

ORIGINAL

IN THE SUPREME COURT OF OHIO

Sugarcreek Township,

Appellee,

v.

City of Centerville,

Appellant.

Supreme Court Case No.

11-0926

On Appeal from the
Greene County Court of Appeals
Second Appellate District

Court of Appeals
Case No. 2010-CA-0052

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT, CITY OF CENTERVILLE, OHIO

Richard C. Brahm (0009481)
Catherine A. Cunningham (0015730)
Counsel of Record
BRAHM & CUNNINGHAM, LLC
145 E. Rich Street
Columbus, OH 43215
(614) 228-2030
Fax: (614) 228-1472
E-mail: rbrahm@brahmcunningham.com
E-mail: ccunningham@brahmcunningham.com

*Counsel for Appellant,
City of Centerville*

Scott A. Liberman (0058432)
ALTICK & CORWIN CO., LPA
1700 One Dayton Centre
One South Main Street
Dayton, OH 45402
(937) 223-1201
Fax: (937) 223-5200
E-mail: liberman@altickcorwin.com

*Co-Counsel for Appellant,
City of Centerville*

Scott D. Phillips (0043654)
FROST BROWN TODD LLC
9277 Centre Point Drive, Suite 300
West Chester, OH 45069
(513) 870-8200
Fax: (513) 870-0999
E-mail: sphillips@fbtlaw.com

*Counsel for Appellee,
Sugarcreek Township*

Matthew J. DeTemple (0023294)
6500 Taylor Road
Blacklick, OH 43004
(614) 863-0045
Fax: (614) 863-9751
E-mail: detemple@ohiotownships.org

*Counsel for Amici Curiae, Ohio
Township Association and Coalition of
Large Ohio Urban Townships*

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THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

Recognizing the great need for Ohio to remain competitive with surrounding states, the Ohio General Assembly established incentives that municipalities, townships and counties could provide owners and developers allowing for the building of public improvements that make development possible. Tax increment financing (“TIF”) for municipalities under R.C. 5709.40 permits the controlling jurisdiction to allow owners to pay service payments into a restricted fund in lieu of a portion of certain enumerated taxes. The postponement of the taxes is only for a limited time and applies only to land improvements that are benefitted by the loan, if you will, to build the roadways and public infrastructure that allow for development to occur. Once the development has occurred and the public improvements are paid for, the postponed taxes are reinstated on the full value of the real property as improved. The real estate taxes at the time of the enactment of the tax increment financing are not affected, only the taxes on the increased value of the property as improved are temporarily postponed and redirected to enhance development. The need to be able to provide incentives to increase development and jobs in the economic situation of Ohio could not be greater than it is today.

The case below changes all of that. The court of appeals held a municipality cannot pass tax increment financing (TIF) affecting township taxes on property that is in the municipality and that also remains in the township based on how the property was annexed into the municipality, not based on any tax statutes or the property’s location within the municipal corporation. The case below holds that if a municipality accepts an annexation that is desired by all of the owners of property being annexed, the township’s real property taxes on that parcel cannot be temporarily postponed, as other governmental taxes are, in order to make the township’s contribution to the public improvement. For all other parcels annexed and in a joint

municipal/township jurisdiction, township taxes would be subject to TIF exemption. In short, two pieces of property, both of which are in the city and also in the township, have different tax rights and privileges as well as tax consequences. According to the court below, if all of the owners want to be annexed, the city cannot defer any of the township's taxes to make the improvements which ultimately provide a greater tax base for all based on an annexation statute. If only 51% of the property owners seek annexation and the property remains in the township, the city can TIF the township's taxes because of language in the statutes for various annexation processes. The municipal TIF tax statute, R.C. 5709.40, expressly permits TIF exemptions upon "parcels of real property located in a municipal corporation" without limitation. This disparate result threatens to undermine development and forestall public improvements throughout Ohio.

The trial court and the court of appeals found that the language of R.C. 709.023(H) enacted as part of annexation reform in 2001 guarantees the township's real property taxes forever in an expedited type-2 100% owner annexation without exemption, without deferment, without any adjustments and without the General Assembly providing for it in Ohio's tax laws. The court erroneously reaches this conclusion based on the language of R.C. 709.023(H):

Notwithstanding anything to the contrary in section 503.07 of the Revised Code * * * territory annexed into a municipal corporation pursuant to this section shall not at any time be excluded from the township under section 503.07 of the Revised Code and, thus, remains subject to the township's real property taxes.

The court below has confused maintaining the status of the township as an entity within the municipality that still receives real property taxes with the overall scheme of the General Assembly to allow for postponement of such taxes in favor of economic development and jobs.

This case of first impression arises under both the comprehensive annexation reform adopted by the General Assembly in 2001 in Senate Bill 5 and local government tax incentives for economic development. It does not involve the merits of an annexation, but rather the effects

of the new expedited type-2 annexation on property rights, economic incentives for development and local government taxes. The crux of this case is the interplay between R.C. 709.023(H) and R.C. 5709.40, *et seq.* The sole question is: does R.C. 709.023(H) prohibit or limit the adoption of tax increment financing by a municipality under R.C. 5709.40 only for properties annexed following the special 100% owner supported expedited type-2 annexation process? It does not.

The decision below affects not only prospective TIFs and their coverage, but also existing TIFs and the full faith and credit of TIF bonds that have already been put in place in accordance with the tax statutes of the state of Ohio. The idea that a township can exist within a city, known as “joint jurisdiction,” has been in Ohio for 50 or more years. When property is annexed, it becomes a joint jurisdiction unless a municipality petitions to conform its boundaries and exclude it from the township under R.C. 503.07. Many cities, including Centerville, have joint jurisdictions. In a joint jurisdiction, a township continues to receive its taxes but is not immune to the effects of Ohio’s tax incentive laws that encourage development. Prior to the decision below, in all such joint jurisdictional circumstances, a municipality has been able to adopt tax increment financing and defer the taxes of various governmental entities as provided for by R.C. Chapter 5709. TIF bonds have been issued on that basis and depend upon the deferment of a portion of township taxes for their satisfaction.

Although annexation and taxes are strictly statutory and can be highly technical and arduous to consider, this case is extremely important to encourage and provide certainty for development in Ohio and to ensure the integrity of bonds issued on the basis that township taxes can be deferred to pay for public improvements. ~~Allowing Ohio tax law to be determined and changed by a court rather than the General Assembly raises significant legal issues and creates inconsistencies in taxes, bonds, financing and development across the state.~~ Appellee

Centerville urges this Court to accept jurisdiction of this case in order to establish the law, eliminate financial uncertainty, facilitate development opportunities in Ohio and undo the damage the decision below has done to TIF bonds and Ohio's economic recovery.

STATEMENT OF THE CASE AND FACTS

The facts in this case are undisputed. The case came before the courts below on summary judgment. If jurisdiction is accepted by this Court, its review will be *de novo* on questions of law. *DIRECTV, Inc. v. Levin*, 2010-Ohio-6279, ¶15, 128 Ohio St.3d 68.

In 2006, the Greene County Board of County Commissioners ("Commissioners") approved and Appellant, the city of Centerville ("Centerville") accepted two annexations of developable property, one 173.181 acres and the other 94.987 acres. (T.d.¹ 227, p. 7-11). Each annexation petition was signed by 100% of the property owners and followed the "expedited type-2" annexation process of R.C. 709.023. (T.d. 227, p. 11). After annexation petitions were filed, but before annexations were approved and accepted by Centerville, Sugarcreek Township created a township TIF for a road improvement that included essentially all of the territory that was annexed and remains undeveloped. *See* R.C. 5709.73. (T.d. 227, p. 14 - 15).

On September 11, 2006, Appellee, Sugarcreek Township ("Sugarcreek") filed an action for declaratory judgment seeking a declaration that Centerville could never establish tax increment financing for the land annexed into Centerville utilizing the R.C. 709.023 expedited type-2 annexation process. Sugarcreek claimed this was particularly true because it had just adopted its own TIF for public improvements on essentially the same territory before the annexation became final and Centerville could not interfere. Centerville agreed it could not and would not interfere with the pre-existing township TIF. R.C. 5709.73. (T.d. 251, ¶5).

¹ T.d. refers to the number assigned to the document referred to in the transcript of docket and journal entries filed in the court of appeals below.

Sugarcreek also claimed that R.C. 709.023(H) guaranteed its taxes could never be exempted or diminished and therefore Centerville was prohibited from ever establishing any municipal TIF on the annexed property to help pay for public improvements in the territory under R.C. 5709.40.

All parties filed motions for summary judgment in the trial court. The case has been before the Greene County Court of Appeals twice on the legal question of whether Centerville can adopt a TIF.² At its initial determination on the merits (case 1), the trial court held that Centerville may never implement a TIF on the annexed land because R.C. 709.023(H) was a mandate that all real property taxes for the territory annexed to Centerville must remain with the township without exemption or delay, forever. (T.d. 235, p. 12, 7). The case was appealed.

In a protracted decision in the first appeal, the court of appeals recognized the property was in joint township/municipal jurisdictions and that both Centerville and Sugarcreek had the commensurate authority as provided by law. The court found Sugarcreek and Centerville were both entitled to: (1) tax the real property in the annexation area, (2) retain their minimum levies on the real property in the annexation area as provided in R.C. 5705.315, and (3) enact TIF resolutions that exempt improvements on real property within the annexation area. 2009-Ohio-4794, ¶171, 172, 174. The court also found that “Sugarcreek and Centerville may not enact TIF resolutions that interfere with each other’s share of the minimum levies on the real property within the annexation area.” 2009-Ohio-4794, ¶174. The court of appeals rejected the idea that the last clause of R.C. 709.023(H) prohibited a municipal TIF and found the language merely restated the law prior to the enactment of R.C. 709.023(H). 2009-Ohio-4794, ¶135. The court of appeals then reversed the trial court in part and remanded the case for further proceedings

² This case was first appealed on the merits of the TIF and remanded as reported in *Sugarcreek Twp. v. City of Centerville*, 2009-Ohio-4794, 184 Ohio App.3d 480 which is attached. The appeal now before this Court arises from the second appeal on the merits following remand.

consistent with its opinion.

On remand, the parties and trial court could not agree on the meaning of the court of appeals' decision. The parties stipulated the facts and again filed motions for summary judgment with the trial court on the meaning of the court of appeals' decision. The result was the same. The trial court again held that R.C. 709.023(H) guaranteed Sugarcreek all of its taxes, both 'unvoted' (inside) and 'voted' (outside) millage without diminution or delay. (Td. 273, p. 7-8) Appellant Centerville again appealed and the matter went back to the court of appeals. In an inconsistent second decision, the court of appeals repudiated its original holding and held in its Opinion at p. 8, 12:

We believe that the plain language of R.C. 709.023(H) precludes Centerville from enacting a TIF plan that would prevent Sugarcreek from collecting the property taxes, whether in the form of inside millage or outside millage, to which it is entitled.

* * *

R.C. 709.023(H) and R.C. 5709.40 should be read in pari materia to permit a municipal corporation to adopt a TIF ordinance affecting real property located within the municipality pursuant to R.C. 5709.40, except to the extent that the real property "remains subject to the real property taxes", R.C. 709.023(H), of a township in which the real property likewise remains located ***following a type-2 annexation***. Therefore, the TIF plan Centerville enacts cannot diminish the outside millage taxes on the real property at issue imposed by Sugarcreek Township or the revenue therefrom to which the township is entitled.

This decision is contrary to the clear language of R.C. 5709.40 providing for tax increment financing, which makes no exception for expedited type-2 annexations. It applies uniformly to all real property and taxing authorities within Ohio municipal corporations without regard to the method of annexation. The court of appeals' decision also defies the state policy to ~~encourage economic and job development through local tax incentives. It violates R.C. 709.10~~ providing for the equal status of all municipal property and inhabitants within a municipal corporation following annexation. Appellant urges this Court to accept jurisdiction over this

case to establish uniform standards across Ohio that are crucial to the state's economic growth and development. Judicially hamstringing development is contrary to Ohio's needed economic recovery.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. 1. R.C. 709.023(H) enacted as part of annexation reform does not guarantee a township will be paid all township real property taxes forever, free from temporary exemption provided by Ohio's tax increment financing laws solely because the "expedited type-2" 100% owner supported annexation process is followed.

The court of appeals erred and changed Ohio law when it found the final clause of R.C. 709.023(H) "and, thus, remains subject to the township's real property taxes": (1) guarantees a township all of its taxes following an expedited type-2 annexation; and (2) prohibits municipal TIF on township taxes. The General Assembly has not protected township taxes from municipal TIF or any other tax exemption nor did it create a new class of property that receives special tax treatment based upon its method of annexing into a joint jurisdiction. It is the location of the property in both a township and a municipality that establishes the applicable regulations, taxes and incentives, not how the parcel got there. The significance of the decision of the court below and its radical change in Ohio law is best understood within the context of local tax incentives and annexation.

