

IN THE SUPREME COURT OF OHIO

THE DREES COMPANY, et al.)
)
Plaintiffs-Appellants,)
)
 -v-)
HAMILTON TOWNSHIP, OHIO, et al.)
Defendants-Appellees.)

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

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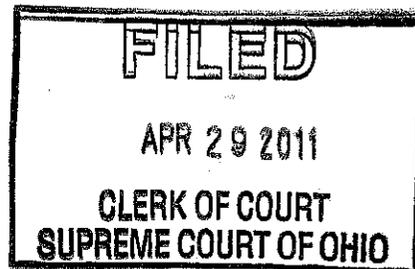
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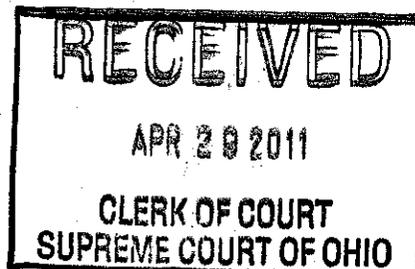
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I. INTRODUCTION

In order for the Township to prevail, it must convince the Court that the Township has been granted the authority to impose impact fees, and that the Resolution does not impose a tax. If the Township does not prevail on both arguments, the Resolution is invalid. Instead of addressing the merits, the Township mischaracterizes Appellants' position, battles straw-men, and assert arguments that border on the absurd.

According to the Township: statutorily granted powers are as insolated from statutory restriction as Constitutionally created powers; the term 'general law' has two irreconcilable definitions within R.C. 504.04(A)(1); limited home rule townships are exempt from complying with Titles V, and XV of the Revised Code; and public benefit is not indicative of a tax. These patently false assertions form the crumbing foundation of the Township's argument.

In reality, statutorily granted powers, such as limited home rule, are subject to statutory limitation. This is especially so where the statutory provision that grants the power expressly subjects those powers to blanket restriction by other statutes—as R.C. 504.04 does. The Township attempts to cloak R.C. 504.04 with constitutional level protection by contorting the term 'general law' with an unworkable definition. 'General law' appears three times within the same sentence of R.C. 504.04. If this statutory term were to mean "affirmative regulation of the populace" as the Township insists, then the Township could not collect any taxes, because no statute that grants a township a taxing authority can qualify as a 'general law.' The Township's definition leads to absurdity. But this absurdity is necessary for the Township's argument that it is exempt from complying with provisions of Revised Code Titles V and XV that set forth how any township, including limited home rule townships, may raise revenues for expenditure on roads, parks, police and fire protection. The Township may not impose impact fees.

To convince the Court that the Resolution doesn't impose a tax, the Township is reduced to arguing that public benefit is not indicative of a tax. The Township must defend this unenviable position because the improvements funded by the Resolution benefit the public—not the payer. However, the Township's argument stretches isolated dicta from a fact bound case beyond its breaking point. It may be true that where a true fee tangentially benefits the public, the tangential benefit does not transform the true fee into a tax. This is not the case here. Here, revenues are generated to expand the Township's infrastructure and no effort is made to target the spending back to the payer. The Resolution operates so that its primary effect—indeed, its purpose—is to benefit the public. It is a tax.

II. R.C. 504.04 IS NOT LICENSE TO IGNORE THE REVISED CODE.

The Township's reading of R.C. 504.04 is simplistic. It claims, "a [limited]¹ home rule township can self-govern and exercise police powers as it sees fit." And because "there is no statute precluding a township from enacting an impact fee," a limited home rule township may do so. According to the Township, if an activity isn't expressly prohibited, the activity is implicitly authorized. This Court, however, has cautioned that conflict analysis is not that simple. "Although on occasion a state statute and municipal ordinance will directly contradict each other, and thereby make a conflict analysis simple and direct, that is not always the case. It is in this context of more nuanced cases that the concept of *conflict by implication* has arisen." *Mendenhall v. Akron*, 117 Ohio St.3d 33, 2008 Ohio 270, ¶ 31. The question is whether the Resolution permits what a state statute indirectly prohibits. *Id.*

The Township accuses Appellants of "avoiding th[e] straightforward test" of whether the Resolution expressly allows what a statute forbids. That test is inapplicable here—there is no statute that expressly authorizes or prohibits impact fees. The Township dwells on the inapposite:

¹ The Township tends to omit this word.

The Township makes light of the distinction between the preemption analysis applicable in different contexts—e.g., federal preemption, municipal home rule, limited home rule, non-home rule—asking “How many ‘strands’ of conflict analysis should there be?” The Township’s argument is one of policy. It isn’t based upon the legal fabric from which the Court must sew. The Township refuses to recognize that the General Assembly must give greater deference to Constitutional restraints on its powers than to self-imposed legislative restraints which can be avoided with a single word, e.g., “notwithstanding.” The Township concludes, “the source of the grant of power does not itself affect the exercise of the respective powers.” But the question is not the act of “exercising” the powers. The question is of scope and of the ability of a higher government to curtail those powers. Federal preemption differs from municipal home rule analysis because the text and the source (U.S. and Ohio Constitutions) are different. As Appellants explained in detail in their merit brief, the differences in the text and source of Constitutional municipal home rule powers and statutory limited home rule township powers require divergent analysis.²

The Township accuses Appellants of “evaporating” a limited home rule township’s powers and even of “ignor[ing] that a legislative grant of [limited] home rule self-government has been made.” To the contrary, Appellants rely on the legislative source of the authority.³

Admittedly, a limited home rule township’s powers are more expansive than those of a traditional township. As the Township notes, it may regulate night club bouncers. It could pass

² The Township queries how other similar statutes should be interpreted. While not *sub judice*, identical language in different sections should generally be treated identically.

