

IN THE SUPREME COURT OF OHIO

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| THE DREES COMPANY, <i>et al.</i> | : | Case No. 10-1548 |
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| Plaintiffs-Appellants, | : | ON APPEAL from the Court of |
| | : | Appeals for the Twelfth Appellate |
| vs. | : | District of Ohio |
| | : | |
| HAMILTON TOWNSHIP, OHIO, <i>et al.</i> | : | Ct. of App. No. 200911150 |
| | : | |
| Defendants-Appellees. | : | |

**AMICUS CURIAE BRIEF ON BEHALF OF OHIO TOWNSHIP ASSOCIATION
IN SUPPORT OF APPELLEE**

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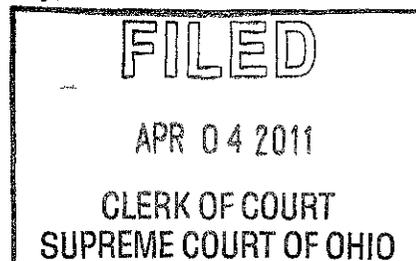
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I. STATEMENT OF FACTS.

Amicus Curiae, Ohio Township Association (hereafter "OTA") incorporates by reference the Statement of Facts of the Appellee.

II. STATEMENT OF INTEREST OF *AMICUS CURIAE*, OHIO TOWNSHIP ASSOCIATION.

Amicus Curiae, the Ohio Township Association, is a statewide professional organization dedicated to the promotion and support of township government in the state of Ohio. The OTA has been in existence since 1928. It is organized in 87 Ohio counties. It has over 5,000 active members, including elected township trustees and township fiscal officers from most of Ohio's 1,309 townships. The Coalition for Large Ohio Urban Townships (hereafter "CLOUT") is a sub-organization within the OTA. Its membership is limited to those townships having a population in excess of 15,000 residents in the unincorporated area of the township, or an annual budget over \$3,000,000.00.

All townships in the State of Ohio, both traditional and limited home rule, have a profound interest in the outcome of this case. Appellants are attempting to persuade the Court to eviscerate the limited home rule statute (R.C. 504.04) by suggesting that the grant of "all powers of local self-government" and "local police, sanitary and other similar regulations" should be meaningless terms. Appellants suggest that *no* power of local self-government or police power should vest in limited home rule townships without further specific legislation by the Ohio legislature. If that were the outcome, limited home rule townships would have no more authority to solve local problems than traditional townships. All Ohio townships have a vital interest in protecting the grant of "all powers of local self-government" and "local police, sanitary and other similar

regulations” to limited home rule townships while preserving the option for traditional townships to determine whether the alternate form of government should be adopted.

OTA seeks affirmance of the Decision of the 12th District Court of Appeals because OTA seeks financial stability for limited home rule townships. Many of them have experienced substantial growth and an inability to provide for a consistent level of service for township residents. Cities are generally built out. The farms are in the townships. A 40-acre farm can turn into 160 starter homes in the blink of an eye. That is what Appellants and Appellants’ *Amici* Home Builders are in the business of doing. An impact fee is a fair method allowing new residents and new businesses to be guaranteed that they will receive the same level of service from capital structures of the township by making a one-time payment to provide those structures.

OTA supports the stability of the Ohio township form of government. Historically, rapidly growing traditional townships had a dilemma: Ask the citizens to raise real estate tax rates, or ask the citizens to incorporate, probably introducing a new income tax and a new format of government. The addition of the limited home rule township form of government provides growing townships with the additional alternative of resolving local problems and police matters as they see fit while maintaining the benefit of township government. Since the adoption of the limited home rule statute, very few townships have voted to incorporate. The limited home rule township form of government allows trustees to solve local problems in the same manner as city councils solve their local problems.

III. PRELIMINARY STATEMENT

This litigation provides the OTA and CLOUT the opportunity to address the two main issues raised:

1. Does existing conflict jurisprudence dealing with municipalities apply when it is claimed a home rule township resolution conflicts with the general law? Existing jurisprudence contains mostly cases dealing with municipal ordinances and few, if any, conflict cases dealing with limited home rule townships.
2. Do previous court decisions determining whether a municipality's impact fee charge is a fee or a tax apply to home rule townships?