Annexation

Annexation is strictly a statutory process. *In Re Petition to Annex 320 Acres to the Village of South Lebanon* (1992), 64 Ohio St.3d 585, 591. In 2001, the General Assembly comprehensively reformed Ohio annexation law with the passage of Am.Sub.S.B. No. 5 ("Senate Bill 5"), 149 Ohio Laws, Part I, 621. One of the major innovations in annexation law was the establishment of three new specific procedures that allow for expedited annexations when all

(100%) the owners of property in a territory sought to be annexed sign an annexation petition in addition to the fourth ‘traditional’ majority-owner supported petition. See *State ex rel. Butler Twp. Bd. of Trustees v. Montgomery Cty. Bd. of Commrs.*, 2006-Ohio-6411, ¶3-4, 112 Ohio St.3d 262. Though there are certain standards common in every annexation, there are also unique criteria in each of the four annexation procedures.

Upon annexation, the territory and its inhabitants have all the rights and privileges and are subject to the same authority and powers of the municipal corporation as all of the other properties and inhabitants within the municipality. R.C. 709.10. Following every annexation, the annexed parcels are in the concurrent and overlapping jurisdictions of the township and municipality. These “joint jurisdiction parcels” are subject to the real property taxes of both the township and municipality (along with other taxing authorities) and can exercise the rights of this dual citizenship as provided by the Constitution and laws of the state of Ohio. Joint jurisdictions are common throughout Ohio.

Since 1967, the Ohio General Assembly has granted municipal corporations the authority to modify or eliminate these overlapping jurisdictions so the property would be only in the city. The municipality could petition the board of county commissioners to remove the territory from the original township and conform its boundaries (“make them identical, in whole or in part”) to the limits of the municipal corporation. R.C. 503.07. If this second petition is filed, the territory is removed from the township and the original township is no longer entitled to any taxes.

One of the unique criteria of the expedited type-2 annexation statute³ is the provision in ~~R.C. 709.023(H) that prevents the exclusion of the township by the municipality by forbidding~~

³ The expedited type-3 annexation process of R.C. 709.024 titled “Special Procedure Of Annexing Land Into Municipal Corporation for the Purpose of Undertaking Significant Economic Development Project” contains identical language in R.C. 709.024(H). R.C. 709.0241(H) was not at issue in this case or discussed by the courts below.

the municipality to conform its boundaries. It is the last clause of R.C. 709.023(H), “*and, thus, remains subject to the township's real property taxes*” that is at issue in this case. That clause is not a tax guarantee, but a statement of the joint jurisdiction status of the annexed territory. There is no mention of a guarantee and no exception for the ordinary operation of Ohio’s tax laws.

The General Assembly looked at what tax laws needed to be modified when it enacted Senate Bill 5. The TIF statutes were not amended. Senate Bill 5 changed only two tax statutes in order to implement annexation reform. It enacted R.C. 5705.315 to provide for the alteration of inside millage and amended R.C. 5705.31(D) regarding the authority of the county budget commission on inside millage. Senate Bill 5 did not amend any other tax law, including the tax exemption for municipal tax increment financing.

Tax Increment Financing

The General Assembly has established a variety of local government tax incentives to encourage development throughout the state.⁴ These incentives are used to entice development and encourage investment in real property for the purposes of creating jobs, expanding the economy, attracting business, and building or improving public infrastructure, commercial properties, businesses, housing and communities. Tax incentives are strictly statutory. They are used when select circumstances are met without distinction as to how the property became part of the jurisdiction involved or the annexation process utilized.

The General Assembly has granted municipalities, townships and counties the authority

⁴ Some of the local tax abatement and increment programs established by the General Assembly include the Community Reinvestment Program (R.C. 3735.65–3735.70), Enterprise Zone Program (R.C. 5709.61–5709.69), Community Urban Redevelopment/Impacted Cities Program (R.C. 1728.01-1728.13), Municipal Urban Renewal Debt Retirement Fund (RC. 725.03) and Tax Increment Financing in incorporated areas for municipalities (R.C. 5709.40, and 5709.42-5709.43) (urban redevelopment) and in unincorporated areas for counties (R.C. 5709.77-5709.81) and townships (R.C. 5709.73-5709.75).

to utilize tax increment financing to support development strictly as provided by statute. R.C. 5709.40-5709.43, R.C. 5709.73-5709.75, and 5709.77-5709.81 respectively. TIF is a financing mechanism to fund public improvements necessary to support development. In joint or overlying jurisdictions of townships and municipalities, only the municipality can grant TIFs after annexation. A TIF works by exempting a portion of the real estate taxes on the increase in the value of select parcels of land for a limited period of time (ten years but no more than thirty years). A municipal TIF never exempts any of the taxes being paid on the value of the property at the time it is annexed or before the effective date of the TIF. R.C. 5709.42(D).

A TIF can best be understood by way of example. If township levies on a parcel annually generate \$100 at the time property is annexed, the township will continue to receive that \$100 without reduction. A typical TIF is for a period of 10 years and abates 75% of the increase in real property taxes after the TIF becomes effective. *See* R.C. 5709.40(C)(4). When a TIF is implemented on the annexed parcel, the township would continue to receive its \$100, plus 25% of its taxes on any increase in the value of the property from improvements. The other 75% is temporarily exempt from taxes and paid by the owner to the county treasurer, then into a special 'tax increment equivalent fund' that can only be used to pay for public infrastructure debt or as otherwise as directed by statute. *See* R.C. 5709.42 and 5709.43. If, for example, the value of the property increases during the 10 years of the TIF raising the annual township tax revenue from the parcel an additional \$1,000 (e.g. \$1,100 annual township taxes), the township would receive its pre-TIF \$100 taxes and an additional \$250 for the 25% non-exempted portion of the incremental increase. ~~The remaining \$750 would be paid into the 'tax increment equivalency fund' to pay the debt for the public infrastructure necessary to support the development for 10 years. At the expiration of the TIF in 10 years (or satisfaction of the debt before that time), the~~

township will receive the entire \$1,100 in taxes without reduction. It is undisputed that with a municipal TIF the township would continue to receive some taxes from the annexed territory.

Municipal TIFs have been established throughout the state in dual municipal/township areas. To Appellant's knowledge, in all of these joint township/municipal jurisdictions where municipal TIF plans have been established, the taxes of all taxing authorities, including townships have been uniformly exempted (postponed) from incremental increase in property value for all parcels in the municipality as provided and protected in R.C. 5709.40. The decision of the court of appeals changes all this by creating different TIF and tax consequences for select parcels in a joint municipal/township jurisdiction on the sole basis that they were annexed utilizing the expedited type-2 process.

Statutory Interpretation and the Reconciliation of Tax and Annexation Statutes

The rules of statutory interpretation are well established. A court must look to the plain language of the statute itself to determine the legislative intent. *Summerville v. City of Forest Park*, 2010-Ohio-6280, 128 Ohio St.3d 221. The plain language "and thus, remains subject to township taxes" does not refer to municipal TIF or any other exemption that will no longer have effect in the township jurisdiction following annexation. The language states that as a consequence ("and, thus") of being in a dual municipal/township jurisdiction, the annexed parcel is "subject to the township's real property taxes" because the city cannot exclude the township territory by use of R.C. 503.07. When interpreting a statute, a court must give meaning to every word in the statute. It did not. R.C. 709.023(H) does not guarantee township taxes without ~~change or exemption or exclude municipal TIF. It guarantees annexed property will remain in~~ the township "subject to" the township's statutory taxing authority and other taxes and exemptions provided by statute. R.C. 709.023(H) does not give the township any greater rights or benefits than before annexation or amend Ohio tax law.

The General Assembly expressly provided only one circumstance in which a township is compensated for township taxes that were exempted by municipal TIF: when annexed territory is excluded from the township and a municipal TIF is placed upon commercial or industrial property within 12 years of annexation. R.C. 709.19(C)(1). Notably, the municipality is only required to compensate the township for a portion of its commercial and industrial real property taxes without reduction for TIF on a sliding scale from 80% declining to 42.5% over twelve years following annexation. R.C. 709.19(C)(1). A municipality is never required to compensate a township for any real property taxes for tax incentives granted for residential or retail properties. R.C. 709.19(D). Even when territory is excluded a township does not receive what the court of appeals called for here, a full guarantee forever.

The court of appeals erred when it found an analogy between municipal compensation ('reparations') to a township for a portion of lost taxes and territory for a limited period of time, and compensation to a township for 100% of the tax incentives forever on property guaranteed to remain in the township. While some township taxes on the increased value of the annexed land may be abated for a period of time, at the conclusion of the abatement, the township, like all other taxing authorities, will benefit from the increased value of the land. This is not "an absurd result" as stated by the court of appeals. Rather, it was the intention of the General Assembly to encourage economic development through expedited annexations and tax incentives and to require all taxing authorities to participate in development they will ultimately benefit from. If the General Assembly wanted to selectively protect township taxes from tax incentives following ~~an expedited type-2 annexation, it could have expressly done so, as it did in R.C. 709.19 or in the~~ municipal TIF statute in R.C. 5709.40(E)(2) and (F)(1)-(12). It did not elevate townships above every other taxing authority whose taxes are subject to TIF exemption and investment into public

infrastructure to support development.

Senate Bill 5 did not amend R.C. 5709.40 to protect township taxes from municipal TIFs after annexation. If the General Assembly had intended to protect township taxes from municipal TIF, it should have expressly done so, as it did in R.C. 709.19 or in R.C. 5709.40(F). R.C. 5709.40 has been amended several times since Senate Bill 5 became effective to protect select tax levies from the application of municipal TIFs. *See* R.C. 5709.40(E)(2) and (F)(1)-(12). None of those amendments, addressed or protected township tax levies or the taxes from properties annexed utilizing the expedited type-2 process from a municipal TIF.

Under the reasoning of the court below and by logical extension, if R.C. 709.023(H) guarantees township taxes over one exemption (TIF) without expressly referring to it, then the same language guarantees taxes over every exemption indiscriminately. R.C. Chapter 5709 provides many other express exemptions from real property taxes, such as: schools, churches or colleges (R.C. 5709.07); government and public property (R.C. 5709.08); and property used for charitable purposes (R.C. 5709.12) to name a few. Does R.C. 709.023(H) also guarantee township taxes over these exemptions or only municipal TIF exemptions? Clearly, the elimination of all exemptions was not the intention of the General Assembly in enacting R.C. 709.023(H). The intention was to keep annexed territory in a joint jurisdiction subject to the same laws as every other joint jurisdiction in Ohio, not to create a new class of property to which Ohio tax laws do not apply.

The decision below also cannot be reconciled with the TIF statutes generally, and ~~R.C. 5709.40 in particular.~~ Tax exemptions are strictly statutory and must be “explicitly provided” by the General Assembly. R.C. 5709.01(A). R.C. 5709.40 expressly permits municipalities to create a TIF plan and exemption upon “parcels of real property located in the

municipal corporation” without limitation. R.C. 5709.40(B) and (C)(1). The municipal TIF statute expressly identifies the tax levies which will not be affected by the imposition of a TIF.⁵ See 5709.40(E)(2) and (F). Townships are not among the entities whose levies will not be affected. R.C. 5709.40 has been amended several times since 2001 to identify additional levies that are not subject to municipal TIFs. Again, township levies were not included.

Absent express statutory exception in R.C. 5709.40, the General Assembly has provided no means to exclude a tax levy from a TIF. Cities cannot select what tax levies a TIF applies to. Centerville cannot create a TIF plan that excludes Sugarcreek Township as the court of appeals erroneously presumes. When taxes are protected from TIF, there is both express statutory authorization for the tax payments to be made to the taxing authority by the county treasurer upon collection or from the tax increment equivalency fund. R.C. 5709.42(C) and 5709.43(C). There is no statutory authority for the payment of any township taxes from a TIF parcel.

If allowed to stand, a significant consequence of the decision of the court of appeals is that expedited type-2 parcels will not have all the same rights, privileges or tax consequences of other identically situated properties in the same municipality but that were annexed utilizing a different process. A municipal TIF plan in a joint jurisdiction could include some expedited type-2 parcels along with parcels annexed by any other process. The TIF parcels could have an identical TIF plan for identical public improvements, yet have different incentives and tax consequences based exclusively on the process of annexation. Only expedited type-2 parcels

⁵ Entities that R.C. 5709.40(F) requires TIF compensation to be made to for real property taxes that would have been payable, but for the exemption, include community mental retardation and developmental disabilities programs and services, senior citizens services or facilities, county hospitals, joint-county district or county alcohol, drug addiction, and mental health services or facilities, libraries, children services and the placement and care of children, zoological park services and facilities, township park districts, joint recreation districts, park districts public assistance; human or social services; public relief; public welfare; public health and hospitalization; and support of general hospitals, and general health district programs.

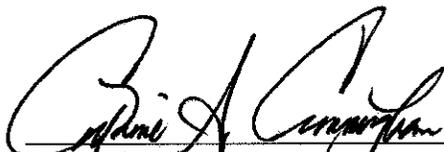
would not receive all TIF incentives. This is contrary to R.C. 709.10 assuring municipal uniformity following annexation and many existing TIFs throughout the state. The Ohio Constitution requires uniformity of taxes for each class of property within the same taxing authority. *See* Section 2, Article II, Ohio Constitution. Expedited type-2 parcels cannot be distinguished.