³ The Township criticizes Appellants for citing to cases addressing the scope and powers of traditional townships. This is a case of first impression. There is no directly applicable precedent to follow. Understanding the historical landscape is critical to achieving the best resolution of these issues. Appellants do not accuse the Township of relying upon Municipal Home Rule precedent that the lower courts found inapplicable.

smoking bans, implement rapid transit, and license street vendors, taxis, and door to door sales. It could exercise eminent domain and condemnation powers. It could exercise most of the municipal powers listed in R.C. 717.01. There are many issues of self-government and police powers to which the Revised Code does not speak. The Township may regulate in those areas. But for the matters to which the Revised Code speaks, conflict analysis is appropriate.

A. Statutory Construction Supports Limits on Limited Home Rule Powers.

If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.

R.C. 1.51. Here, the general provision of 504.04 grants limited home rule powers to qualifying townships. The specific provisions of R.C. §§ 505.39, 505.51, 511.27, 511.33, 5571.15, 5573.07, 5573.10, 5573.11, 5573.211, governing the funding of township capital improvements to roads, parks, police and fire services, prevail. R.C. 504.04 did not contain the “manifest intent” that it would prevail over these specific provisions. In fact, R.C. 504.04 contained the manifest intent that it would not supersede existing general laws.

Matters of township finance are addressed in the Revised Code in detail. This detailed regulation requires the Court to engage in implied conflict analysis. The Township may subjectively view implied conflict analysis to be “lengthy and taxing conflict analysis,” but that editorializing is not license to ignore the conflict between the Resolution and the general law.

The Township urges this Court to give the term ‘general law’ a nonsensical meaning in R.C. 504.04. The Township’s logic rests on the jaw dropping assertion that there is no “significant” distinction between a constitutional and statutory grants of power. This audacious assertion is made without citation because it is unsupported. Both lower courts in this case

rejected the Township's argument.⁴ The Township ignores the disastrous impact of its definition. Nor does it address the absurdity of it not being permitted to impose taxes because no tax could be "authorized by general law" if 'general law' means a positive exercise of police power by the State. Also, township self-governance would be *unlimited* as no section limiting self-governance powers is an exercise of police powers. This definition of 'general law' is unworkable.

Applying the *Canton* definition yields nonsensical results elsewhere in the Revised Code also. The Ninth District has found Revised Code provisions defining duties of county prosecutors to be general laws. *State ex rel. O'Connor v. Davis* (2000), 139 Ohio App. 3d 701, 708, 745 N.E.2d 494 (Batchelder, J.)("Because the [ordinance] attempts to diminish the statutory duties of the prosecuting attorney . . . , the ordinance *conflicts with general law*.").⁵ The existing law holds that in the Revised Code, 'general law' includes the Revised Code.⁶

B. The Township Ignores 'Shall' And Defines 'May' Illogically.

The Township's substantive conflict argument is limited to the conclusory sentiment that permissive statutes are non-exclusive. The township is not required to levy road, park, police,

⁴ "The definition of 'general law' in the *Canton* decision is properly understood as an interpretive statement made within the context of O. Const. XVIII, Section 3. *** But there is no such constitutional obstacle to legislative enactments circumscribing the authority of a [limited] home rule township to exercise either its police power or its power of self government. *** For this reason, the definition of 'general law' provided in *Canton* is not a useful one for purposes of the analysis this Court must engage in. This Court concludes that a general law, for purposes of R.C. 504.04, is any enactment of the Ohio General Assembly." (Trial Op. at 6-7)

⁵ Also from *O'Connor*: "The *general laws*, thus grant authorization to boards of county commissioners to retain outside counsel, but carefully limit that authorization." 139 Ohio App. 3d at 711. "Even in a properly established charter form of county government, the General Assembly continues to provide by *general law* for the 'government of counties.'" *Id.* at 713.

⁶ The Township mistakenly stated that this 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" in *Clermont Environmental Reclamation Co. v. Wiederhold* (1982), 2 Ohio St. 3d 44,442 N.E.2d 1278. The township in that case knew it could not benefit from the Home Rule Amendment. Instead, it argued that if the statute violated the Home Rule Amendment and was inapplicable to cities, the statute "would not have uniform operation across the State" under Section 26, Article II of the Ohio Constitution. This Court rejected both prongs of that argument. *Clermont Environmental* provides the Township no quarter.

and fire protection taxes; nor is it required to charge property owners special assessments for road improvements. The Township, however, makes the mistaken leap of logic to assume that because the specified levies and assessments are permissive, alternate means may be used to fund these improvements. This is not true. “When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.” *Botany Mills v. U.S.* (1929), 278 U. S. 282, 289. A township is not required to raise additional revenues for improvements, but if a township elects to do so, it must use the specified means.

The Township also overlooks the restrictive term ‘shall.’ In the case of road improvements, “The compensation, damages, and costs of township road improvements *shall* be apportioned and paid in any of the following methods . . .” R.C. 5573.07. The section then lists a series of means including assessing property based upon proximity to the improvement, taxation, and use of “funds . . . available therefor.”⁷ Impact fees are not listed. The statute uses the word “shall,” meaning that compliance is mandatory. *Dorrian v. Scioto Conserv. Dist.* (1971), 27 Ohio St.2d 102, 271 N.E.2d 834, Syllabus. The Township argues that the General Assembly adopted a comprehensive scheme for how improvements could be paid, but made compliance with it optional. This is absurd. ‘Shall’ is not optional. R.C. 5573.07 is a general law with which limited home rule townships must comply.