Before this Brief addresses these questions, OTA and CLOUT emphasize: The underlying studies, calculations, service areas, fee determinations, credits and general implementation and operation of Hamilton Township's impact fee are *not* under attack. Appellants voluntarily removed all paragraphs dealing with such claims at the trial level, leaving open only whether a home rule township has the authority to enact an impact fee resolution under its home rule powers.

After granting partial summary judgment to Hamilton Township, Trial Court Judge Flannery stated, "Defendants' Motion for Partial Summary Judgment is well taken and is granted. This matter will be set for case management conference on the remaining issues." (Appx. 18) Immediately thereafter, Appellants moved to amend their Complaint to dismiss all unresolved claims (dealing with the operation and implementation of the impact fee), to which the Court acquiesced.

"This Court having considered and granted Plaintiffs' Motion to Amend their Complaint to withdraw all unresolved claims...the Court finds no remaining issues of material fact or law...Accordingly...this Court's September 30, 2009 Entry shall now be a final, appealable Order as of the date of this Order." (Appx. 3, T.d. 29)

Thus, Appellants tried to buy an "express ticket" to the Court of Appeals by removing all paragraphs dealing with the operation and implementation of the impact fee. By the calculated choice of Appellants, the issues related to the operation and implementation of the impact fee are not before this Court.

Therefore, this Brief does not address Appellants and their *Amici's* various challenges to the operation and implementation of the Hamilton Township impact fee.

Further, there is no issue before this Court as to whether the Hamilton Township impact fee meets the Dual Rational Nexus Test as articulated by this Court in *Home Builders Ass'n of Dayton & the Miami Valley v. Beavercreek*, (2000) 89 Ohio St.3d 121, 729 N.E.2d 349. The test is met through two stipulations of the parties at factual stipulations 28 and 27, which, when read together state:

The resolution assesses an impact fee to previously undeveloped property, and property undergoing redevelopment, to offset increased services and improvements needed because of the development. The purpose of the impact fee is to **benefit the property** by providing the township with adequate funds to provide the **same level of service to that property** that the township currently affords previously developed properties. (Emphasis added). (Appx. 35)

Will affirmance of the 12th District decision in this case lead to a glut of impact fees in Ohio's limited home rule townships as suggested by Appellants and their *Amici*? It is doubtful. There has not been a glut of municipal impact fees in the ten years following the *Beavercreek* decision by the Ohio Supreme Court. Home rule townships are created by statute. The Ohio legislature can always make a determination as to the fundamental right, nature and operation of home rule township impact fees if it chooses to do so. It has not chosen to do so.

IV. ARGUMENT

A. THE IMPACT FEE RESOLUTION DOES NOT CONFLICT WITH A GENERAL LAW.

The limited home rule township chapter R.C. 504 grants townships enacting this form of government "all powers of local self-government" and "local police, sanitary and

other similar regulations.” These broad powers are restricted in the statute by the *caveat* that they must not “conflict with general laws...” R.C. 504.04(A). Limited home rule townships have a right to rely upon the grant of **all** powers of local self-government and the right to enact local police, sanitary and other similar regulations.

Appellants suggest a flood of conflict cases will arise if the Court does not adopt a more stringent conflict test for limited home rule townships than that adopted by the courts for municipalities. Appellants identify extensive jurisprudence dealing with city ordinance/state statute conflicts. The case law is extensive because cities and villages so frequently attempt to avoid statewide statutes by torturing their ordinances into the “local self-government” safe harbor provided by the Ohio Constitution. Cities understand, in their exercise of police powers, they must avoid conflict with statewide police power pronouncements. But cities have “free reign” to pass local self government ordinances whether or not they conflict with the Revised Code. Contrary to the dire prediction of Appellants, home rule townships will never exercise their local self-government or police powers as boldly as cities. Home rule townships are clearly forbidden to conflict with statewide general laws. Home rule townships must bow to statewide pronouncements regardless of whether the resolutions are based upon the power of local self-government or the police power.

However, the critical issue is that limited home rule townships have all powers of local self-government and police powers, both of which must not **conflict** with state statutes. Conflict is the critical issue. Without conflict, there should be no need for further analysis.