Finally, the court of appeals' decision puts at risk current TIF bonds for property annexed following the expedited type-2 process where TIF incentives were granted and applied to township real property taxes and have not yet been satisfied. Future debt payments for the bonds that are required to be made in lieu of township taxes may not be made if township taxes are not subject to TIF. With the recent breakdowns in financial markets, more uncertainty will put Ohio at greater financial risk and an even greater competitive disadvantage for development than it now faces.

CONCLUSION

Appellant urges this Court to accept jurisdiction and render a decision that clarifies the parameters of the statewide development incentives established by the General Assembly for local governments. Certainty for development is especially critical in this economic downturn. The protracted litigation and uncertainties arising from this case have already cost Ohioans millions of dollars in lost development and jobs that were proposed in the city of Centerville but did not come about. If the decision of the court of appeals is allowed to stand, it may cost Ohioans even more as developers and businesses choose other states and countries that can provide more incentives, can more quickly respond to the needs for development, and can offer more lucrative incentives than the Ohio incentives that have been erroneously constrained by the court of appeals.

Respectfully submitted,



Richard C. Brahm (0009481)

Catherine A. Cunningham (0015730)

Counsel of Record

BRAHM & CUNNINGHAM, LLC

145 E. Rich Street

Columbus, OH 43215

(614) 228-2030

Fax: (614) 228-1472

E-mail: rbrahm@brahmcunningham.com

E-mail: ccunningham@brahmcunningham.com

Counsel for Defendant-Appellant,

City of Centerville

Scott A. Liberman (0058432)

ALTICK & CORWIN CO., LPA

1700 One Dayton Centre

One South Main Street

Dayton, OH 45402

(937) 223-1201

Fax: (937) 223-5200

E-mail: liberman@altickcorwin.com

Co-Counsel for Defendant-Appellant,

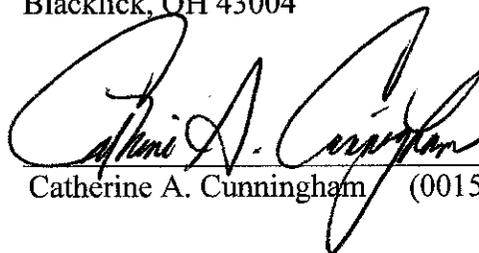
City of Centerville

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served upon the following parties via regular first-class U.S. Mail, postage prepaid, on this 31st day of May, 2011:

Scott D. Phillips, Esq.
Frost Brown Todd LLC
9277 Centre Pointe Drive, Suite 300
West Chester, OH 45069

Matthew J. DeTemple, Esq.
Ohio Township Association
6500 Taylor Road
Blacklick, OH 43004



Catherine A. Cunningham (0015730)

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IN THE COURT OF APPEALS OF GREENE COUNTY, OHIO

SUGARCREEK TOWNSHIP
 Plaintiff-Appellee : C.A. CASE NO. 2010-CA-52

vs. : T.C. CASE NO. 2006CV0784

CITY OF CENTERVILLE
 Defendant-Appellant : (Civil Appeal from
 Common Pleas Court)

O P I N I O N

Rendered on the 15th day of April, 2011.

Richard C. Brahm, Atty. Reg. No. 0009481, Catherine A. Cunningham, Atty. Reg. No. 0015730, 145 East Rich Street, Columbus, OH 43215-5240

Attorneys for Plaintiff-Appellee Sugarcreek Township

Scott D. Phillips, Atty. Reg. No. 0043654, Joseph W. Walker, Atty. Reg. No. 0079369, 9277 Centre Point Drive, Suite 300, West Chester, OH 45069

Attorneys for Defendant-Appellant City of Centerville

Matthew J. DeTemple, Atty. Reg. No. 0023294, 6500 Taylor Road, Suite A, Blacklick, OH 43004

Attorney for Amici Curiae the Ohio Township Association and Coalition of Large Ohio Urban Townships

GRADY, P.J.:

This appeal concerns a dispute between Plaintiff, Sugarcreek Township, and Defendant, City of Centerville, regarding land located in Sugarcreek Township that was annexed by Centerville in 2006 pursuant to R.C. 709.023. This is the second time this dispute is before us. We issued a prior decision on September

11-04-2877

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THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT

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11, 2009, which reversed the judgment of the trial court and remanded the cause for further proceedings. *Sugarcreek Township v. City of Centerville*, 184 Ohio App.3d 480, 2009-Ohio-4794 ("Sugarcreek I").

In 2006, Centerville entered into a preannexation agreement with the owner of two parcels of real property located in Sugarcreek Township. The annexation was an expedited type-2 annexation pursuant to R.C. 709.023, in which the annexed land nevertheless also remains part of the township from which it was annexed. The terms of the preannexation agreement required Centerville to enact an ordinance adopting a tax increment financing plan ("TIF plan") that would apply to the annexed land. On April 20, 2006, prior to the filing of the annexation petitions with the Greene County Board of Commissioners, Sugarcreek adopted its own TIF plan that encompassed some of the annexed lands.

A TIF plan "is a method of financing that is used to pay for public improvements. A public entity will sell bonds for public improvements and recoup the money from the increase in value of property that is enhanced by the public improvements. The property owners make service payments to a fund in lieu of property taxes, and the public entity pays the bond obligations with the money in this fund, rather than with the public entity's general revenue fund." *Sugarcreek I*, at ¶24. R.C. 5709.40 authorizes a municipality to adopt an ordinance creating a TIF plan.

In late June and early July 2006, Greene County granted Centerville's annexation petitions. In September of 2006, Sugarcreek commenced an action for declaratory judgment in the common pleas court. In paragraph 58 of its Second Amended Complaint, Sugarcreek sought "a declaration that Centerville may not implement a TIF on the Annexed Land, both because Sugarcreek is entitled to all real property tax receipts from the Annexed Land and because Centerville may not adopt a TIF on land that is already covered by Sugarcreek's TIF." Sugarcreek also sought a declaration that Centerville's annexation of the two parcels of real property located in Sugarcreek Township was invalid because proper procedures were not followed in annexing the land.

The parties filed motions for summary judgment in the declaratory judgment action. The trial court found that Sugarcreek is entitled to all real property taxes collected from the two parcels of land annexed by Centerville. Therefore, Centerville could not adopt a TIF plan covering the annexed land. The court reasoned "that Centerville's commitment in the Pre-Annexation Agreement, that would result in Centerville's TIF for the annexed land, would divert real property taxes from Sugarcreek in violation of R.C. § 709.023(H)." (Dkt. 235, p. 7.) The trial court granted Sugarcreek a declaratory judgment "that the City of Centerville may not implement a TIF on the annexed land . . . that would in any way divert real property taxes for the annexed territory from Sugarcreek Township." (Dkt. 235, p. 12.) The trial court also found that the annexations of the two

parcels of land were properly petitioned, granted, accepted, and completed in accordance with the requirements of applicable law.

Centerville filed a notice of appeal from the trial court's judgment, arguing that Sugarcreek Township neither had standing to challenge the annexation nor had presented a real case or controversy. Centerville also argued that the trial court erred in finding that a municipality may not enact a TIF plan covering property that has been annexed under the expedited annexation procedure in R.C. 709.023.

Based on our review of the record before us, we found that the trial court did not err in holding that Sugarcreek had standing to bring a declaratory-judgment action and that the controversy was ripe for adjudication. Further, we concluded that:

"the trial court erred in part in holding that Sugarcreek is entitled to all property tax revenues from the annexed property. The trial court correctly concluded that Centerville cannot interfere with Sugarcreek's collection of real property tax revenue levied on the unimproved and improved value of the real estate that remains in the township. However, the court failed to recognize that Centerville is also entitled to its own share of the minimum levies on the property under R.C. 5709.31 and 5709.315 and can therefore enact TIF legislation to the extent that it does not interfere with Sugarcreek's right to collect its share of the minimum levies on the property under the same statutes." *Sugarcreek I*, at ¶4.

We reversed the judgment of the trial court and remanded the cause for further proceedings consistent with our Opinion. On remand, the parties could not agree on the correct application of our judgment to the parties' motions for summary judgment with regard to the TIF plan that Centerville had agreed to implement in the preannexation agreements. Following additional briefing by the parties, the trial court applied our reasoning with regard to revenue each entity could receive from the minimum levies (or statutory "inside millage"), and further found that Centerville and Sugarcreek were each entitled to their respective revenues from additional levies (or voted "outside millage") imposed by each for the annexed territory. Consequently, Centerville could not adopt a TIF plan that would affect Sugarcreek's right to its outside millage. The trial court explained:

"Centerville's and Sugarcreek's shares of the outside millage, are the outside millage real property taxes voted respectively by the residents of Centerville and Sugarcreek, including residents of the annexed territory, and applicable to Centerville and Sugarcreek respectively, including the annexed territory. Centerville may enact a TIF Plan to exempt its own share of the outside millage applicable to the annexed territory. [] But Centerville may not enact a TIF Plan to exempt Sugarcreek's share of the outside millage, i.e., real estate taxes voted by Sugarcreek on Sugarcreek Township including the annexed territory. Those Sugarcreek real estate taxes remain subject to Sugarcreek Township pursuant to O.R.C. § 709.023(H).

Otherwise the last phrase of R.C. § 709.023(H) would refer only to inside millage, a limitation not expressed or implied in the law, and, in the opinion of this Court, a conclusion not intended by the Court of Appeals' Opinion on September 11, 2009." (Dkt. 272, p. 15-16.)

Centerville filed a notice of appeal, raising the following two assignments of error:

FIRST ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED AS A MATTER OF LAW IN DETERMINING THAT A MUNICIPALITY CANNOT TIF THE VOTED (OUTSIDE) MILLAGE OF A TOWNSHIP'S REAL PROPERTY TAXES ON TERRITORY THAT HAS BEEN ANNEXED UTILIZING THE R.C. 709.023 (EXPEDITED TYPE-2) ANNEXATION PROCESS."

SECOND ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED AS A MATTER OF LAW BY RE-CONSTRUING THEN MISAPPLYING R.C. 709.023(H) ON REMAND CONTRARY TO THIS COURT'S CONSTRUCTION AND OPINION AND BY ADDING LANGUAGE TO R.C. 5709.40 THAT JUDICIALLY AMENDED THE MUNICIPAL TIF STATUTE."

When reviewing a trial court's grant of summary judgment, an appellate court conducts a de novo review. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336. "De Novo review means that this court uses the same standard that the trial court should have used, and we examine the evidence to determine whether as a matter of law no genuine issues exist for trial." *Brewer v. Cleveland City Schools Bd. Of Edn.* (1997), 122 Ohio App.3d 378, 383, citing *Dupler v. Mansfield Journal Co.*

(1980), 64 Ohio St.2d 116, 119-20. Therefore, the trial court's decision is not granted any deference by the reviewing appellate court. *Brown v. Scioto Cty. Bd. Of Commrs.* (1993), 87 Ohio App.3d 704, 711.

Centerville argues that the trial court erred and varied from our mandate in *Sugarcreek I* in holding that any TIF plan Centerville may adopt cannot interfere with Sugarcreek's right to revenue from the outside millage tax on the two annexed parcels that Sugarcreek imposed. Because municipal annexations are governed by statute, we necessarily refer to the sections of the Revised Code implicated by Centerville's argument.

Annexation is governed by R.C. Chapter 709. R.C. 709.02 to 709.11 governs petitions for annexation filed by a majority of the owners of real property contiguous to a municipal corporation. Prior to the enactment of S.B. 5 in 2001, once a municipality annexed contiguous land that was situated in a township, the municipality then had to petition the county's board of commissioners to conform the resulting new boundaries of the municipality and the township pursuant to R.C. 503.07. *Sugarcreek I*, at ¶104. If a municipality failed to so petition, the annexed property became part of the municipal corporation but also remained part of the township. The taxpayers in the annexed area then resided both in the city and in the township and were obligated to pay both taxes levied by the township and taxes levied by the municipality. *Id.* at ¶106. If, however, a municipality successfully petitioned to conform the boundaries

pursuant to R.C. 503.07, the annexed land was no longer a part of the township, but the municipality then was required to pay the township real property tax on the annexed area. R.C. 709.19. "This indicates an intent to benefit townships, by allowing payment whenever any taxable property is excluded from the township." *Sugarcreek I*, at ¶111.

S.B. 5 was enacted in 2001. Among other things, the bill provided for an expedited type-2 annexation procedure. The section governing that form of annexation is R.C. 709.023. *Sugarcreek I*, at ¶97-98. The section is not analogous to any sections of the Revised Code enacted prior to 2001. *Id.* at ¶98. R.C. 709.023 provides for an expedited annexation procedure in which the land annexed may not be excluded from the township pursuant to the boundary conformity provisions of R.C. 503.07, and therefore remains a part of the township. R.C. 709.023(A). R.C. 709.023(H) provides:

"Notwithstanding anything to the contrary in section 503.07 of the Revised Code, unless otherwise provided in an annexation agreement entered into pursuant to section 709.192 of the Revised Code or in a cooperative economic development agreement entered into pursuant to section 701.07 of the Revised Code, territory annexed into a municipal corporation pursuant to this section shall not at any time be excluded from the township under section 503.07 of the Revised Code and, thus, remains subject to the township's real property taxes." (Emphasis supplied.)