Where the General Assembly sets forth a detailed list of the means by which a township may fund certain functions, the list is exclusive. “The canon *expressio unius est exclusio alterius*

⁷ The Township implies that “funds . . . available therefor” grants powers to impose impact fees. It does not. Rather this language references general receipts, and funds earmarked for transportation spending, including grants, bond funds under R.C. 5573.14, motor vehicle registration revenue under R.C. 4501.04(E), motor vehicle tax revenue under 4504.05(B), and county grants under 5535.08. *C.f.* 1990 Ohio Op. Atty Gen No. 97 (discussing earmarks and township grants). At best, the Township begs the question of which funds are “available therefor.”

. . . has force only when the items expressed are members of an associated group or series, justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence.” *Summerville v. City of Forest Park*, 128 Ohio St.3d 221, 2010 Ohio 6280, at ¶ 35. This canon applies here. A limited home rule township may not fund roads, parks, police or fire protection by means other than those set forth in the Revised Code.

C. Limited Home Rule Townships Must Follow the Lien Provisions in R.C. Ch. 504.

Remarkably, the Township claims even the provisions of Chapter 504. do not apply to a limited home rule resolution. “To enforce a township resolution under this chapter, a board of township trustees may authorize . . . [the filing] for a lien against the property of the violator if the violation relates to the use of the property and if the violator has failed to pay a fine imposed pursuant to section 504.07.” R.C. 504.08(B). The Township argues that it isn’t imposing a fine, so it needn’t abide by R.C. 504.08. This demonstrates the fallacy of the Township’s non-exclusive ‘may’ argument. According to the Township, it need only abide by the monetary limits of R.C. 504.05 and afford a resident the process due under R.C. §§ 504.06, .07 and .08 if it labels the lien a fine. If the Township labels the lien something else, and there is no Revised Code provision that addresses that type of lien, then the Township may proceed as it wishes. RC 504.08 provides the exclusive means for a limited home rule resolution to lien a property.

The Revised Code applies to the Township, which lacks authority to assess impact fees.

III. IMPACT FEES ARE IMPERMISSIBLE TAXES

A limited home rule township may not enact taxes “other than those authorized by general law.” R.C. 504.04(A)(1). The Township concedes that absent enabling legislation, it may not enact impact fees that are merely taxes in disguise. (Appellee Brief, 22-23). “The most salient features of these analyses are whether the charge is roughly equal to the cost of providing the service, and whether the service being paid for is provided primarily to the payers of the fee

or to other persons.” (Trial Op., 13). Two fundamental and related aspects of the Resolution indisputably render it a tax: 1) the revenues generated will be spent for the benefit of the Township as a whole; and 2) there is no requirement to expend the revenue to benefit the property for which the moneys were paid. In short, there is no nexus between the payer and beneficiary. The trial court acknowledged, “It is the case that a new resident may pay a fee that is ultimately used for a new park installation on the other side of the Township.” (*Id* at. 14). This is a tax.

The Township attempts to gloss over this disconnect by claiming that “payers *as a class*” benefit. Supposedly it is acceptable for the payer not to benefit from the moneys she pays if some other payer is benefited. The assumption being that at some point in the future the payer might benefit from the expenditure of moneys collected from another. This is analogous to public school funding. While Homeowner A may not benefit from the school taxes she pays now, she may benefit in the future from others’ taxes if she sends a child to public school. Neither the assessments to support the schools nor the assessments to make capital improvements can be classified as anything other than a tax. Neither is necessarily used to benefit the actual payer.

A. The Impact Fees Possess Tax Attributes

A court may not merely look at labels or, as the Township would have it, consider only the stated intent of the governmental body, but must review “the substance of the assessments, and not merely their form” and perform a case-by-case analysis of whether a charge constitutes a tax or a fee. *State ex rel. Petroleum Underground Storage Tank Release Comp. Bd. v. Withrow* (1991), 62 Ohio St. 3d 111, 117, 579 N.E.2d 705.

1. *The Impact Fee Is Impermissibly Cumulative to the Zoning Fee.*

A government imposes a fee when it provides a service in return for payment. *Id.* at 113. But when the amount of the fee exceeds the cost and expense of the service, the fee constitutes a tax. *Granzow v. Bur. of Support of Montgomery Cty.* (1991), 54 Ohio St. 3d 35, 38, 560 N.E.2d 1307. Excessive and unusual zoning fees or those exceeding the cost of inspection and regulation constitute taxes. *See Blower v. Alside Homes Corp.* (1963), 90 Ohio L. Abs. 516, 187 N.E.2d 636; 1997 Atty.Gen.Ops. No. 1997-22.

The Township admits that it collects a zoning fee. Because the issuance of a zoning certificate is also conditioned upon payment of the impact fee, the payment of the fee and issuance of the certificate are inextricably (and impermissibly) linked. The Township already collects an adequate zoning fee to cover the cost of administrative expenses related to the issuance of zoning certificates. The Impact fee is in addition to the zoning fee and is therefore an impermissible tax.

