calculated the capital costs to maintain the current services are not at issue.

**E. THE RESOLUTION DOES NOT ALTER THE STRUCTURE OF GOVERNMENT.**

Hamilton Township *still* has four elected officials – three trustees and one fiscal officer – just as it did prior to the Resolution. The structure of its government is unchanged by the Resolution.

Appellants claim that the Resolution enacts “an impact fee district” which is “in essence a combined road, park, police and fire district with a funding structure different than those permitted by the Revised Code.” (Appellants’ Merit Brief at 38) The creating and funding of such a structure is, claim Appellants, a violation of R.C. 504.04(A)(1) which does not allow a Home Rule Township to “change, alter, combine, eliminate, or otherwise modify the former structure of the township government unless the change is required or permitted by this Chapter.”

This half-hearted argument has no merit. First, there is nothing in the Resolution itself which creates an “impact fee district.” Rather, the Resolution treats the Township as a “single service area.”<sup>6</sup> Rather than “altering the form or structure of Township government,” the Resolution does the opposite: it leaves the structure unchanged. Under the logic of Appellants’ argument, any single exercise of Home Rule power by a township would be illegal. For example, were the Township to pass a Resolution requiring the licensing of nightclub bouncers and providing for a new Township employee to supervise the licensing of nightclub bouncers across the Township, the form and structure of Township government would have been changed or altered. The suggestion is preposterous.

The statutes authorizing the creation of a road or fire district *do not require the creation* of such a district. Appellants’ argument repeats the error of finding a non-existing requirement or prohibition in the specific statutes authorizing township funding of roads, parks, police and fire

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<sup>6</sup>Factual Finding 13 of the Resolution provides: “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.” (Appx. - 43, Resolution at 3) (emphasis added)

protection. None of the Ohio statutes cited by Appellants, including R.C. 504.04(A)(1), creates a conflict with the Home Rule Township Resolution.

**F. THE RESOLUTION DOES NOT ATTEMPT TO ESTABLISH  
SUBDIVISION REGULATIONS.**

Appellants' two-paragraph argument is not entirely clear. It is correct that under R.C. 504.04(B)(3), a Limited Home Rule Township may not establish or revise subdivision regulations, and it is true that R.C. 711.10, which generally concerns the platting and subdivision of land within unincorporated territory of a county, provides:

A county or regional planning commission shall adopt general rules, of uniform application, governing plats and subdivisions of land falling within its jurisdiction, to secure and provide for the proper arrangement of streets or other highways in relation to existing or planned streets or highways or to the county or regional plan, for adequate and convenient open spaces for traffic, utilities, access of firefighting apparatus, recreation, light, and air, and for the avoidance of congestion of population.

However, as the Trial Court observed, "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." (Appx. - 17, Entry at 14) Nor does anything in the Resolution conflict with any Warren County subdivision regulation concerning the level of service, or congestion, of the Township roads. Appellants' argument is without merit, and the Resolution does not conflict with R.C. 504.04(B)(3), nor with R.C. 711.10.

**APPELLEES' COUNTER-STATEMENT OF PROPOSITION OF LAW  
NO. 2.**

**A PARTY'S STIPULATION OF FACT AS TO THE PURPOSE OF A TOWNSHIP  
RESOLUTION BINDS THE PARTIES TO THE FACTUAL NATURE OF THE STATED  
PURPOSE OF THE RESOLUTION.**

The parties mutually agreed to the Stipulation that:

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. (Appx. - 35, Stipulation 27)

The Court of Appeals, in citing this Stipulation, made the following analysis:

¶19. To 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.

*Drees v. Hamilton Twp.*, 12 Dist. No. CA 2009-11-150, 2010-Ohio-3473 at ¶ 19, p. 7 of Opinion.

Appellants assert that the Court of Appeals erred in two respects: (1) that it “failed to undertake an independent review of the Township’s legislative action” and (2) that the Court ignored the law regarding stipulation. (Appellants’ Merit Brief at 41) Appellants argue that the Stipulation entails “a legal conclusion,” the resolution of which is the business of the Court.

But Stipulation 27 does not contain a stipulation, or agreement, about a legal conclusion; rather, it contains a factual conclusion about the purpose of the Resolution. Stipulation 27 should be read in conjunction with Stipulation 28:

28. The Resolution assesses an impact fee to previously undeveloped property, and property undergoing redevelopment, to offset increased services and improvements because of the development. (Appx. - 35, Stipulation 28)

While Stipulation 27 describes the purpose of the Resolution that the parties have agreed to, Stipulation 28 states the means by which the Resolution accomplishes that purpose. Appellants stipulate that the impact fee “offset[s] increased services and improvements needed because of the development”!