The issue the present case involves is whether R.C.

709.023(H), and particularly its final clause, precludes Centerville from adopting a TIF plan that diminishes the tax revenue to which Sugarcreek is entitled from the outside millage Sugarcreek imposes on land covered by the proposed Centerville TIF plan. It is undisputed that Centerville's TIF plan may not affect Sugarcreek's right to tax revenue from its share of the statutory inside millage, per *Sugarcreek I*.

Townships, like municipalities, are taxing authorities, R.C. 5705.01(A) and (C), and, like municipalities, townships have authority to tax co-extensively within their borders. R.C. 5705.03; *Roderer v. Miami Twp. Bd. Of Trustees* (1983), 14 Ohio App.3d 155, 158. R.C. 709.023(H) precludes a municipality that annexes land from a township through an expedited type-2 annexation from petitioning to conform their boundaries pursuant to R.C. 503.07, and further provides that the annexed land "remains subject to the township's real property taxes." Because Sugarcreek may tax co-extensively with its borders, Sugarcreek remains authorized after an expedited type-2 annexation to the revenue from the outside millage tax that Sugarcreek imposed on the two parcels of land that Centerville annexed. Consistent with Sugarcreek's right in that respect, Centerville may not adopt a TIF plan that diminishes the tax revenue from outside millage Sugarcreek remains entitled to receive.

Centerville argues that the plain language of R.C. 709.023(H) merely precludes Centerville from conforming the boundaries of Centerville and Sugarcreek under R.C. 503.07, and

does not preclude Centerville from adopting a TIF ordinance under R.C. 5709.40 that limits Sugarcreek's ability to collect property taxes on the annexed property. As we explained in our prior Opinion, however, "R.C. 709.023(H) is not quite as narrow as Centerville contends. R.C. 709.023(H) does not merely indicate that boundaries may not be conformed; it also clearly states that, as a consequence of that prohibition, the annexed property 'remains subject to the township's real property taxes.'" *Sugarcreek I*, at ¶134. We believe that the plain language of R.C. 709.023(H) precludes Centerville from enacting a TIF plan that would prevent Sugarcreek from collecting the property taxes, whether in the form of inside millage or outside millage, to which it is entitled.

Centerville argues that it should be able to adopt a TIF plan that affects Sugarcreek's voted outside millage because the legislature could have amended R.C. 5709.40(F) to prevent such a result, but it did not. R.C. 5709.40(C)(1) provides, in part:

"The legislative authority of a municipal corporation may adopt an ordinance creating an incentive district and declaring improvements to parcels within the district to be a public purpose and, except as provided in division (F) of this section, exempt from taxation as provided in this section"

R.C. 5709.40(F)(1)-(12) identifies twelve local tax levies that are excepted from the TIF plan tax exemption authorized by R.C. 5709.40(C)(1). Township real property taxes are not included among the twelve exceptions. According to Centerville,

the failure of the legislature to include an exception for township real property taxes in R.C. 5709.40(F) demonstrates that the legislature did not intend to preclude municipalities from enacting TIF plans that interfere with the township's authority to tax property within its borders. We do not agree.

In matters of statutory interpretation, expression of one thing generally suggests exclusion of others. The twelve exceptions in R.C. 5709.40(F) were not added until well after the passage of Senate Bill 5, authorizing expedited type-2 annexation. However, it was not necessary to include an exception for expedited type-2 annexations in R.C. 5709.40(F) because the savings clause in R.C. 709.023(H), specifying that land thus annexed "remains subject to the township's real property taxes," served the same purpose. The expression of legislative intent is the same under either alternative.

Further, our interpretation of R.C. 709.023(H) is consistent with the legislature's intent to benefit townships. For example, pursuant to R.C. 709.19(C)(2), a municipality that conforms boundaries under R.C. 503.07 must continue to make tax payments to a township even after the municipality has exempted the annexed property from the township's real property taxes through a TIF plan adopted pursuant to R.C. 5709.40. *Sugarcreek I*, at ¶115-16; R.C. 709.19(C)(2). It would be an absurd result to then permit municipalities that are precluded by R.C. 709.023(H) from conforming boundaries to adopt a TIF plan that limits a township's ability to impose taxes on and receive tax payments

for property within its borders.

Centerville also argues that, being a special provision, R.C. 5709.40(F) prevails over R.C. 709.023(H), which is the more general provision, pursuant to R.C. 1.51. However, that section applies only when a "conflict between the provisions is irreconcilable." *Id.* Otherwise, the provisions "shall be construed, if possible, so that effect is given to both." *Id.* That outcome is readily available here.

R.C. 709.023(H) and R.C. 5709.40 should be read in *pari materia* to permit a municipal corporation to adopt a TIF ordinance affecting real property located within the municipality pursuant to R.C. 5709.40, except to the extent that the real property "remains subject to the real property taxes", R.C. 709.023(H), of a township in which the real property likewise remains located following a type-2 annexation. Therefore, the TIF plan Centerville enacts cannot diminish the outside millage taxes on the real property at issue imposed by Sugarcreek Township or the revenue therefrom to which the township is entitled.

The assignments of error are overruled. The judgment of the trial court will be affirmed.

FAIN, J. and FROELICH, J. concur.

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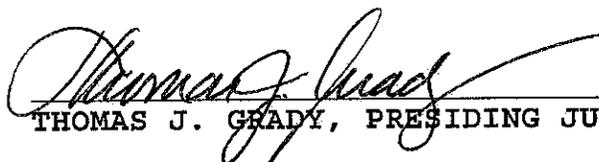
Richard C. Brahm, Esq.
Catherine A. Cunningham, Esq.
Scott D. Phillips, Esq.
Joseph W. Walker, Esq.
Matthew J. DeTemple, Esq.
Hon. Stephen A. Wolaver

IN THE COURT OF APPEALS OF GREENE COUNTY, OHIO

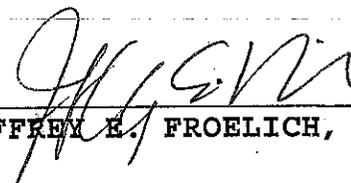
SUGARCREEK TOWNSHIP
Plaintiff-Appellee : C.A. CASE NO. 2010-CA-52
vs. : T.C. CASE NO. 2006CV0784
: FINAL ENTRY
CITY OF CENTERVILLE
Defendant-Appellant :

.....

Pursuant to the opinion of this court rendered on the
15th day of April, 2011, the judgment of the trial
court is Affirmed. Costs are to be paid as provided in App.R.
24.


THOMAS J. GRADY, PRESIDING JUDGE


MIKE FAIN, JUDGE


JEFFREY E. FROELICH, JUDGE

Copies mailed to:

Richard C. Brahm, Esq.
Catherine A. Cunningham, Esq.
145 East Rich Street
Columbus, OH 43215-5240

Scott D. Phillips, Esq.
Joseph W. Walker, Esq.
9277 Centre Point Drive, Suite 300
West Chester, OH 45069

Matthew J. DeTemple, Esq.
6500 Taylor Road, Suite A
Blacklick, OH 43004

Hon. Stephen A. Wolaver
45 N. Detroit Street
Xenia, OH 45385-2998

H

Court of Appeals of Ohio,
 Second District, Greene County.
 SUGARCREEK TOWNSHIP, Appellee,
 v.
 CITY OF CENTERVILLE, Appellants, et al.

No. 2009-CA-27.
 Decided Sept. 11, 2009.

Background: Township brought declaratory action that city could not establish a tax-increment financing (TIF) plan for land it intended to annex. The Court of Common Pleas, Greene County, 2008-CV-0784, adopting magistrate's decision, granted partial summary judgment to both parties. City appealed.

Holdings: The Court of Appeals, Fain, J., held that:
 (1) township had standing;
 (2) action presented a real case in controversy and was ripe for determination; and
 (3) annexed territory was subject to taxation by both township and municipality.

Reversed and remanded.

West Headnotes

[1] Municipal Corporations 268  953

268 Municipal Corporations
268XIII Fiscal Matters
268XIII(C) Bonds and Other Securities, and Sinking Funds
268k952 Payment
268k953 k. In general. Most Cited Cases

A "tax-increment financing" (TIF) plan is a method of financing that is used to pay for public improvements in which a public entity will sell bonds for public improvements and recoup the money from the increase in value of property that is enhanced by the public improvements, the property owners make service payments to a fund in lieu of property taxes,

and the public entity pays the bond obligations with the money in this fund, rather than with the public entity's general revenue fund.

[2] Declaratory Judgment 118A  302.1

118A Declaratory Judgment
118AIII Proceedings
118AIII(C) Parties
118Ak302 Government or Officers as Parties
118Ak302.1 k. In general. Most Cited Cases

Township had standing to bring declaratory action that city could not establish a tax-increment financing (TIF) plan for land it intended to annex pursuant to pre-annexation agreements with owner of real property and developer; township had interest in having agreements construed, territory would remain subject to taxation by township, since statute stated that territory annexed into a municipal corporation would not be excluded from township, and it was entitled to have the statute construed and to obtain a declaration of its rights under the statute. R.C. § 709.023(H).

[3] Action 13  13

13 Action
13I Grounds and Conditions Precedent
13k13 k. Persons entitled to sue. Most Cited Cases

Issue of standing is a threshold question for the court to decide in order for it to proceed to adjudicate the action.

[4] Action 13  13

13 Action
13I Grounds and Conditions Precedent
13k13 k. Persons entitled to sue. Most Cited Cases

Issue of lack of standing challenges the capacity

of a party to bring an action, not the subject matter jurisdiction of the court.

[5] Parties 287 ↪6(1)

287 Parties

287I Plaintiffs

287I(A) Persons Who May or Must Sue

287k6 Real Party in Interest

287k6(1) k. In general. Most Cited

Cases

To decide whether the requirement has been satisfied that an action be brought by the real party in interest, courts must look to the substantive law creating the right being sued upon to see if the action has been instituted by the party possessing the substantive right to relief.

[6] Declaratory Judgment 118A ↪7

118A Declaratory Judgment

118AI Nature and Grounds in General

118AI(A) In General

118Ak7 k. Necessity, utility and propriety.

Most Cited Cases

Declaratory Judgment 118A ↪61

118A Declaratory Judgment

118AI Nature and Grounds in General

118AI(D) Actual or Justiciable Controversy

118Ak61 k. Necessity. Most Cited Cases

A grant of declaratory judgment is proper when (1) a real controversy exists between adverse parties, (2) the controversy is justiciable, and (3) speedy relief is needed to preserve rights that otherwise may be impaired. R.C. § 2721.03.

[7] Municipal Corporations 268 ↪406(1)

268 Municipal Corporations

268IX Public Improvements

268IX(E) Assessments for Benefits, and Special Taxes

268k406 Power to Levy in General

268k406(1) k. In general. Most Cited

Cases

Municipalities have the power to levy and collect special assessments for the costs of improvements that specially benefit property.

[8] Municipal Corporations 268 ↪439

268 Municipal Corporations

268IX Public Improvements

268IX(E) Assessments for Benefits, and Special Taxes

268k436 Benefits to Property

268k439 k. Nature, extent, and amount.

Most Cited Cases

Municipal Corporations 268 ↪455

268 Municipal Corporations

268IX Public Improvements

268IX(E) Assessments for Benefits, and Special Taxes

268k455 k. Notice of proceedings for making

of assessment and hearing thereon. Most Cited Cases

Special assessments are typically considered to be different from general taxes because they cannot be levied on property without notice to the owner and cannot exceed the special benefit.

[9] Municipal Corporations 268 ↪405

268 Municipal Corporations

268IX Public Improvements

268IX(E) Assessments for Benefits, and Special Taxes

268k405 k. Nature of assessment or tax.

Most Cited Cases

A "special assessment" is not a tax as such; it is an assessment against real property based on the proposition that, due to a public improvement of some nature, such real property has received a benefit.

[10] Municipal Corporations 268 ↪953

268 Municipal Corporations

268XIII Fiscal Matters

268XIII(C) Bonds and Other Securities, and Sinking Funds
268k952 Payment
268k953 k. In general. Most Cited Cases

Municipal Corporations 268 ↪967(2)

268 Municipal Corporations
268XIII Fiscal Matters
268XIII(D) Taxes and Other Revenue, and Application Thereof
268k967 Exemptions from Taxation
268k967(2) k. Power to exempt in general. Most Cited Cases

General distinction between special assessment and tax did not exist in scenario in which city's property tax would be abated in exchange for the special assessment; if city could not directly enact a tax-increment financing (TIF) ordinance that would interfere with township's collection of property tax, it could not do so indirectly, by means of an ordinance authorizing a special assessment that would be paid in exchange for tax abatement. R.C. § 709.023(H).