2. *The Impact Fee Serves the Same Purpose as a Tax*

Impact fees earmarked for services “traditionally . . . funded by tax revenue” are taxes. *Ocean Springs v. Homebuilders Ass’n* (Miss. 2006), 932 So.2d 44, 58-59.⁸ Because the impact fees serve the same purpose as traditional taxes, including purposes for which the Township already has three levies in place, the impact fees act as taxes.

⁸ Contrary to the Township’s contention, *Ocean Springs* is relevant to this action. *Ocean Springs* involved an impact fee which was not expressly authorized under state law and or the city’s home rule power. 932 So.2d. at 50-53. The *Ocean Springs* court observed several factors in differentiating taxes and fee: whether the fee exceeds expenses to exercise the city’s police power, whether the infrastructure funded by the fee confers a benefit on those paying the fee or is provided for general public use, and whether the fee funds services ordinarily funded by the city’s general revenue. *Id.* at 53-59. It concluded impact fees are taxes.

While *Withrow* involved a fee for a rather unique proprietary function—mandatory environmental insurance for underground storage tanks—the Township’s impact fees cover services that governments traditionally fund with tax revenues—roads, parks, police and fire protection. In fact, in addition to the impact fee, developed properties will pay increased taxes based on their increased property value for these same services—effectively, a double tax.

3. *Earmarking Impact Fees in Separate Accounts is Not Enough*

The mere segregation of impact fees from general revenue is not dispositive of whether the charges are taxes. *American Landfill, Inc. v. Stark/Tuscarawas/Wayne Joint Solid Waste Mgmt. Dist.* (6th Cir. 1999), 166 F.3d 835, 839 (Revenue held in a special fund was a tax where it ultimately “serve[d] public purposes benefiting the entire community.”); *A&M Builders Inc. v. City of Highland Heights* (Jan. 20, 2000), 8th Dist. No. 75676, 2000WL 45859, at *3-4 (“The simple act of placing these taxes in a segregated fund does not magically transform these taxes into fees.”); *Ocean Springs*, 932 So.2d 44 (same). When funds ultimately benefit the entire community, earmarking them to specific funds makes them “no less ‘general revenue raising levies.’” *Id.* at 839. Here, revenues are expended for the general benefit—which is a tax.

4. *Labeling the Impact Fees as Voluntary Proves Nothing*

The Township claims its impact fee isn’t a tax because it is a “voluntary” payment. Impact fees are “voluntary” only in the sense that a citizen can choose not to build a home on her land. Considering the impact fees to be voluntary is meaninglessly simplistic.

Many taxes are voluntary. An excise tax is a “privilege tax,” stemming from the “*voluntary* action of the person taxed in performing the act, enjoying the privilege or engaging in the occupation which is the subject of the excise, and [lacking] the element of absolute and unavoidable demand.” Am. Jur.2d, *State and Local Taxation*, §28 (1973) (emphasis added). Notably, several courts have classified impact fees as excise taxes. *See, e.g., Homebuilders*

Ass'n of Greater Des Moines v. City of West Des Moines, 644 N.W.2d 339, 346 (2002); *see also*, *Waters Landing L'td Partnership v. Montgomery County*, 337 Md. 15, 650 A.2d 712, 716-17 (1994). Sales taxes are also “voluntary.” Labeling impact fees as voluntarily proves nothing.

B. Charges Separating the Payer and Beneficiary are Taxes

Charges separating the payer and beneficiary are taxes, not fees. “The chief distinction is that a tax is an exaction for public purposes while a fee relates to an individual privilege or benefit to the payer.” *American Landfill*, 166 F.3d at 838. Three elements determine whether a charge is a tax or fee: (1) the entity imposing the assessment; (2) the parties upon whom the assessment is imposed; and (3) whether the assessment is expended for general public purposes, or used for regulation or benefit of the parties upon whom the assessment is imposed. *Id* at 837.

Here, the impact fees are imposed by a local government, not a regulatory agency and the payers are property owners, not regulated entities. The improvements funded by the impact fee benefit the public at large and provide no exclusive benefit to the individual fee payer. *See West Des Moines* 644 N.W.2d at 348.⁹ All three factors point to this being a tax. Add to that the Township’s attempt to annex property into a municipality—where the Township will not be servicing the property, but reaping revenues—and the conclusion is forgone.

This impact fee separates the payer and beneficiary. When revenues can be used without limitation as to the location of improvements or benefit to the payer, the impact fee is a tax. “The fact that additional services are made necessary by growth and development does not change the essential nature of the services provided: they are for the public at large.” *Idaho*

⁹Contrary to the Township’s contention, *West Des Moines* is comparable to this action. The Iowa Constitution afforded cities broad police powers, but required express statutory authority for a city to impose any tax. 644 N.W.2d at 345-346. The court considered whether the impact fee was as a tax or as a fee based, on among other considerations, whether the fee conferred a special benefit on those paying the fee. *Id.* at 347-350.

Building Contractors Ass'n v. City of Coeur D'Alene (1995), 126 Idaho 740, 743. The impact fees are spent on a first-in/first-out basis. The revenue may be used to make improvements anywhere in the Township and which bear no relationship to the subject property. A new homeowner next to an existing fire station has to pay the fee, but the beneficiary may be a far off existing residence near whom a new fire station is built. A new house may be located on the edge of the Township on a road that doesn't need improved, but the beneficiary will be residents on a chip-and-seal road 5 miles away that is widened and paved. A farmer may build a second house on his farm for his 18 year old who is taking over the farm. The impact to the Township is negligible, but the \$6,250.00 fee is still accessed and new taxes reaped for the house. If the Township razes and replaces the existing police station with one twice its size, the Township has stated it could fund the new building 50% from impact fees and 50% from general revenues. New development would be paying both halves—the first through impact fees, the second through its share of taxes. These examples show that the payer isn't the beneficiary. The Township's self-labeled "arithmetically complicated" formula does not calculate if a payer will use the improvements she finances.