The jurisprudence developed over conflict cases involving municipal corporations provides an excellent roadmap for the Court to follow. As important, it provides a critical roadmap for limited home rule townships to follow.

It is clear how limited home rule townships may identify their rights as to their powers of local self government. Whether the legislation is an exercise of home rule power or police, sanitary and other similar regulations, it must yield to statewide legislative pronouncements. Thus, in township conflict cases, the Courts need not engage in an analysis of whether the local resolution is an exercise of police power or local self-government power, as the Courts must do in municipal corporation conflict cases. All municipal conflict cases are based upon an ordinance which is couched as an exercise of local self government powers, but in many cases, the Courts have determined that the ordinance is actually a police power ordinance. When conflict with statewide police power statutes exist, the local ordinance is sometimes stricken. *Cleveland v. State*, 128 Ohio St. 3d 135, 2010-Ohio-6318, 924 N.E.2d 370, *American Financial Services v. Cleveland*, 112 Ohio St.3d 170, 2006-Ohio-6043, 858 N.E.2d 776.

Contrary to another assertion of Appellants, the Ohio Supreme Court has not found any wisdom in adopting a “field preemption” analysis in Ohio. The *Mendenhall v. Akron* case, 117 Ohio St.3d 33, 2008-Ohio-270, 881 N.E.2d 255, makes it clear there will be no “conflict by implication” unless the state legislature has clearly indicated that statewide law will exclusively control the subject matter. (*Mendenhall* at 40). Thus, statewide general speed limits are appropriate. *Schneiderman v. Sesanstein*, (1929) 121 Ohio St. 80, 167 N.E.158.

Further, the Court in *Mendenhall* ruled, under a home rule analysis, the Supreme Court has never followed the reasoning of field preemption. This type of analysis

“...has never been adopted by a majority of this Court, and we decline to apply such an analysis today.” (*Mendenhall* at 42)

Mendenhall followed and expanded upon the *Canton v. State* case, 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963, and the *American Financial Services v. Cleveland* case, dealing with predatory lending as a statewide concern. In all conflict cases, the conclusion is “no real conflict can exist unless the ordinance declares something to be right which the state law declares to be wrong, or vice versa.” *Struthers v. Sokol*, (1923) 108 Ohio St. 263, 140 N.E. 519.

Appellants are presenting a logical fallacy in suggesting that the Ohio legislature has indicated an intent to preempt limited home rule townships in the means by which townships construct parks, roads, police and fire structures. This fallacy is based upon the statutes which are necessary for traditional townships to construct those capital structures. Even within those statutes, the legislation is clear that the township “may,” in its discretion, utilize these procedures and the funding for parks, roads, police and fire buildings will come from “other available funds of the township treasury.” R.C. 5571.15, R.C. 5573.07, R.C. 5573.211 (“...**may** levy a tax”), R.C. 5573.11, R.C. 511.27 (“...**may** levy a tax” to defray park district costs), R.C. 511.43 (“...**may** appropriate funds” from the Township Treasury for park management), R.C. 505.39 (“...**may** in any year levy a sufficient tax” for fire protection), R.C. 505.51 (“...**may** levy a tax” to provide police protection) (emphasis added).

It is impossible to create a “conflict” unless there is a clear statewide pronouncement by the Ohio legislature compelling or forbidding certain actions by limited home rule townships. Nowhere in Chapter 504 does the legislature grant, restrict or even identify the right of limited home rule townships to enact impact fees. Nor has

the legislature spoken on the financial basis for the impact fee – maintenance of current levels of service of infrastructure for roads, parks, police structures and fire structures. Thus, how can there be a conflict?

The Trial Court in this matter specifically found the *Mendenhall* case indicated there is no field preemption in Ohio since all of the funding statutes for Ohio townships are clearly permissive. Thus, the Trial Court found there has been no intention expressed by the Ohio legislature to completely occupy the field to the exclusion of other funding sources. (Appx. 10-13, T.d. 27).

Professor Vaubel, extensively quoted in the Supreme Court Decision concerning predatory lending in *American Financial Services v. Cleveland*, has explained the *Canton* test and the importance of identifying whether a true conflict exists as follows: Is the state law a comprehensive matter controlled by the State as the sole regulator and part of a subject matter “where statewide dominance is required?” (*American Financial Services v. Cleveland* at 176).