[11] Declaratory Judgment 118A ↪209

118A Declaratory Judgment
118AII Subjects of Declaratory Relief
118AII(K) Public Officers and Agencies
118Ak209 k. Counties and municipalities and their officers. Most Cited Cases

Township's declaratory action that city could not establish tax-increment financing (TIF) plan for land it intended to annex pursuant to pre-annexation agreements with owner of real property and developer presented a real case in controversy and was ripe for determination; methods specified in agreements for financing improvements would impair township's ability to collect property taxes in annexation area, and township had entered into agreements for construction and funding of road in the annexation area that required funds, the procurement of which conflicted with TIF resolution required by preannexation agreement.

[12] Municipal Corporations 268 ↪956(1)

268 Municipal Corporations
268XIII Fiscal Matters
268XIII(D) Taxes and Other Revenue, and Application Thereof
268k956 Power and Duty to Tax in General
268k956(1) k. In general. Most Cited Cases

Townships have authority to tax coextensively within their borders. R.C. § 5705.03.

[13] Municipal Corporations 268 ↪956(1)

268 Municipal Corporations
268XIII Fiscal Matters
268XIII(D) Taxes and Other Revenue, and Application Thereof
268k956 Power and Duty to Tax in General
268k956(1) k. In general. Most Cited Cases

Municipalities have the power to tax within their boundaries. R.C. § 5705.03.

[14] Municipal Corporations 268 ↪34

268 Municipal Corporations
268I Creation, Alteration, Existence, and Dissolution
268I(B) Territorial Extent and Subdivisions, Annexation, Consolidation, and Division
268k26 Alteration and Creation of New Municipalities
268k34 k. Submission of question to inhabitants or property owners. Most Cited Cases

Board of county commissioners has some discretion with regard to majority-owner annexations.

[15] Municipal Corporations 268 ↪33(5)

268 Municipal Corporations
268I Creation, Alteration, Existence, and Dissolution
268I(B) Territorial Extent and Subdivisions, Annexation, Consolidation, and Division
268k26 Alteration and Creation of New Municipalities
268k33 Proceedings
268k33(5) k. Petition. Most Cited

Cases

Board of county commissioners must approve annexation under expedited annexation statutes if the petition complies with certain technical requirements. R.C. § 709.023.

[16] Municipal Corporations 268 ↪35

268 Municipal Corporations

268I Creation, Alteration, Existence, and Dissolution

268I(B) Territorial Extent and Subdivisions, Annexation, Consolidation, and Division

268k26 Alteration and Creation of New Municipalities

268k35 k. Operation and effect. Most Cited Cases

Municipal Corporations 268 ↪36(4)

268 Municipal Corporations

268I Creation, Alteration, Existence, and Dissolution

268I(B) Territorial Extent and Subdivisions, Annexation, Consolidation, and Division

268k26 Alteration and Creation of New Municipalities

268k36 Adjustment of Pre-Existing Rights and Liabilities

268k36(4) k. Taxes and assessments. Most Cited Cases

If a municipality that annexes township territory chooses not to petition the board of county commissioners to conform the boundaries, the annexed territory continues to be a component part of the township in which it was situated prior to municipal annexation; taxpayers in the annexed area reside both in the city and in the township and are obligated to pay both taxes levied by the township and taxes levied by the city, subject to the 10-mill limit on real property taxation, unless a majority of the voters have authorized additional taxes. Const. Art. 12, § 2; R.C. § 503.07.

[17] Municipal Corporations 268 ↪953

268 Municipal Corporations

268XIII Fiscal Matters

268XIII(C) Bonds and Other Securities, and

Sinking Funds

268k952 Payment

268k953 k. In general. Most Cited Cases

When a municipality enacts a tax-increment financing (TIF) resolution, the TIF will cover any increases in the value of the property due to development. R.C. § 5709.40.

[18] Municipal Corporations 268 ↪36(4)

268 Municipal Corporations

268I Creation, Alteration, Existence, and Dissolution

268I(B) Territorial Extent and Subdivisions, Annexation, Consolidation, and Division

268k26 Alteration and Creation of New Municipalities

268k36 Adjustment of Pre-Existing Rights and Liabilities

268k36(4) k. Taxes and assessments. Most Cited Cases

Statute requiring municipality that annexes township territory to conform boundaries to pay township percentage of township taxes that would have been due had the land not been annexed includes the amount of the taxes on the value of real property as improved. R.C. § 503.07.

[19] Taxation 371 ↪3245

371 Taxation

371III Property Taxes

371III(P) Disposition of Taxes Collected, and Failure of Local Authorities to Collect

371k3245 k. Proceedings for apportionment, accounting, and settlement. Most Cited Cases

Revenues from real property taxation must be shared by the jurisdictions that have taxing authority over the property.

[20] Municipal Corporations 268 ↪957(4)

268 Municipal Corporations

268XIII Fiscal Matters

268XIII(D) Taxes and Other Revenue, and Application Thereof

268k957 Constitutional Requirements and Restrictions

268k957(4) k. Submission to voters, and levy, assessment, and collection. Most Cited Cases

“Inside millage” is up to 10 mills of property tax that can be levied without voter approval. Const. Art. 12, § 2.

[21] Counties 104  **190.2**

104 Counties

104IX Taxation

104k189 Taxation

104k190.2 k. Limitations. Most Cited Cases

Municipal Corporations 268  **957(3)**

268 Municipal Corporations

268XIII Fiscal Matters

268XIII(D) Taxes and Other Revenue, and Application Thereof

268k957 Constitutional Requirements and Restrictions

268k957(3) k. Limitations as to rate or amount, or property or persons taxable. Most Cited Cases

If amount of “inside millage” sought exceeds amount available, county budget commission has statutory responsibility for approving tax levies and for fixing the amounts that various taxing units may levy within the 10-mill limitation established by constitution; certain levies are required to be approved, some taxing units are guaranteed minimum levies, but commission must make adjustments and reductions to comply with the limitation on unvoted taxes and, in case of overlapping political subdivisions, to assure that the 10-mill limitation is given effect throughout the state. Const. Art. 12, § 2; R.C. §§ 5705.31, 5705.32.

[22] Municipal Corporations 268  **36(4)**

268 Municipal Corporations

268I Creation, Alteration, Existence, and Dissolution

268I(B) Territorial Extent and Subdivisions,

Annexation, Consolidation, and Division

268k26 Alteration and Creation of New Municipalities

268k36 Adjustment of Pre-Existing Rights and Liabilities

268k36(4) k. Taxes and assessments. Most Cited Cases

For annexations granted on or after October 26, 2001, during any tax year within which territory annexed to municipality is also part of a township, both entities retain minimum levies, except in the territory in which the subdivisions overlap; where they overlap, minimum levies are reduced as prescribed by statute to come within 10-mill limitations, either by agreement between municipality and township, or by giving each one-half of the millage available for use within the portion of the overlapping territory. R.C. §§ 5705.31, 5705.315.

[23] Municipal Corporations 268  **36(4)**

268 Municipal Corporations

268I Creation, Alteration, Existence, and Dissolution

268I(B) Territorial Extent and Subdivisions, Annexation, Consolidation, and Division

268k26 Alteration and Creation of New Municipalities

268k36 Adjustment of Pre-Existing Rights and Liabilities

268k36(4) k. Taxes and assessments. Most Cited Cases

Township territory annexed under type-2 expedited annexation statute by municipality pursuant to pre-annexation agreements with owner of real property and developer was not excluded from the township and, thus, was subject to taxation by both township and municipality which were required to share tax revenues on the inside millage; territory remained in township, was subject to its real property taxes, and to taxation by every taxing unit within which it was located. R.C. §§ 709.023(H), 5705.01(A, H), 5705.93.

[24] Municipal Corporations 268  **953**

268 Municipal Corporations

268XIII Fiscal Matters

268XIII(C) Bonds and Other Securities, and Sinking Funds

268k952 Payment

268k953 k. In general. Most Cited Cases

Township is permitted to create its own tax-increment financing (TIF) district, and the improvements that can be exempted include increases in the assessed value of real property after the date of the resolution creating the TIF. R.C. § 5709.73(B, D).

****657** Frost, Brown, Todd, L.L.C., Scott D. Phillips, and Joseph W. Walker, for appellee.

Plank & Brahm, Richard C. Brahm, and Catherine A. Cunningham, for appellant Centerville.

****658** FAIN, Judge.

***484** ¶ 1} Defendant-appellant, the city of Centerville, appeals from a declaratory judgment of the trial court, which holds that plaintiff-appellee, Sugarcreek Township, is entitled to all real property taxes to be collected from two parcels of land annexed by Centerville. The trial court also held that Centerville violated Sugarcreek's rights under R.C. 709.023(H) by entering into a preannexation agreement to enact a tax-increment financing ("TIF") plan for the annexed parcels.

¶ 2} Centerville contends that the trial court erred in finding that Sugarcreek has standing to enforce the terms of an agreement to which Sugarcreek is not a party. Centerville further contends that the trial court erred in finding that Sugarcreek's claims present a real case or controversy or are ripe for determination. Finally, Centerville contends that the trial court erred in finding that a municipality may not enact a TIF ordinance in connection with property that has been annexed under the expedited annexation procedure in R.C. 709.023.

¶ 3} We conclude that the trial court did not err in holding that Sugarcreek has standing to bring a declaratory-judgment action, because Sugarcreek has an interest in having the preannexation agreement construed. Sugarcreek's status is also affected by R.C. 709.023(H), and Sugarcreek is entitled to have the statute construed and to obtain a declaration of its rights under the statute. We further conclude that this controversy is ripe for adjudication because all of the

methods Centerville proposed for financing public improvements to the annexation area involve tax abatement on real property that remains in Sugar-creek Township.

¶ 4} Finally, we conclude that the trial court erred in part in holding that Sugarcreek is entitled to all property tax revenues from the annexed property. The trial court correctly concluded that Centerville cannot interfere with Sugarcreek's collection of real property tax revenue levied on the unimproved and improved value of the real estate that remains in the township. However, the court failed to recognize that Centerville is also entitled to its own share of the minimum levies on the property under R.C. 5709.31 and 5709.315 and can therefore enact TIF legislation to the extent that it does not interfere with Sugar-creek's right to collect its share of the minimum levies on the property under the same statutes.

***485** ¶ 5} Accordingly, the judgment of the trial court is reversed, and this cause is remanded to the trial court for further proceedings consistent with this opinion.

I

¶ 6} This case arises from a dispute between adjoining jurisdictions over two parcels of commercially valuable land. Centerville won the battle of whether the land was properly annexed to Centerville, but lost the larger war because Sugarcreek retained the right to collect all the real property taxes levied on both parcels of land.

¶ 7} The land in question belonged to the Charles A. Dille Irrevocable Trust ("Dille Trust"). After Dille's death in August 1999, the trust was fully funded with assets, which included some cash, about 70 acres of land owned by the Dille Trust, and shares of Dille Laboratories Corporation ("Dille Corporation"), which owned about 400 acres of land. A sale of some of the land was desired in order to fund the trust with cash.

¶ 8} After speaking to various potential purchasers, Dille Corporation and the Dille Trust entered into a purchase agreement with Bear Creek Capital, L.L.C. ("Bear ****659** Creek") in September 2004. The purchase agreement covered approximately 157 acres on the west side of Interstate 675 and about 73 acres on the east side of Interstate 675 (referred to respec-

tively as the “northern parcel” and the “southern parcel”). Both parcels were located in Sugarcreek Township and were considered to have valuable development potential. Bear Creek had previously developed commercial property in Sugarcreek and intended to develop a large-scale, multiuse, commercial project on the parcels.

{¶ 9} During 2004, Bear Creek worked with the Sugarcreek Township trustees on development, which would require zoning changes. In February 2005, Bear Creek brought up the possibility of annexation to the adjacent cities of Kettering or Centerville, in the event that Sugarcreek failed to immediately move on the zoning changes. Sugarcreek passed zoning at that time, but negotiations between Sugarcreek and Bear Creek subsequently broke down, due to zoning issues and a merger study that had been placed on the ballot for Sugarcreek Township and the city of Bellbrook. If the merger study passed, annexation to other jurisdictions would be precluded while the merger was being studied.

{¶ 10} The proposal for a merger study was defeated in November 2005, and Bear Creek then discussed annexation with Kettering officials in December 2005. Bear Creek also began discussing annexation with Centerville officials around the same time. In January 2006, Centerville's city manager told the Centerville city council that he hoped to have an annexation agreement approved by the city and Bear Creek within the next few weeks.

*486 {¶ 11} In February 2006, officials of Kettering, Centerville, and Sugarcreek met to discuss a plan for how the Dille property would be developed, since the development would affect all three jurisdictions. There is some conflict over what occurred at this meeting. According to Sugarcreek, the parties believed that Bear Creek was shopping its plan with other jurisdictions to get the best economic plan and concluded that forming a joint economic agreement might be in the best interests of Centerville, Sugarcreek, and Kettering. Sugarcreek left the meeting with the impression that none of the communities would go it alone. In contrast, Centerville maintains that its clearly stated position was that it was open to pursuing joint projects but that it was also open to annexation if that was the developer's preference.