If the capital improvements that the Township desires to fund with impact fees do not occur, the Township argues that the absolute "level of service" within the Township will remain constant while demand increases. The Township concludes the result will be a relative reduction in the "level of service." This "reduction" (actually, lack of increase) will befall the entire Township because the entire Township is the "Benefit District."¹⁰ The Township intends to use its road impact fee revenues primarily to widen lanes on its existing roads—a benefit to all users.

¹⁰ The Township quibbles over the term 'District,' claiming instead to have created a 'Service Area.' The Impact Fee Study discussed 'Assessment Districts' and 'Benefit Districts.' See T.d. 8, Exh. C thereto, p. 4.

Spending revenues for systemic improvements anywhere the Township desires, regardless of benefit to the development from which the revenues were derived is the epitome of a tax.

This contrasts with *Beavercreek*, where the City's impact fee district was $\frac{1}{4}$ the size of the Township, was mostly undeveloped, and was subdivided into 33 "*vacant* planning areas" (VPA) with an average size of 150 acres (0.25 sq.mi.). *Home Builders Assn. of Dayton and the Miami Valley v. City of Beavercreek* (1998), 2d Dist. No. 97-CA-113, 97-CA-115, 1998 Ohio App LEXIS 4957, *6. The fees collected from each VPA were required to be spent on improvements to benefit that specific VPA. This method targeted the benefit back to the payer. And, it contained an offset for contribution of taxes towards improvements. The Township offers no tax offset. The Township is 22,016 acres (34.4 square miles)—which is 137 times the area of the VPAs in *Beavercreek*. The Township estimated its population to be 20,000 in 2007 when the Resolution was adopted, equating to a population density of over 580 people per square mile. The Township, unlike the *Beavercreek* VPAs, was anything but undeveloped vacant land. Hamilton Township is not geographically divided into pre-developed and undeveloped zones. The revenues are fungible. Parks will be used by occupants of old development. Police and fire equipment will respond to calls from old development. A rising tide raises all boats. When all residents equally benefit, but only a few residents shoulder the burden, the charge is a tax.

Two complementary provisions underscore the Resolution's status as a tax. The first *prohibits* credits "for improvement to the major roadway system that primarily serve traffic generated by the applicant's project . . ." (Resolution X(1)(b)). The second states that the Township *may require* "construction of reasonable project improvement to serve the development project, whether or not such improvements are of a type for which credits are available under subsection X, Reimbursements." (*Id.* at XI(1)). The Township requires a

developer to make improvements to township infrastructure to offset the impact of the development, but still imposes the full impact fee for improvements unrelated to that development. The expenditure is divorced from the impact of the fee-payer and is a tax.

The Township's contention that the impact fee is somehow a regulatory measure is unsupported. The Township misapplies *Withrow*, which observed that limited public benefit from a cleaner environment did not convert the regulatory nature of the Underground Storage Tank ("UST") fees into taxes. UST fees in *Withrow* were inextricably linked to the problem of leaking underground tanks. UST fees carry an unmistakable regulatory nexus. They form part of framework which tracks such tanks over their useful life and holds tank owners strictly liable for damages caused by leaks. *Withrow's* holding was "narrow and confined to the facts of this case." 62 Ohio St. 3d., at 117. *Withrow's* public benefit was attenuated.¹¹ Here, public benefit is the goal. The Resolution states it "assures the continuation of capital services to benefit one of the fastest growing townships in the State of Ohio and the United States of America."¹² (Resolution I(5)). The Township admits that revenues are to benefit the entire Township.¹³

C. The Township May Not Impose Subdivision Regulations

The Township cannot have it both ways. At numerous junctures, it asserted that the impact exaction *is* intended as part of a regulatory program. But if this were true, which is

¹¹ The Township's brief states that "The Hamilton Township impact fee follows the *Withrow* factors and enacts a fee, not a tax," and lists four claimed attributes of the Resolution. (Appellee's Brief, 42). These claimed attributes are not listed in *Withrow* as factors.

¹² The Township snipes that no facts in the record demonstrate whether the "service in question" benefits the payer. All revenues have remained escrowed and unspent. In this sense, there are no facts to support either side regarding the implementation of the Resolution. But this is a red herring. This case is a facial challenge. The fact that the text of the Resolution does not target the illusory and diffuse "benefit" to the payer is the issue.

¹³ At the Trial Court, the Township admitted the impact fees "raise revenue" and "will equally benefit existing residents" and "maintain level of service for all." These are public benefits.

dubious, it would be an *ultra vires* act. “No resolution adopted pursuant to this chapter shall ... Establish or revise subdivision regulations.” R.C. 504.04(B)(3).

Taking the Township at its word, it is “regulating the demand created by new residential development upon existing roads and government services.” (Appellee Brief at 36). Appellants construct new homes in platted subdivisions. If the Township is regulating the impact of new residential development, then it is regulating subdivisions in violation of R.C. 504.04(B)(3).