Thus, the extensive jurisprudence on conflict cases is well settled and established in the State of Ohio. All townships, particularly limited home rule townships, rely on that jurisprudence. Limited home rule townships are vested with all powers of local self government as granted through the statute (R.C. 504), and cities are vested with that same grant through the Ohio Constitution. The powers are the same. The source is different. The only possible divergence, which is purely hypothetical, would be if the Ohio legislature passed a statewide statute identifying how limited home rule townships and cities could enact and operate impact fees. Limited home rule townships would abide by the legislative pronouncement pursuant to the dictates of Chapter 504. Cities might claim that such a pronouncement was unconstitutional as violative of the

local self-government powers of municipal corporations. However, the General Assembly has never taken such action.

The Ohio legislature has had approximately ten years since this Court resolved the *Beavercreek* case. The inaction of the legislature in the area of impact fees represents a clear acknowledgment of the nature and operation of such fees. Thus, there is no conflict with a general law, nor is there a statewide police concern dealing with impact fees. Statewide police matters have been identified in areas such as: Prevailing wage laws for government employees throughout the State, *State, ex rel. Evans v. Moore* (1982) 69 Ohio St.2d 88, 23 O.O.3d 145, 431 N.E.2d 311; the calculation of vacation leave credits for government employees throughout the state, *State, ex rel. Adkins v. Sobb* (1986) 26 Ohio St.3d 36, 496 N.E.2d 994; the regulation of high power electric transmission wires throughout the state, *Cleveland Elec. Illum. Co. v. Painesville* (1968) 15 Ohio St.2d 125, 44 O.O.2d 121, 239 N.E.2d 75; and boat use on Ohio waterways, *State, ex rel. McElroy v. Akron* (1962) 173 Ohio St. 189, 19 O.O.2d 3, 181 N.E.2d 26. City ordinances in these areas have been stricken as being in conflict with the statewide police concern.

However, even statewide statutes dealing with police matters do not always signal a denial of the right of local self-government activity. Examples are: The ethnic intimidation law of Ohio does not prevent local governments from expanding the intimidation laws to include matters other than ethnicity, *Columbus v. Spingola* (2001) 144 Ohio App.3d 76, 759 N.E.2d 473; the statewide statute mandating the lineal distance that sexually oriented businesses must locate from certain locations does not prevent local communities from increasing the distance, *Harris v. Fitchville Twp. Trustees* (N.D. Ohio 2001) 154 F.Supp.2d 1182; a state mandate of mobile home park

density does not prevent a local community from reducing the density. *Mentor Green Mobile Estates v. Mentor* (1991) 11th Dist. No. 90-L-15-135, 1991 WL 163450.

The Ohio legislature has already clearly identified the limitations placed upon home rule townships at R.C. 504.04. Limited home rule townships may not supply sewer or water other than as specified; may enforce its regulations only through civil fines and not through criminal ordinances; shall enact no taxes other than as authorized by the legislature; shall not revise the structure of the township elected officials; shall not regulate subdivision standards, road construction standards, urban sediment rules and stormwater regulations other than as specified; shall not amend the statewide building codes; shall not revise the statewide laws concerning agricultural use and conservation rules; shall not pass laws regulating hunting, and trapping or fishing other than as provided throughout the State. These are already clearly specified in the statute.

Limited home rule townships are well aware that may not alter the structure of their government. As stated above, booming townships have always had the opportunity to incorporate. However, this would substantially alter the structure of government and will typically result in an income tax. Therefore, the legislature mandated that limited home rule townships continue to operate in the same manner as traditional townships, that is, the election of three township-wide trustees and the election of one fiscal officer.

The statute indicates that a limited home rule township may not create new taxes other than as already authorized by the statutes. This limitation is clear for all limited home rule townships.