{¶ 12} On April 3, 2006, Centerville city council

held a special meeting to consider passing resolutions authorizing City Manager Greg Horn to enter into a preannexation agreement with Bear Creek, Dille Corporation, and the Dille Trust regarding the property. Sugarcreek representatives who had been present at the meeting in February 2006 spoke before the Centerville city council and stated that they were shocked and stunned by the annexation news. Nonetheless, city council passed resolutions authorizing Horn to enter into the preannexation agreements, which were later signed by Horn and the other parties on April 5, 2006.

{¶ 13} Three preannexation agreements, with virtually identical terms, were signed in April 2006. For purposes of brevity, we will refer to the preannexation agreement for the 157-acre parcel, which was signed by Horn, Dille Corporation as the “Owner,” and Bear Creek as the “Developer.” The agreement provides as follows:

{¶ 14} “1. Annexation

{¶ 15} “(a) The Developer agrees that it will obtain the signature of the Owner and will, at its own expense, prepare and file the necessary annexation petition or petitions**660 with accompanying map or plat with the appropriate board of county commissioners. The Owner agrees that it will sign the annexation petition and will support and not withdraw its name during the annexation process and/or any subsequent administrative or legal action involving pursuit of the annexation. The annexation petition shall be filed as an ‘Expedited Type 2’ annexation as provided in Section 709.023 of the Ohio Revised Code. * * * The City agrees to pass a service resolution and/or any necessary supporting resolutions as required by Section 709.023(C) of the Ohio Revised Code within twenty (20) days of the date of the filing of the annexation petition with the appropriate board of county commissioners. A service resolution will set out those services that will be provided by the City upon annexation and will establish the approximate date when those services will be available.

*487 {¶ 16} “(b) The Owner, Developer, and the City agree to cooperate and provide information necessary for the county commissioners to make their ‘review’ of the annexation as required by Section 709.023 of the Ohio Revised Code. If, at the conclusion of the review process the county commissioners

deny the annexation petition, the Owner agrees to file in the appropriate court a request for a writ of mandamus to compel the county commissioners to approve the annexation as set out in Section 709.023 of the Ohio Revised Code. * * *

{¶ 17} “(c) Should the annexation be approved, the Owner, Developer, and the City agree to process the annexation as provided by law subject to the terms of this agreement.”

{¶ 18} The preannexation agreement contains further provisions on zoning, platting, and water, sewer, and public utilities. In Section 5, the agreement provides as follows with regard to financing improvements:

{¶ 19} “The parties recognize that significant improvements may be needed to service the proposed development of the Property in the City, and, accordingly, the parties agree to undertake or participate in the following financing arrangements or mechanisms:

{¶ 20} “(a) Coincident with the City's approving the final plans for development of any portion of the Property that has been annexed to the City, the City shall as soon as practical take steps to present to the City Council legislation to create the Tax Increment Financing (the ‘TIF Ordinance’) to enable the City to collect up to the maximum amount of payments in lieu of taxes which may be generated from the new development without approval from a school district. The payments made in lieu of taxes will be applied by the City to recoup and apply to the costs associated with the construction of the necessary public improvements. Pursuant to the TIF Ordinance, the City and Developer shall enter into a public infrastructure agreement (‘the Infrastructure Agreement’) pursuant to which the City and Developer agree to erect, construct and maintain Public Improvements on the Property or which, in the opinion of the City, benefit or serve the Property or which have been deemed reasonably necessary by the City and the Developer. The TIF Ordinance shall also specify the use of service payments as provided in ORC Section 5709.42.

{¶ 21} “(b) The Developer and City shall enter into a service payment agreement reasonably acceptable to Developer and the City (the ‘Service Agreement’) setting forth the duties and obligations of a

Tax Increment Financing District that does not involve the deprivation of any school district moneys.

****661** {¶ 22} “(c) Upon request of the Developers, the City agrees that it will take such action as is necessary to issue Tax Increment Financing Bonds (the ‘Bonds’) in order to pay the costs of the Public Improvements to be constructed on the *488 Property and that the debt service on the Bonds will be paid solely from Service Payments (which means the Statutory Service Payments and any supplemental payments (the ‘Minimum Service Payments’) as may be required by a Service Agreement. The Public Improvements to be covered by Tax Increment Financing shall include, but not be limited to, the installation of roads, utility lines, sidewalks, and other public infrastructure improvements deemed reasonably necessary by the Developer and the City.” (Unmatched parentheses sic.)

{¶ 23} The preannexation agreement also contains various representations, including “This Agreement is the valid and binding act of the City, enforceable against the City in accordance with its terms.” Section 6(c). Finally, the agreement states that any waiver of the terms of the agreement must be made in writing, and that “[t]he representations, warranties and covenants contained in this Agreement shall not terminate for a period of twenty (20) years.”

[1] {¶ 24} A tax-increment financing plan (“TIF plan”) is a method of financing that is used to pay for public improvements. A public entity will sell bonds for public improvements and recoup the money from the increase in value of property that is enhanced by the public improvements. The property owners make service payments to a fund in lieu of property taxes, and the public entity pays the bond obligations with the money in this fund, rather than with the public entity's general revenue fund.

{¶ 25} In late May 2006, annexation petitions were filed with the Greene County Board of Commissioners, seeking annexation of the northern and southern parcels to Centerville. On April 20, 2006, before the annexation petitions were filed, Sugarcreek adopted a TIF plan that encompassed some of the annexed lands, among others. The TIF funds were to be used to extend Clio Road in Sugarcreek Township and for other infrastructure improvements in the area. The Clio Road project had been planned for

about 12 years and was needed for safety purposes so that citizens could be served by the Safety Building and fire station located on Clyo Road. At the time, Clyo Road dead-ended without a connection to other parts of Sugarcreek township.

{¶ 26} Sugarcreek had \$300,000 in a bridge fund and had also previously received a \$500,000 public-works grant for the Clyo Road project. In addition, Sugarcreek had acquired most of the right of way and had obtained a \$1,500,000 TIF-anticipation loan. Sugarcreek decided to create a TIF in April 2006, due to the potential loss of the public-works funding. The Clyo Road project was also a high priority for the township.

{¶ 27} The Sugarcreek TIF resolution lists certain public improvements that are to be made in the TIF district, including the Clyo Road extension and other improvements necessary for development of the parcels in the TIF district. The *489 resolution further provides for service payments in lieu of taxes for owners who make private improvements in the TIF district after the date of the resolution. Seventy-five percent of the assessed value of the improvements is exempted from real property taxation, and the owners are to make semiannual service payments to the Greene County treasurer. The service payments, in turn, are to be deposited into **662 a tax-increment-equivalent fund, which is to be used to pay the cost of the public improvements in the TIF district. The service payments are scheduled to last ten years, or until the public improvements are paid in full from the fund, but in no case for more than ten years. Sugarcreek Township Resolution No. 2006-04-20-01.

{¶ 28} In late June and early July 2006, Greene County granted the annexation petitions for the northern and southern parcels, respectively. Centerville then accepted the annexation of the parcels in October 2006. Before Centerville accepted the annexations, Sugarcreek filed an action for declaratory judgment in the Greene County Common Pleas Court. Sugarcreek sought a declaration that Centerville could not establish a TIF plan for the land it intended to annex. Subsequently, Sugarcreek filed an amended complaint, alleging that Centerville's resolutions accepting the annexed land were defective and per se invalid. Sugarcreek also alleged that the resolutions violated Centerville's charter and Ohio Sunshine Laws.

{¶ 29} Centerville filed a motion and supplemental motions for summary judgment. In its original motion, Centerville contended that no case or controversy existed, because Centerville had not passed a TIF ordinance. Centerville also alleged that the pre-annexation agreement had been amended by a October 2006 memorandum of understanding ("MOA") that expanded the types of financing options that could be used to finance future public improvements. In a supplemental motion, Centerville contended that Sugarcreek lacked standing to contest the annexation because Sugarcreek had failed to avail itself of statutory remedies under the annexation statutes.

{¶ 30} Sugarcreek also filed a motion for partial summary judgment with regard to Centerville's ability to implement a TIF ordinance. In the motion, Sugarcreek contended that it was entitled to retain the property taxes on the annexed property pursuant to R.C. 709.023(H).

{¶ 31} In November 2007, the case was removed from the trial court's active docket because Sugarcreek and Centerville had executed a memorandum of understanding regarding possible settlement of the case. Sugarcreek subsequently moved the court to reactivate the case in April 2008 because the parties had not been able to finalize an agreement. Mistakenly believing the case had been settled, the trial court dismissed the case with prejudice. The court then *490 granted Sugarcreek's motion for relief from judgment in September 2008 and vacated the dismissal.

{¶ 32} After the case was reinstated, Centerville filed another supplemental motion for summary judgment, claiming that Sugarcreek had entered into an agreement for construction and funding of the Clyo Road extension and had admitted in the signed documents that the property had been annexed and was located in Centerville. In response, Sugarcreek noted that Centerville had taken affirmative steps to implement a TIF and had, in fact, introduced TIF legislation related to the Dille property in its city council proceedings in January 2008.^{FNI}

^{FNI}. A motion to table the TIF resolution was passed on January 28, 2008. See minutes of Centerville city council meeting for January 28, 2008.

{¶ 33} In January 2009, a magistrate held a summary-judgment hearing and heard oral argument but no evidence. The magistrate then filed a decision, concluding that Sugarcreek's failure to object to the petition for annexation of the northern parcel constituted consent to the annexation under R.C. 709.023(D). The magistrate further held that Sugarcreek's objection**663 to the petition for annexation of the southern parcel was not specific and failed to meet the conditions specified in R.C. 709.023(E)(1). In addition, the magistrate found that judicial appeal of a municipality's acceptance of annexation is outside the scope of an appeal filed under R.C. 709.023.

{¶ 34} Regarding the TIF claims, the magistrate held that Sugarcreek had standing to seek a declaratory judgment as to its right to real property taxes for the annexed property. The magistrate also concluded that there was no evidence that the parties had executed an amendment to the preannexation agreement, incorporating the changes in the October 2006 MOA, or that the MOA had nullified the commitment in the preannexation agreement for the city to present legislation creating TIF financing. The magistrate held that this financing would violate R.C. 709.023(H) by diverting real estate taxes from Sugarcreek to Centerville. Centerville, therefore, could not divert real estate property taxes for the annexed property from Sugarcreek to Centerville, either by service payments in lieu of taxes or otherwise. The magistrate, therefore, granted the motion for summary judgment of Centerville, Dille Corporation, and the Dille Trust on the issue of annexation and granted Sugarcreek's motion with respect to the TIF issue.^{FN2} Both sides filed objections to the magistrate's decision.

^{FN2}. Dille Corporation and the Dille Trust had been added as parties to the litigation in July 2007 and had joined in Centerville's summary-judgment motions.

{¶ 35} The trial court, in a judgment entry filed in March 2009, adopted the magistrate's decision. The trial court concluded that Sugarcreek had standing because Centerville did not commit to an abandonment of TIF financing in the *491 October 2006 MOA. The court further held that enacting a TIF plan in the annexed territory would violate R.C. 709.023(H). The trial court also concluded that the property had been properly annexed.

{¶ 36} Centerville appeals from the summary judgment of the trial court rendered in favor of Sugarcreek on the issue of the enactment of a TIF. Sugarcreek has not appealed the summary judgment rendered in favor of Centerville on the issue of the annexation itself.

II

[2] {¶ 37} Centerville's first assignment of error is as follows:

{¶ 38} "The trial court erred in finding that Sugarcreek Township had standing to enforce the terms of a contract it was not a party to and that the contracting parties themselves agreed and intended not to enforce certain provisions."

{¶ 39} Under this assignment of error, Centerville contends that the trial court erred in concluding that Sugarcreek has standing to bring this action. Centerville argues that Sugarcreek is not a party to the preannexation agreement and has no right to enforce its terms. In addition, Centerville contends that the parties to the agreement waived enforcement of the TIF requirement when they entered into the October 2006 MOA.

{¶ 40} Our review of a summary judgment is "de novo, which means that we apply the same standards as the trial court." GNFH, Inc. v. W. Am. Ins. Co., 172 Ohio App.3d 127, 133, 2007-Ohio-2722, 873 N.E.2d 345, at ¶ 16. The standard used by trial courts is that summary judgment under Civ.R. 56 may be granted "if there are no genuine issues of material fact remaining to be litigated, the moving party is entitled to judgment as a matter **664 of law, and reasonable minds can come to only one conclusion, and that conclusion is adverse to the nonmoving party, who is entitled to have the evidence construed most strongly in his favor." Smith v. Five Rivers MetroParks (1999), 134 Ohio App.3d 754, 760, 732 N.E.2d 422.

{¶ 41} The parties in the case before us do not dispute the material facts, although they do dispute the meaning of some of the facts as they apply to the issue of standing. For example, Centerville contends that the MOA removed any obligation to enact TIF legislation. Conversely, Sugarcreek contends that the MOA does nothing to modify or rescind Centerville's

agreement that it shall present TIF legislation. Sugarcreek also contends that there is no evidence that Centerville ever amended the preannexation agreement.