D. The Township May Not Alter the Structure and Form of Township Government

As discussed above,¹⁴ the Resolution created two new “districts.” An “impact fee assessment district” and an “impact fee benefit district.” The Township now quibbles with its own wording and wishes the districts be referred to as “service areas.” The effect is the same. The Township has created new governmental districts, similar to park districts, police districts, and fire districts. The Township also argues that it is not required to create districts. This is untrue. *See e.g.*, R.C. 504.16 (requiring a police district). The creation of these additional districts modifies the form and structure of the township government in violation of R.C. 504.04(A)(1).

IV. THE STIPULATIONS WERE OF THE TOWNSHIP’S INTENT

A. The Parties Did Not Stipulate to the Effect of the Resolution.

The Township has misrepresented the nature of the stipulated facts. The parties agreed to submit the matter on stipulated facts for summary judgment for determination whether the Resolution facially was *ultra vires* because either the Revised Code dictates how roads, parks, police and fire protection could be funded, or because the Resolution imposed a tax. The cross-motions for summary judgment were premised upon a facial challenge, thus the stipulations.

¹⁴ *Supra*, at 12, n. 10 and accompanying text.

The majority of the stipulations came directly from the Complaint. For example, the complaint read, “The *alleged* 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.” (Complaint, ¶ 185). Defendants/Appellees admitted as much. (Answer, ¶185). The parties agreed to submit cross motions for summary judgment to the trial court on agreed facts. Defendants/Appellees requested, for the purposes of summary judgment, Plaintiffs/Appellants not contest whether the Township actually had an undisclosed purpose. Plaintiffs/Appellants agreed, for the purposes of the cross-motions only, not to contest the Defendants’/Appellees’ subjective purpose. Thus, ‘alleged’ was removed from the “purpose” stipulation, which otherwise is identical to Complaint ¶ 185. (*See* Stipulation, ¶27).

The Township did not argue a different interpretation of the stipulation at the trial court or court of appeals. The trial court recognized that the stipulation was to stipulate to the intent of the Resolution—not its outcome. Thus, the trial court wrote: “The aim of the new impact fees is ‘to ensure that impact-generating development bears a proportionate share of the cost of improvements . . .’” (Trial Op. at 2). The Court of Appeals erred when it concluded, contrary to the trial court, that the parties stipulated to the effect of the Resolution.

It is telling that the Township has taken up this argument. The Township also expands it to also include Stipulation ¶28. Stipulation ¶28 was based upon Complaint ¶ 198, which reads, “The Resolution assesses an impact fee to previously undeveloped property, and property undergoing redevelopment, *allegedly* to offset increased services and improvements needed because of the development.” The Township admitted this allegation (Answer, ¶198). Stipulation ¶28 was subject to the same agreement as Stipulation ¶27, that Appellants would not

contest the Township's purpose or intent. There was never an agreement to stipulate to the effect of the Resolution, which has always been hotly contested.

The Township was well aware that it could not enact the Resolution as a tax. Thus, the Township intended for the Resolution not to be a tax. It is a fallacy of logic to conclude that purpose *is* effect. To borrow from a colloquialism, the road to a law's invalidity is paved with arguably laudatory purposes. Even where a purpose is laudatory, the question is whether the method of achieving that purpose is lawful. The unambiguous answer here is in the negative.

B. The Parties did not Stipulate to the Validity of the Township's Methodology.

Throughout its brief, the Township attempts to cloud the air with arguments that bear no relevance on the issues before the Court. The Township presents an extensive analysis and explanation of the study it commissioned prior to setting the impact fee levels and relies on the study throughout its argument to justify distinguishing the impact fee from a tax—none of which is in the record. Only in the last line of its argument does the Township admit that the studies are plainly irrelevant to the arguments presented to this Court: “studies which calculated the costs to maintain the current services are not at issue.” (Appellee Brief, 42). *Both* parties have expressly reserved argument on the formulas setting the fees.¹⁵

¹⁵ According to the Study, the majority of Township roads are significantly under capacity, *and will remain under capacity through 2030*. (Impact Fee Study, p. 9). Thus only a fraction of roads qualify for expenditure of impact fee revenues. (*Id.* at 14) For example, there are several new developments abutting 5 mile long Zoar Road (one of the longest roads in the Township). (*Id.* at 9). Yet, no stretch of Zoar Road qualifies to receive any impact fee expenditures. Additionally, no credit is given for developer improvements to S.R. 48 or US 22 / S.R. 3, or for private fire protection. (*Id.* at 13) This renders it even less likely that new development will receive a benefit from the fees. In fact, over half of township major roadways are ineligible. In addition, it attributes all park use to residences, and none to offices, hospitals or hotels. Even if this Court were to conclude that a limited home rule township may enact an impact fee in a given form, the case will likely need remanded for additional discovery to determine if the Resolution meets the standards set forth by this Court.

The parties were fully cognizant that vigorous disputes over the methodology used to formulate the impact fees were tabled. The methodology was not subject to discovery below because where the proper classification as a tax is outcome determinative; it does not matter how “rationally and reasonably drafted” the exaction is, “The reasonableness of the [measure] simply never becomes an issue.” *Coeur d’Alene*, 126 Idaho at 745. Neither side stipulated to the other sides views on these issues. Rather, discovery related to these issues was stayed by agreement. If examination of the study is necessary to determine whether the Resolution poses a tax, then remand to the trial court is necessary for discovery on those issues.