Limited home rule townships follow the clear dictates of Chapter 504, plus the other authorizations of Chapter 5, dealing generally with townships in Ohio, as well as the tax levy provisions of Title 55. Hypothetically, if a limited home rule township wanted to pass a unique zoning restriction or procedure, it could do so under its police powers as long as it does not conflict with a statewide pronouncement. Appellants misconstrue the zoning power of limited home rule townships. Appellants cite the *Dsuban v. Union Twp. Board of Zoning Appeals* case, (2000) 140 O.App.3d 602, 748 N.E.2d 597, as suggesting that since zoning is a police power throughout Ohio, and since the permissive zoning statutes of Chapter 5 define zoning rules and zoning procedures, then home rule townships in Ohio must follow Chapter 5 absolutely and to the letter. This is misleading because *Dsuban* was not only decided in favor of a township, (the term "home rule" was never even used in the case) but also, the Court actually approved the local zoning authority of the township to regulate the location of "barbed wire fences" in the township. The state zoning statute did not say anything about "barbed wire" fences, but the Court approved the authority of the local township to locate the placement of such structures under its general grant of zoning authority.

Since Chapter 504 grants limited home rule townships "all powers of local self-government" other than those which specifically conflict with general statutes, it is important to all townships in Ohio that this statutory grant be left intact. Appellants would have the Court judicially rewrite the statute to read that limited home rule townships have *no* power of local self-government unless the power is specifically granted by a statute passed by the Ohio legislature. This would make limited home rule townships no different from traditional townships and thus negate the entire Chapter 504.

B. THE IMPACT FEE OF HAMILTON TOWNSHIP IS A FEE, NOT A TAX.

All resolutions passed by limited home rule townships, like municipal ordinances, are cloaked with the strong presumption of validity. The impact fee resolution passed by Hamilton Township was challenged as an improper tax by Appellants. Each of the four judges who has examined the Resolution has determined that the one-time charge is a proper fee, not a tax. This should be given some deference by the Supreme Court.

When Hamilton Township designed its impact fee, it hired experts to document the precise financial need to construct capital structures which would maintain only the current level of service in order to provide the new residential and business occupants of the Township with the same level of service as those who were already in the Township. The experts studied impact fee jurisprudence throughout the numerous states which approve impact fees, including Ohio.

Hamilton Township did not only apply the concepts adopted by the Ohio Supreme Court in the *Beavercreek* case. The Township did more. It also addressed the concerns expressed by the dissenting opinion in *Beavercreek*, especially the assurance of the timing of the expenditures from the impact fee funds. Thus, the Hamilton Township impact fee resolution benefited from all of the issues addressed in *Beavercreek* and its predecessor cases.

The Hamilton Township impact fee does not represent a general revenue-enhancing mechanism. It provides a specific service to the payer of the fee: The guarantee that the capital structures necessary to provide the same level of service in the physical structures only (not for the payment of salaries, maintenance or operation)

for the parks, roads, police structures and fire structures, will be maintained. (Appx. 35, T.d. 8).

Some states, including Mississippi, Iowa and Alabama, have decisions of their courts which deny the opportunity to local communities to enact impact fees for two reasons: (1) The fee provides funding for government activities which are “traditionally” funded by taxes; and (2) The fee provides more than the cost to administer a department which oversees the government service in question. In other words, these states do not authorize the payment of a service which is a capital expenditure, but merely authorize administrative fees. *Mayor and Board of Aldermen, City of Ocean Springs, Mississippi v. Homebuilders Ass’n of Mississippi* (2006) 932 So.2d 44. *Armstrong v. City of Montgomery* (1949) 251 Alabama 632, 38 So.2d 863. *Home Builders Ass’n of Greater Des Moines v. City West Des Moines* (2002) 644 N.W.2d 339.

Ohio has held, in *Beavercreek*, that the payment for a capital structure with an impact fee is a valid expenditure. Ohio does not limit an impact fee to the cost to administer a government department.

Also, Ohio does not forbid the generation of funds from an impact fee to provide for expenditures which are not for “traditional government services.” Impact fees are **not** traditional government funding mechanisms, but are uniquely created by local communities to resolve their local problems. Ohio, (through the *Beavercreek* case and its predecessors) does not follow the “traditional government services” reasoning. Impact fees allow townships and municipal corporations the ability to recognize the property right to grow and develop of the business community while still offering the same level of service as was previously enjoyed by all citizens and businesses of the community. Further, in Ohio, there is no such thing as “traditional government services

funding” since all local communities, including traditional and limited home rule townships receive funding from numerous sources, including real estate taxes, distributive share of license plate fees, estate tax distributions (which may or may not continue), the statewide Local Government Fund, gifts and inheritances, JEDD income taxes and many other sources, including recreation user fees and other fees.