[3][4][5] {¶ 42} The issue of standing “is a threshold question for the court to decide in order for it to proceed to adjudicate the action.” *State ex rel. Jones v. Suster* (1998), 84 Ohio St.3d 70, 77, 701 N.E.2d 1002. The issue of “[l]ack of *492 standing challenges the capacity of a party to bring an action, not the subject matter jurisdiction of the court.” *Id.* To decide whether the requirement has been satisfied that an action be brought by the real party in interest, “courts must look to the substantive law creating the right being sued upon to see if the action has been instituted by the party possessing the substantive right to relief.” *Shealy v. Campbell* (1985), 20 Ohio St.3d 23, 25, 20 OBR 210, 485 N.E.2d 701.

{¶ 43} Sugarcreek contends that it has standing under the declaratory-judgment provision in R.C. 2721.03, which states:

{¶ 44} “[A]ny person interested under a deed, will, written contract, or other writing constituting a contract or any person whose rights, status, or other legal relations are affected by a constitutional provision, statute, rule as defined in section 119.01 of the Revised Code, municipal ordinance, township resolution, contract, or franchise may have determined any question of construction or validity arising under the instrument, constitutional provision, statute, rule, ordinance, resolution, contract, or franchise and obtain a declaration of rights, status, or other legal relations under it.”

[6] {¶ 45} “A grant of declaratory judgment is proper when (1) a real controversy exists between adverse parties, (2) the controversy is justiciable, and (3) speedy relief is needed to preserve rights that otherwise may be impaired.” *Clark Cty. Solid Waste Mgt. Dist. v. Danis Clarkco Landfill Co.* (1996), 109 Ohio App.3d 19, 40, 671 N.E.2d 1034, citing *Fairview Gen. Hosp. v. Fletcher* (1992), 63 Ohio St.3d 146, 148-149, 586 N.E.2d 80.

{¶ 46} After reviewing the record, we conclude that Sugarcreek has standing to bring this action on two grounds. First, Sugarcreek has an interest in having the preannexation agreement construed. Second,

Sugarcreek's status is affected by R.C. 709.023(H), and Sugarcreek is entitled to have the statute construed and to obtain a declaration of its rights under the statute.

{¶ 47} In *Canton v. Imperial Bowling Lanes, Inc.* (1968), 16 Ohio St.2d 47, 45 O.O.2d 327, 242 N.E.2d 566, the Supreme Court of Ohio held that a city had standing under R.C. 2721.03 to bring a declaratory-judgment action to determine whether a liquor permit holder could sell intoxicating liquor in a part of a dry township that had been annexed to the city, which was wet. *Id.* at 48-51, 45 O.O.2d 327, 242 N.E.2d 566. The court held that a justiciable controversy existed, because the city's legal relations, as enforcer of the law, were affected by various statutes involved in the **665 question of whether sales of liquor in the annexed territory were now lawful. *Id.* at 51, 45 O.O.2d 327, 242 N.E.2d 566.

{¶ 48} Similarly, in *Silver Lake v. Metro Transit Auth.*, Summit App. No. 22199, 2005-Ohio-2157, 2005 WL 1026552, a village brought a declaratory-judgment action, attempting to obtain a declaration that a regional transit authority *493 had no statutory authority to operate a dinner excursion train on a secondary railroad line that ran along the village's border. *Id.* at ¶ 2. On appeal, the village contended that it had standing because it was interested in the contract between the transit authority and a third party and because its rights were affected by statutory authority addressing the power and authority of the transit authority. *Id.* at ¶ 20. The village also claimed injury based on violation of its zoning code and an alleged decrease in property values of homes affected by operation of the excursion train. *Id.*

{¶ 49} The Ninth District Court of Appeals concluded that the village did not have standing to seek a declaration that the proposed commercial use of the railway line was improper, because the village had never zoned the area where the line was located. *Id.* at ¶ 21. The court did find, however, that the village had standing because of the potential decrease in property values if the transit authority pursued operation of the excursion train in excess of its statutory authority to do so. *Id.* at ¶ 22.

{¶ 50} Likewise, in *Sylvania Twp. Bd. of Trustees v. Lucas Cty. Bd. of Commrs.*, Lucas App. No. L-01-1447, 2002-Ohio-3815, 2002 WL 1729895, the

Sixth District Court of Appeals found that a township had standing to challenge annexation covenants signed by property owners in the township, as well as a prior sewerage agreement signed by the city of Sylvania and Lucas Township. The Sixth District concluded that a “real controversy” existed because the area over which the township had jurisdiction would be reduced if annexation were allowed to proceed. *Id.* at ¶ 5 and 18-19.

{¶ 51} In the case before us, Sugarcreek contends that it is entitled to all property tax revenues from the annexed properties, pursuant to R.C. 709.023(H). Centerville conversely claims that R.C. 709.023(H) cannot be construed in the manner that Sugarcreek contends. Centerville contends that it is statutorily entitled to both collect and exempt property tax revenues in the annexed area. A real controversy exists as to the construction of R.C. 709.023(H), as well as other statutes raised by Centerville, and Sugarcreek will suffer an injury if it is deprived of property taxes from the annexed areas. Therefore, Sugarcreek has standing to pursue this matter.

{¶ 52} Sugarcreek also has an interest in the construction of the preannexation agreement, and a justiciable controversy exists in that regard. Under Section 1(c) of the agreement, if the annexation is approved, Centerville must process the annexation “as provided by law subject to the terms of this agreement.” Section 5 of the agreement further requires Centerville to present legislation to create a TIF ordinance to allow the city to collect the allowable maximum of payments in lieu of taxes from the new development. Finally, the agreement provided that its *494 warranties, representations, and covenants “shall not terminate for a period of twenty (20) years.” Section 19.

{¶ 53} Centerville claims that the preannexation agreement was amended by an October 6, 2006 MOA. In this document, Centerville, Dille Corporation, the Dille Trust, and Bear Creek agreed to allow the MOA to “serve as an agreement **666 to enter into an Amendment to the Pre-Annexation Agreement.” Paragraph 5 of the MOA states:

{¶ 54} “The parties agree to provide or review alternative financing options for the public road improvements in addition to TIF financing, including

consideration of special assessments. The agreement will add a paragraph (d) that states ‘That the City and developer may set up or utilize special assessment financing to guarantee service payments in accordance with the utilization of the TIF or, as an alternative or supplement to the TIF or will provide traditional CRA financing.’ ”

{¶ 55} The magistrate and trial court noted that this agreement does not either nullify or rescind the commitment to present TIF legislation to city council or to implement a TIF plan for the annexed territory. We agree, for several reasons.

{¶ 56} In the first place, Centerville failed to submit evidence that the city manager was authorized to sign the MOA. The testimony of both Centerville's economic development director and a city council member, James Singer, indicates that council passed three resolutions during a public meeting, authorizing the city manager to enter into the preannexation agreement in April 2006. These resolutions have not been made part of the record, and there is also no indication that the resolutions authorized the city manager to enter into future agreements, following the preannexation agreements that were signed in April 2006.

{¶ 57} Furthermore, there is neither testimony nor evidence of record indicating that resolutions were passed by city council during a public meeting, authorizing the city manager to enter into the October 2006 MOA. The October 2006 MOA is attached as Exhibit 77 to the deposition of City Manager Greg Horn. Horn indicated in his deposition that he had signed the MOA. However, he never stated that council had authorized him to sign the agreement, nor did he say that council had passed a resolution authorizing him to enter into the MOA.^{FN3}

^{FN3}. By our discussion, we are not concluding that city council did not authorize its manager to enter into the MOA; there is simply no evidence of that fact in the record. Compare Exhibit E attached to Sugarcreek's motion to reactivate, which was filed on April 4, 2008. Exhibit E is a copy of Resolution No. 52-09, which was enacted by the Centerville city council on November 5, 2007. This resolution authorized the city manager to enter into a memorandum of un-

derstanding with Sugarcreek Township regarding the Dille property, in order to settle the lawsuit between the parties. It is possible that a similar resolution was enacted, giving the city manager the ability to enter into the October 2006 MOA, but no resolution matching this description is part of the trial court record.

*495 {¶ 58} Furthermore, even if Horn had been given authority to enter into the October 2006 MOA, there is no evidence that the parties followed through by amending the preannexation agreement. And as noted by the trial court, the MOA did not rescind the requirement of introducing TIF legislation.

{¶ 59} More important, however, is the fact that the alternatives listed in the October 2006 MOA-special assessments and CRA financing-both involve tax abatement or exemption and would affect Sugarcreek's tax revenues in the annexation area.

[7][8][9][10] {¶ 60} Horn testified in his deposition that a "special assessment financing to guarantee service payments" is "similar to what we did with the Yankee Trace development where the owner petitioned for special assessment financing, and we were able to do that through a tax exempt structure and spread it out over several years to help assist with financing **667 of public improvements." Horn indicated that special assessments are included on the property tax bill as a "special item."^{FN4}

FN4. Under R.C. Chapter 727, municipalities have the power to levy and collect special assessments for the costs of improvements that specially benefit property. See, e.g., R.C. 727.01. Special assessments are typically considered to be different from general taxes because they cannot be levied on property without notice to the owner and cannot exceed the special benefit. Hammond v. Winder (1919), 100 Ohio St. 433, 444-445, 126 N.E. 409. " 'A special assessment is not a tax as such. It is an assessment against real property based on the proposition that, due to a public improvement of some nature, such real property has received a benefit.' " Cleveland Clinic Found. v. Wilkins, 103 Ohio St.3d 382, 2004-Ohio-5468, 816 N.E.2d 224, at ¶ 12, quoting State v.

Carney (1956), 166 Ohio St. 81, 83, 1 O.O.2d 210, 139 N.E.2d 339. This distinction does not exist in the present situation, however, because Horn stated that the property tax would be abated in exchange for the "special assessment." If Centerville cannot directly enact a TIF ordinance that would interfere with Sugarcreek's collection of property tax, it cannot do so indirectly, by means of an ordinance authorizing a "special assessment" that would be paid in exchange for tax abatement.

{¶ 61} Horn also testified that a "traditional CRA" is a "community reinvestment area." Regarding how a community reinvestment area works, the following exchange occurred during Horn's deposition:

{¶ 62} "A. That is a method under Ohio law that allows for abatement of taxes.

{¶ 63} "Q. So it becomes, basically a - it forgives taxes that are otherwise due, or what?

{¶ 64} "A. I guess 'forgives' would be acceptable terminology. It is, again, an abatement.

{¶ 65} "Q. How would that work on a project like this one?

{¶ 66} "A. It would provide an alternative revenue source for public infrastructure.

*496 {¶ 67} "Q. * * * Can you maybe explain that a little bit more?

{¶ 68} "A. It is an incentive to a developer to allow them to be in a position to financially take on major infrastructure costs.

{¶ 69} "Q. So instead of the city floating bonds for the infrastructure work to be done, the developer pays for those improvements himself and then, in exchange for that, gets an abatement on the property on a portion of the property taxes?

{¶ 70} "A. It could be done that way. It doesn't necessarily mean that the city wouldn't float bonds. It could be a supplement or in conjunction with."

{¶ 71} Accordingly, even if the preannexation agreement had been modified by the October 2006 MOA, Sugarcreek's ability to collect property tax revenues in the annexation areas would have been affected. Any property tax exempted by Centerville would affect Sugarcreek, because Sugarcreek contends that it is entitled to all the property tax revenue in the annexation area.

{¶ 72} Based on the preceding discussion, we conclude that Sugarcreek had standing on two separate grounds to maintain a declaratory-judgment action under R.C. 2721.03. Centerville's first assignment of error is overruled.

III

[11] {¶ 73} Centerville's second assignment of error is as follows:

{¶ 74} "The trial court erred in finding tax increment financing (TIF) claims made by Sugarcreek Township either presented a real case in controversy or were ripe for determination. (Judgment entry p. 6; magistrate's decision p. 71)."

**668 {¶ 75} Under this assignment of error, Centerville contends that this matter is not ripe and that no real case or controversy exists because Centerville has not yet enacted TIF legislation. The trial court concluded otherwise, finding that Centerville had already violated R.C. 709.023(H) by contracting to enact TIF legislation.

{¶ 76} The Supreme Court of Ohio has indicated:

{¶ 77} "The ripeness doctrine is motivated in part by the desire 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies * * *.' Abbott Laboratories v. Gardner (1967), 387 U.S. 136, 148, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681, 691. As one writer has observed:

{¶ 78} " 'The basic principle of ripeness may be derived from the conclusion that "judicial machinery should be conserved for problems which are real or present and imminent, not squandered on problems which are abstract or hypothetical or remote." * * *

[T]he prerequisite of ripeness is a limitation on *497 jurisdiction that is nevertheless basically optimistic as regards the prospects of a day in court: the time for judicial relief is simply not yet arrived, even though the alleged action of the defendant foretells legal injury to the plaintiff.' Comment, Mootness and Ripeness: The Postman Always Rings Twice (1965), 65 Colum. L.Rev. 867, 876 [quoting Kenneth Culp Davis, Ripeness of Governmental Action for Judicial Review (1955), 68 Harvard L.Rev. 1122]." State ex rel. Elyria Foundry Co. v. Indus. Comm. (1998), 82 Ohio St.3d 88, 89, 694 N.E.2d 459.