C. Township Resolutions are Laws, and Needn’t Be Included in Factual Stipulations

The Township condescendingly alleges that Appellants raised “new ‘factual’ material concerning lien affidavits relating to the Impact Fee,” which the Township alleged “are not part of the record in this case, [and] are not properly before this Court.” (Appellee Brief, at 3). To the contrary, Appellants have been meticulously consistent in the presentation of facts and legal argument through out this case. In fact, Appellants’ Merit Brief, p. 23, discussing the lien affidavits is almost identical to Plaintiffs’ Motion for Summary Judgment, p. 16—down to the footnote. The incorrectness of the Township’s allegation of an improper argument equals its mischaracterization of the stipulations. Even if the resolution authorizing the liens was not in the record, the Court may take judicial notice of this law. Civ. R. 44.1; S.Ct. Prac. R. §§9.8, 9.9.

The Court should also take judicial notice of the Township’s current legislative activity. The Township recently created a Joint Economic Development District (“JEDD”) with Maineville, Ohio. (*See* Maineville Resolution 2011-R4, and Township Resolution 2010-121 appended hereto.) A JEDD is one of the multitude of methods the General Assembly has provided townships to raise revenue. A JEDD permits a township to impose an income tax in cooperation with a municipality. *See* R.C. 715.691, *et seq.* Other means by which a township is

permitted to raise revenue include: assessing new development (*e.g.*, R.C. 5573.07); planned unit development exactions (R.C. 519.021); a special improvement district (R.C. Ch. 1710); cooperative economic development agreements (R.C. 701.07); and/or levies.

The Hamilton Township/Maineville JEDD is significant because it is a legitimate means to raise revenue to fund the Township. It is also significant because it further demonstrates that the Resolution is a tax. The JEDD exempts residential development therein from paying the impact fee. Instead, that development's impact fees are to be funded by an income tax. Now, not only are impact fee payers paying for improvements that benefit previous development, they are also paying for improvement to benefit current and future development that is exempt from paying impact fees. These impact fees are taxes.

The Township's argument that a factual stipulation means something different than the parties agreed, and its argument that the Court cannot take judicial notice of its Resolutions, are patently false. These arguments serve only to distract from the merits of the case. This case was filed and crafted with the understanding that because it addressed the powers of a new form of township government to unprecedentedly pursue new revenue sources, the matter would likely be resolved by this Court. Appellants did not begin this journey by agreeing to stipulate that the Resolution was not a tax. Any argument to the contrary is disingenuous. At best, there is a factual dispute regarding the stipulation, which effectively renders the stipulation a nullity.

V. CONCLUSION

The Revised Code provides detailed regulations on how limited home rule townships may fund capital improvements to roads, parks, police and fire protection. An impact fee is not among them. The impact fee adopted by Hamilton Township imposes a tax because the substantial revenues it raises can be expended on projects unrelated to the property for which the "fee" is paid. The Township exceeded its authority in enacting the Resolution, which must be

stricken. The judgment of the Court of Appeals should be reversed. Judgment should be entered in favor of Appellants. If judgment is not entered in favor of Appellants, then the matter should be remanded to the trial court for implementation of the Court's ruling.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief was served upon the following parties by ordinary mail this 29th day of April, 2011.

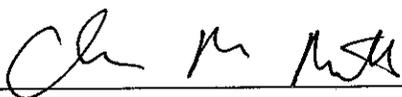
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APPENDIX

RESOLUTION NO. 10-121

HAMILTON TOWNSHIP, WARREN COUNTY, OHIO

**A RESOLUTION PROVIDING FOR ACCEPTANCE OF THE MAINEVILLE -
HAMILTON TOWNSHIP JOINT ECONOMIC DEVELOPMENT DISTRICT
CONTRACT IN ITS PRESENT FORM.**

Motion by Trustee Bobby E. King

WHEREAS, the Township of Hamilton ("Hamilton") and the Village of Maineville ("Maineville") have negotiated and intend to enter into a Maineville-Hamilton Township Joint Economic Development District Contract (the "Contract") to create and provide for the operation of the Maineville-Hamilton Township Joint Economic Development District (the "District") in accordance with Section 715.71 of the Revised Code for their mutual benefit and for the benefit of their residents and of the State of Ohio (the "State").

NOW, THEREFORE, BE IT RESOLVED by the Hamilton Township Board of Trustees:

Section 1. The Township approves the form of the Contract now on file with the Clerk subject to any revisions thereto following the public hearing provided for herein and to final approval by this Board.

Section 2. The Township has held a public hearing concerning the Contract On December 1st, 2010 at the Hamilton Township Administration Building. The public hearing allowed for public comment and recommendations on the proposed Contract. The Township included in the Contract any of those recommendations prior to final approval of the Contract. The Fiscal Officer was authorized and caused notice of the time and place of the public hearing which was published in The Western Star, which is a newspaper of general circulation in the Township, 30 days prior to the public hearing.

Section 3. A copy of the text of the Contract, together with copies of District maps and plans related to or part of the Contract, have been on file, for public examination, in the office of the Township Fiscal Officer,

Section 4. This Board finds and determines that all formal actions of this Board concerning and relating to the adoption of this resolution were adopted in an open meeting of this Board and that all deliberations of this Board and of any of its committees that resulted in those formal actions were in meetings open to the public in compliance with the law.

Section 5. This resolution shall be in full force and effect from and immediately upon its adoption.

Kurt Weber seconded the motion.