Appellants would suggest that a recreation user fee, such as a swimming pool membership, represents a tax because the fees generated are utilized to operate and maintain the parks and pools. Under Appellants’ *Mississippi* analysis, those expenditures represent “traditional government funding” and would be outlawed as an improper tax. However, Ohio communities statewide charge user fees for parks and pools to partially offset the expenditure necessary to maintain and operate these structures.

In addition, Ohio does not need further enabling legislation for limited home rule townships to initiate impact fees. In the *Mississippi*, *Iowa* and *Alabama* cases, the Courts determined that further legislative action was necessary in order to authorize impact fees. Ohio Courts have clearly made the decision through the *Beavercreek* case and prior cases that impact fees are already enabled through the power of local self-government and police power. Ohio cities receive those powers through the Constitution. Limited home rule townships receive that power through Chapter 504 of the Revised Code. ***It is the same power.***

In the attempt by Appellants to characterize the impact fee as a tax, they describe how the impact fee operates. The Court is reminded that Appellants have completely dismissed the portion of the litigation which deals with how the Hamilton Township impact fee operates. For example, the issue of how many service areas

should benefit from the four separate components of the Hamilton Township impact fee is not before the Court. How many service areas is a matter of decision by the community establishing an impact fee. How and why Hamilton Township made this decision should not be challenged by Appellants.

In fact, Hamilton Township made the decision by relying on its unchallenged expert report, which states: "This study calculates maximum impact fees that Hamilton Township can charge based on the existing levels of service for roads, parks, fire and police. For all four types of facilities, the entire jurisdiction would be appropriate as a single service area." (Supp. 66)

Appellants also struggle with the Court of Appeals' identification of a factual stipulation that the impact fee benefits the exact, specific property which is paying the fee. This stipulated fact must be given the same deference by the Court as a specific finding of fact issued by the Trial Court. This factual stipulation logically leads to the proper conclusion that both factors in the Dual Rational Nexus Test are followed.

Appellants and their *Amici* improperly suggest economic stress is caused by the impact fee. There is no evidence before the Court to evaluate such an undocumented assertion. It is not even part of the record who pays the fee. The farmer? The developer? The builder? The purchaser? This issue would have been evaluated and presented to the trial court. Appellants completely dismissed the paragraphs of the Complaint dealing with the operation and implementation of the impact fee. Thus, these issues are not before this Court.

An improper economic stress argument is presented by the claim of Appellants and *Amici* that townships in Ohio are not experiencing growth. Not only is this claim irrelevant, it is completely unfounded. If Hamilton Township was not experiencing

explosive growth, it would not have chosen to enact the impact fee. The stipulated studies performed by the experts documents the explosive growth experienced by Hamilton Township. This Court may take judicial notice of the recent United States Census Bureau's determination that Hamilton Township's population has "exploded" by 146% in the last decade.

The impact fee is the best mechanism for local governments to regulate and benefit the existing property owners and new occupants of the Township. Some farmers who own 40-acre farms may choose to continue farming the land, and therefore pay no impact fee. Some of them may sell the farm for 5-acre large lots, and pay a minimal impact fee. Some of them may elect to sell the 40-acre farm for development into 160 starter homes. There would be a much larger impact fee in such case. However, how the impact fee affects growth is not before the Court because the operation and implementation aspect of the case has been dismissed by the Appellants.

The Dual Rational Nexus Test is complied with by the Hamilton Township impact fee. There is significant benefit to each property which pays the fee. This fact has been determined by the Trial Court and the Court of Appeals. The stipulation commented upon by the 12th District Court of Appeals is a significant factual stipulation. Stipulations 28 and 27 formed an important foundation for the Court in *Drees v. Hamilton Township*, 12th Dist. No. CA2009-11-150, 2010-Ohio-3473:

The resolution assesses an impact fee to previously undeveloped property, and property undergoing redevelopment, to offset increased services and improvements needed because of the development. The purpose of the impact fee is to **benefit the property** by providing the township with adequate funds to provide the **same level of service to that property** that the township currently affords previously developed properties. (Emphasis added) (Appx. 35)