As Appellants themselves acknowledge, the Stipulation is “adapted from the recitals included in the Resolution.” (Appellants’ Merit Brief at 40) Notable among those recital provisions is ¶ 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.” (Appx. - 42, Amended Resolution No. 2007-0418 at 2)

The purpose or intent of the Resolution to benefit new development is plainly stated in the Resolution, and is a fact to which the parties stipulated, and are bound by: “Where, as here, adversaries in a case stipulate the facts necessary to determine the essential issues presented by the pleadings, those parties are bound mutually by what they have stipulated to be true . . .” *Westfield Ins. Co. v. Michael Hunter*, (Ohio App. 12<sup>th</sup> Dist.), 2009 WL 3415894, 2009-Ohio-5642 at ¶ 30. In Stipulation 27, the parties did not stipulate or bind themselves to a legal conclusion. However, *the fact* of the purpose of the Resolution is germane to the legal conclusion of whether the Resolution is a tax or a fee because it demonstrates the Township’s intent to benefit the property paying the fee. Appellants stipulated further in Number 28, as a matter of fact, that the impact fee offsets the cost of “increased services and improvements needed because of the development.”

The Court of Appeals analysis of the operation of the Resolution, while more cursory in this respect than the Trial Court Opinion, nevertheless takes note of other factors relevant to the issue of the benefits to the property. For example, the Court found that “the individual funds” for each portion of the impact fee are “to be used only for narrow and specific purposes occasioned by the Township’s ever-expanding population growth.” (Appx. - 26, Opinion at ¶ 20) The Court of Appeals further noted that the collected charges are refunded if not spent on projects initiated within

three years of their collection date, another indication that the projects are intended to benefit the expanding population growth. (Id.) The Court of Appeals then proceeded to make a legal, rather than a factual, conclusion: “These factors, when taken together, indicate that the charges imposed by the Township are fees paid in return for the services it provides.” (Id.)

The Court of Appeals further stated that its conclusion was based upon “a thorough review of the record” and that “based on the narrow and confined facts of this case,” the charges operate “not as a tax, but as a fee.” (Id. at 7-8) Stipulation 27 was simply one of the facts upon which the Court of Appeals based its legal conclusion. Appellants misapprehend the analysis of the Court of Appeals. There is no basis for Appellants’ assertion that the Court of Appeals failed – contrary to that Court’s own claim that it conducted a “thorough review of the record . . . based on the narrow and confined facts of this case” – to “undertake an independent review” of the Resolution. (Appx. - 26-27, Entry at 7-8; Appellants’ Merit Brief at 41)

Finally, even if this Court should determine that the Court of Appeals erroneously treated Stipulation 27 as an agreement to a legal rather than a factual conclusion, this Court may nevertheless affirm the Court of Appeals. It is well settled that an error in rendering a judgment for an erroneous reason is not considered prejudicial and does not warrant the reversal of a judgment upon appeal where there are other reasons appearing of record warranting the judgment. *Williams v. Goodwin* (3d App. Dist 1950), 90 Ohio App. 159, 104 N.E.2d 81. The Ohio Supreme Court will affirm the reversal by the lower court even though the reversal in that court was on a ground that in the opinion of the Ohio Supreme Court was not sufficient to warrant it, so long as another ground exists that is sufficient. *Clark v. Stewart* (1933), 126 Ohio St. 263, 185 N.E. 71. The argument in this Brief above, as well as the lengthy opinion by the Trial Court, demonstrate that there are

numerous other grounds – including Stipulation 28 – upon which a finding can be made that the impact fee as enacted in the Resolution not only has the purpose of benefitting the affected property, but does benefit that property and is a significant factor by which the Resolution must be considered a fee rather than a tax.

### CONCLUSION

The General Assembly created a new form of political subdivision, the Home Rule Township, with all powers of self-government and policing, except as specifically limited in Chapter 504 of the Revised Code. The Supreme Court should reject Appellants’ argument that Hamilton Township, a Home Rule Township, has only those powers that are specifically authorized by the legislature in separate enabling legislation and that it cannot pass an impact fee to regulate new growth within the Township unless the Assembly specifically authorizes a township or Home Rule Township to pass an impact fee. Appellants ask the Court to nullify the Assembly’s general grant of self-government power to Home Rule Townships. This Court recently stated, “[T]he General Assembly is the final arbiter of public policy . . . It is not the role of courts to establish legislative policies or to second-guess the General Assembly’s policy choices.” *State ex rel Cydrus v. Ohio Public Employees Retirement System*, 127 Ohio St. 3d 257, 2010-Ohio-5770. If the Court would deny that a Home Rule Township has the authority to pass a self-government police-power measure such as the impact fee, it would be second-guessing policy choices already made by the General Assembly.

The Hamilton Township Impact Fee Resolution does not conflict with any limitation in R.C. 504.04 upon its Home Rule powers. It does not conflict with any of the “general laws” of Ohio, whether understood as the *Canton* definition, or as any statute in the Revised Code. Finally, the

Resolution enacts a proper fee to regulate rapid development and is not a tax benefitting the general public.

Appellees Hamilton Township et alia ask that the Court affirm the Court of Appeals in upholding the Resolution.

Respectfully submitted,



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