Upon roll call on the adoption of the resolution, the vote was as follows:

Trustee Eugene Duvelius Yes
Trustee Becky Ehling Yes
Trustee Kurt Weber Yes

Eugene Duvelius
Eugene Duvelius

Becky Ehling
Becky Ehling

Kurt E. Weber
Kurt Weber

Attest:
Jackie Terwilleger
Jackie Terwilleger
Hamilton Township Fiscal Officer

The foregoing is a true and correct certified copy of Resolution No. 10-121 of the Township Trustees of the Township of Hamilton.

Jackie Terwilleger
Jackie Terwilleger
Hamilton Township Fiscal Officer

December 1, 2010
Date



RESOLUTION 2011-R4

A RESOLUTION PROVIDING FOR ACCEPTANCE OF THE MAINEVILLE - HAMILTON TOWNSHIP JOINT ECONOMIC DEVELOPMENT DISTRICT CONTRACT IN ITS PRESENT FORM

ADOPTED MARCH 17TH, 2011

1st Reading Feb. 17th, 2011. Motion to adopt by Bill Shearer, 2nd by Tony Dickman, Vote: 4/2
2nd Reading Mar. 3rd, 2011. Motion to adopt by Tony Dickman, 2nd by Donna Moore, Vote: 4/2
3rd Reading Mar. 17th, 2011. Motion to adopt by Bill Shearer, 2nd by Tony Dickman, Vote: 4/1

Dale Marconet, Mayor

James Marconet, Administrator

John D. Reynolds, Chief of Police

Kevin McDonough, Solicitor

RESOLUTION 2011-R4

**A RESOLUTION PROVIDING FOR ACCEPTANCE OF THE MAINEVILLE -HAMILTON
TOWNSHIP JOINT ECONOMIC DEVELOPMENT DISTRICT CONTRACT IN ITS
PRESENT FORM**

WHEREAS, the Township of Hamilton (“Hamilton”) and the Village of Maineville (“Maineville”) have negotiated and intend to enter into a Maineville-Hamilton Township Joint Economic Development District Contract (the “Contract”) to create and provide for the operation of the Maineville-Hamilton Township Joint Economic Development District (the “District”) in accordance with Section 715.71 of the Revised Code for their mutual benefit and for the benefit of their residents and of the State of Ohio (the “State”).

NOW THEREFORE, BE IT RESOLVED by the Council of the Village of Maineville:

Section 1. The Village approves the form of the Contract now on file with the Interim Clerk/Fiscal Officer subject to any revisions thereto following the public hearing provided for herein and to final approval by this Council.

Section 2. The Village has held a public hearing concerning the Contract on December 2, 2010, at the Village of Maineville Administration Building. The public hearing allowed for the public comment and recommendations on the proposed Contract. The Village included in the Contract any of those recommendations prior to final approval of the Contract. The Interim Clerk/Fiscal Officer was authorized and caused notice of the time and place of the public hearing which was published in The Western Star, which is a newspaper of general circulation in the Village, 30 days prior to the public hearing.

Section 3. A copy of the text of the Contract, together with copies of District maps and plans related to or part of the Contract, have been on file, for public examination, in the office of the Interim Clerk/Fiscal Officer.

Section 4. This Council finds and determines that all formal actions of this Council concerning and relating to the adoption of this Resolution were adopted in an open meeting of this Council and that all deliberations of this Council and of any of its committees that resulted in those formal actions were in meetings open to the public in compliance with the law.

Section 5. This resolution shall be in force and effect from and immediately upon its adoption.

BE IT FURTHER RESOLVED that any rule requiring three (3) readings is hereby suspended, that immediate filing of this Resolution is necessary for the health and welfare of the community, it is therefore declared to be an emergency, shall take effect immediately, and shall be promptly filed.

Mr. Bill Shearer made the motion, **Mr. Tony Dickman** seconded the motion, and a vote being called upon the question of adoption of Resolution 2011-R4, the vote resulted as follows:

Roll Call:	Mrs. Humphries – Yes	Mr. Drook – No	Mr. Shearer – Yes
	Mr. Dickman – Yes	Mr. Jebson – <i>Absent</i>	Ms. Moore – Yes

4 yea/1 **nay**, Resolution passed on three readings (2/17/2011, 3/3/2011 and 3/17/2011)

Resolution adopted this 17th day of **March, 2011**.

Dale Marconet, Mayor

ATTEST:

James Marconet, Interim Fiscal Officer

1st Reading February 17th, 2011

A **motion** was made by Mr. Shearer to adopt Resolution 2011-R4, 2nd by Mr. Dickman.

Roll Call:	Mrs. Humphries – Yes	Mr. Drook – No	Mr. Shearer – Yes
	Mr. Dickman – Yes	Mr. Jebson – No	Ms. Moore – Yes

4 yea/2 **nay**, lack of 3/4th majority, Emergency Passage **failed**, now considered 1st reading.

2nd Reading March 3rd, 2011

A **motion** was made by Mr. Dickman to adopt Resolution 2011-R4, 2nd by Ms. Moore.

Roll Call:	Mrs. Humphries – Yes	Mr. Drook – No	Mr. Shearer – Yes
	Mr. Dickman – Yes	Mr. Jebson – No	Ms. Moore – Yes

4 yea/2 **nay**, lack of 3/4th majority, Emergency Passage **failed**, now considered 2nd reading.

CERTIFICATE

I, James Marconet, the undersigned Fiscal Officer for the Village of Maineville do hereby certify that the foregoing is a true and correct copy of Resolution 2011-R4 as passed on March 17th, 2011.

James Marconet, Interim Fiscal Officer