When Appellants claim that the impact fee is a tax because it operates more like a tax, Appellants are blurring the line between the *right* of the limited home rule township to enact the fee with the manner in which the fee operates. In the *Withrow* and *American Landfill* cases, the Courts focused on the total structure of local fees, both their legal basis and their operation. *State, ex rel. Petroleum Underground Storage Tank Release Comp. Bd. v. Withrow* (1991) 62 Ohio St.3d 11, 579 N.E.2d 705, and *American Landfill, Inc. v. Stark/Tuscarawas/Wayne Joint Solid Waste Mgmt. Dist.* 166 F.3d 835 (6th Cir.1999). These cases are not based upon the mere right of the local government to enact a proper fee, but are based primarily on how the funds are spent. This of course is the operation and implementation issue which was dismissed by Appellants and is not before this Court.

All of the jurisprudence from numerous states boils down to the specific components of the impact fee as a financial mechanism that is completely different from a tax. All of the components are present in the Hamilton Township impact fee resolution.

First, its payment is completely voluntary. A farmer may continue to farm rather than sell to the Appellant developers and home builders.

Second, the property paying the fee receives a definite benefit for the payment. This was clearly established by both the Trial Court (Appx. 4-18, T.d. 27) and the Court of Appeals (*Drees v. Hamilton Township*, 12th Dist. No. CA2009-11-150, 2010-Ohio-3473). The new property owners are guaranteed, even if they are the purchasers of 160 starter homes where a farm used to exist, that they and their families will receive

the same level of service from the capital structures of the parks, roads, police stations and fire stations.

Third, the payers of the fee are not paying all of the costs of the structures. They are only paying the initial cost to make necessary capital upgrades. The entire cost of maintaining those structures falls on the entire Township. The cost to construct an additional road lane is insignificant compared to the cost to continuously monitor and maintain that lane of roadway. The impact fees shall not be used for ongoing repair and maintenance and are limited to infrastructure improvements to maintain the present level of service.

Fourth, the fees are totally segregated, both as to type of fee and as to segregation from general Township funds.

Fifth, the fees **must** be spent within a stated amount of time in order to assure the payers that the necessary capital structures will be improved as needed.

A highway toll payment is considered to be a fee, not a tax. Yet it occurs every time that a driver utilizes the road. Further, its use is to maintain the capital structures of the highway system. The Hamilton Township impact fee is a one-time payment to guarantee that capital structures will be maintained to provide the same level of service as they had in the past.

Finally, Appellants and their *Amici* incorrectly suggest that the fee is a tax because it benefits all existing residents and business occupants of the Township. This is incorrect. Since the fee only provides for the **same** level of service of capital structures, the existing residents do not receive a benefit. What is maintained is the status quo, the same level of service. For example: Today, a married couple who takes their young child to a Township park to play on the swing set may have to wait a few

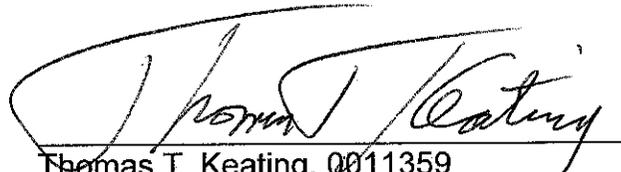
minutes until a swing becomes available. Tomorrow, after a 40-acre farm develops into 160 starter homes, many more children will be at the swing set. The impact fee guarantees to these old and new families that the wait after the new homes are built will be approximately the same. There will be more children using the swings and there will be a few more swings constructed. But the wait (level of service) will be the same.

V. CONCLUSION

Therefore, the OTA strongly urges on behalf of all townships in Ohio and the millions of citizens residing in Ohio's townships, to affirm the right of limited home rule townships to solve their local self government problems by properly crafting a fair and reasonable impact fee.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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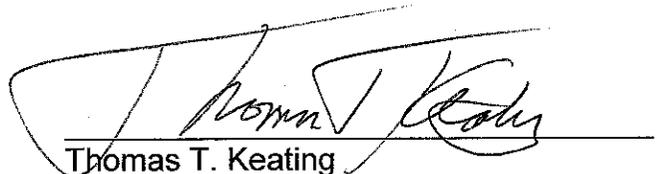
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