{¶ 79} For the reasons stated above, this assignment of error is without merit. Any of the alternative methods for financing improvements specified in the agreements between Centerville and Bear Creek would impair Sugarcreek's ability to collect property taxes in the annexation area. Accordingly, the dispute is not hypothetical or abstract but presents a real case or controversy between the parties.

{¶ 80} Moreover, according to Centerville's evidence, Sugarcreek has entered into agreements for the construction and funding of Clio Road and has therefore incurred expense that must be repaid by properties in the annexation area, pursuant to Sugarcreek's TIF resolution. That resolution accounts for the maximum permissible amount (75 percent of the assessed value of improvements in the annexation area) that can be taken without approval of the local school districts. See R.C. 5709.73. The required TIF resolution in the preannexation agreement covers the same amount and would conflict with Sugarcreek's ability to collect property tax. Accordingly, for the reasons stated, the present controversy is neither hypothetical nor abstract.

{¶ 81} Centerville's second assignment of error is overruled.

IV

{¶ 82} Centerville's third assignment of error is as follows:

{¶ 83} "The trial court erred in finding that a municipality may not utilize tax increment financing on property that has been annexed utilizing the R.C. 709.23 expedited (type 2) annexation process. (Judgment entry p. 6, 7, 8 and 12; magistrate's decision p. 70-71)."

{¶ 84} Under this assignment of error, Centerville contends that the trial court erred in concluding that property annexed under a type-2 annexation can never be exempted from real property taxation in connection with municipal tax-increment financing. Centerville contends that ****669**R.C. 709.023(H) is clear on its face and simply provides that municipalities may not conform a township's boundaries to those of the municipality after annexation. For purposes of argument, Centerville further contends that even if R.C. 709.023(H) is ambiguous, it does not alter the real property tax consequences or economic-development ***498** incentives prescribed by Ohio law. Sugarcreek argues in response that R.C. 709.023(H) unambiguously provides that townships retain the right to property tax revenues following annexation and that Centerville's commitment to adopt a TIF plan violates the statute.

{¶ 85} In order to fully address these points, we will first consider general principles relating to property taxation and annexation and will then discuss the statutes involved in this case.

A. General Principles of Property Taxation

{¶ 86} All real property in Ohio is subject to taxation, except as expressly exempted. R.C. 5709.01(A). Real property is taxed in the district and county in which it is located. Each county is the unit for assessing real estate, and the county auditor assesses all real estate situated in the county. R.C. 5713.01.

{¶ 87} Real estate is assessed and taxed based on its "true value," which is the fair market value or current market value. The value of property is determined by the county auditor, and the assessed value of real property is 35 percent of its true value. R.C. 5713.03; Ohio Adm.Code 5703-25-05(B). Under R.C. 5705.03(B)(1), if a subdivision is located in more than one county, the county auditor obtains current tax valuations for the portion of the subdivision located in the other county.

{¶ 88} Constitutionally, no real property may be taxed in excess of one percent of its true value in money for all state and local purposes, except that a majority of electors in a taxing district may pass additional taxes outside this limit and that additional taxes may be provided for by the charter of a municipal

corporation. Section 2, Article XII of the Ohio Constitution.

{¶ 89} Under R.C. 5705.02, the aggregate amount of taxes that may be levied on any taxable property in any subdivision or other taxing authority (which includes townships and municipalities) is ten mills on each dollar of tax valuation of the subdivision, except for taxes specifically authorized to be levied in excess thereof.

{¶ 90} R.C. 5705.03 authorizes taxing authorities to levy taxes annually on real and personal property within the subdivision for the purpose of paying the current operating expenses of the subdivision and acquiring or constructing permanent improvements. This section also provides a procedure for submitting taxes outside the ten-mill limit to the electorate. Special levies within the ten-mill limit are allowed for construction and repair of roads, for libraries, and for some other purposes, without a vote of the people. R.C. 5705.06. Levies in excess of the ten-mill limit are authorized by vote of the people. R.C. 5705.07. And R.C. 5705.19 lists purposes for which taxes can be levied in excess of ten mills, upon approval of a majority of the electorate.

499** [12][13] {¶ 91} All revenue derived from the general levy for current expenses within the ten-mill limit, for any general levy for expense authorized in excess of the ten-mill limit, and from sources other than the general property tax are paid into the general fund. R.C. 5705.10. Townships, like municipalities, are taxing authorities. R.C. 5705.01(A) and (C). Townships also have authority to tax coextensively with their borders. See, e.g., R.C. 5705.03 and *670**Roderer v. Miami Twp. Bd. of Trustees (1983), 14 Ohio App.3d 155, 158, 470 N.E.2d 183. Municipalities have the same power to tax within their boundaries.

B. General Principles of Annexation

{¶ 92} Annexation is governed by R.C. Chapter 709. R.C. 709.02 to 709.11 governs petitions for annexation by a majority of owners of real estate that is contiguous to a municipal corporation. Prior to the enactment of Am.Sub.S.B. No. 5, 149 Ohio Laws, Part I, 621 ("Senate Bill 5") in 2001, the requirement was that the land be "adjacent."

{¶ 93} Before Senate Bill 5 was enacted in 2001,

there were no special procedures for annexation occurring with the consent of 100 percent of the property owners in the area to be annexed—the law simply indicated that a majority of owners of adjacent real estate could petition the board of county commissioners to be annexed. A public hearing then had to be held, after which the board could grant the petition if it found, among other things, that the annexed area was not unreasonably large and that the general good of the territory would be served by the annexation. This gave the board some discretion over annexation. Former R.C. 709.02 (1979) and 709.033 (1989); and In re Annexation of 118.7 Acres in Miami Twp. to Moraine (1990), 52 Ohio St.3d 124, 131-132, 556 N.E.2d 1140.

[14] {¶ 94} Senate Bill 5 retained this procedure. Currently, in majority-owner petitions, the board of commissioners must still decide that the proposed area is “not unreasonably large” and that, on balance, the general good of the territory proposed to be annexed will be served. R.C. 709.033(A). Therefore, the board still has some discretion with regard to majority-owner annexations.

{¶ 95} After an annexation is approved by the board and is accepted by the municipality, the annexed territory is a part of the municipal corporation and the inhabitants have the rights and privileges of inhabitants of, and are subject to the power of, the municipality. R.C. 709.10.

{¶ 96} Prior to the enactment of Senate Bill 5, another method of annexation existed. Municipal corporations could petition to annex contiguous property owned only by the municipal corporation, a county, or the state. These procedures*500 have analogs in the law after Senate Bill 5 and are not particularly relevant. See R.C. 709.13 to 709.16.

[15] {¶ 97} The legislature enacted Senate Bill 5 in 2001 and substantially altered existing annexation statutes. The new annexation statutes add three special procedures for expedited annexation. These procedures eliminate discretion by requiring the board of commissioners to approve annexation if the petition complies with certain technical requirements.

{¶ 98} The annexation involved in the present case is the second of the three new annexation procedures and is referred to as an “expedited type-2 an-

nexation.” State ex rel. Butler Twp. Bd. of Trustees v. Montgomery Cty. Bd. of Commrs., 112 Ohio St.3d 262, 264, 2006-Ohio-6411, 858 N.E.2d 1193, at ¶ 7. The statute pertaining to this type of procedure is R.C. 709.023 and is not analogous to any statutes existing prior to 2001.

{¶ 99} R.C. 709.023 is used when the land annexed is not to be excluded from the township under R.C. 503.07. R.C. 503.07 existed prior to the enactment of Senate Bill 5 and allows municipalities to petition the county commissioners to change township lines, so that the boundary lines are identical, in whole or in part, with the limits of the municipal corporation.

**671 {¶ 100} Prior to the passage of R.C. 503.07 in 1961, there were two methods of changing township boundaries - by petition of township residents and by a city's petition. State ex rel. Dublin v. Delaware Cty. Bd. of Commrs. (1991), 62 Ohio St.3d 55, 58, 577 N.E.2d 1088. Granting the petition of a city or township residents was originally discretionary with the board of county commissioners. In 1961, granting a city's petition was made mandatory, pursuant to R.C. 503.07. However, the commissioners still retained discretion over the petitions of township residents. Id.

{¶ 101} The Ohio Supreme Court held in State ex rel. Dublin:

{¶ 102} “Pursuant to R.C. 503.07, a board of county commissioners must comply with a municipal petition for a change of township boundaries in order to make those boundaries conform, in whole or in part, to the limits of the municipality.” Id. at syllabus.

{¶ 103} State ex rel. Dublin involved the city of Dublin, whose boundaries included land in three counties and four townships, and none of the townships was wholly located in the city. Id. at 56, 577 N.E.2d 1088. The city wanted the borders of the largest township enlarged to encompass the parts of the other townships that were within city boundaries. The Supreme Court of Ohio held that the commissioners had no discretion—that they were required to change the township boundaries upon the city's application, due to the changes in the statute (R.C. 503.07) that governs municipal requests to conform boundaries. The *501 Supreme Court of Ohio also held that the

boundaries of a township can extend into an adjoining county. Id. at 60-61, 577 N.E.2d 1088.

{¶ 104} The relevance of this is that if the annexation in the present case were not a type-2 annexation, Centerville could have petitioned the Greene County Board of Commissioners, under R.C. 503.07, to conform the boundaries of the annexed property in Sugarcreek Township to those of Centerville.

[16] {¶ 105} In situations in which a municipality chooses not to petition the commissioners to conform the boundaries under R.C. 503.07, the “annexed township territory continues to be a component part of the township in which it was situated prior to municipal annexation.” 1984 Ohio Atty.Gen.Ops. 051, 1984 WL 196643, *3. A prior attorney general opinion, rendered in 1977, had indicated that the procedure in R.C. 503.07 should be followed as a matter of course each time a municipality annexes part of a township, due to possible inequities when residents may find themselves taxed by both the municipality and the township.

{¶ 106} If a municipality fails to take action under R.C. 503.07, the property becomes part of the municipal corporation but also remains part of the township. The taxpayers in the annexed area reside both in the city and in the township and are obligated to pay both taxes levied by the township and taxes levied by the city. 2005 Ohio Atty.Gen.Ops. 024, at 2-244 to 2-245. Of course, these taxes are subject to the ten-mill limit on real property taxation, unless a majority of the voters have authorized additional taxes.

{¶ 107} Centerville concedes in its brief that Ohio law has long allowed municipal corporations to eliminate overlapping jurisdictions within the corporation, by petitioning the board of county commissioners under R.C. 503.07 to remove the territory from the original township and conform its boundaries to those of the municipal corporation. Centerville fails to mention in its brief, however, that Ohio law has also required municipal corporations to pay townships real property tax on the annexed **672 area. Before Senate Bill 5 was enacted in 2001, the payments extended only to situations in which the area in question was 15 percent or more of the taxable value of the township. Senate Bill 5 eliminated

this threshold value requirement and now requires payment whenever boundaries are conformed under R.C. 503.07, R.C. 709.19.

C. Changes in Annexation Law after the 2001 Amendments in Senate Bill 5.

{¶ 108} The legislature made a number of changes to R.C. 709.19 when it enacted Senate Bill 5. Prior to the enactment of Senate Bill 5, R.C. 709.19 provided for three schedules of payment that would be made to townships if territory was annexed. But the statute applied only to situations in which the annexed territory included at least 15 percent, but less than 100 percent, of the *502 total taxable value of real, public utility, and tangible personal property subject to taxation in the township in the base year, which was the calendar year immediately preceding the annexation period. Former R.C. 709.19(B)(1), 1981 Am.H.B. No. 19, 139 Ohio Laws, Part I, 1422. The 15 percent amount also had to occur within a certain period of time, which was a period referred to in the statute as one, two, or three consecutive 12-month periods. Id.

{¶ 109} The schedules of payment depended on which annexation period applied. For example, the schedule allowed for 100 percent of the tax revenues to be paid back to the township for the first three years, if the annexation period was 12 consecutive months. Under this schedule, the payment of taxes to the township extended for seven years. Former R.C. 709.19(B), 1981 Am.H.B. No. 19, 139 Ohio Laws, Part I, 1422, and Legislative Service Commission Final Analysis, Am.Sub.S.B. No. 5, 26-27. The duration of payments decreased if the annexation period was longer.

{¶ 110} The payments were also required to be made whether or not township boundaries were conformed to those of the annexing municipal corporation, because R.C. 503.07 was not mentioned in R.C. 719.09 prior to the 2001 amendments.

{¶ 111} R.C. 709.19 was repealed by Senate Bill 5, and new R.C. 709.19 was enacted. Under the new statute, payments to townships begin upon the exclusion of the annexed property from the township under R.C. 503.07. Thus, the payments are no longer dependent upon at least a 15 percent loss of township tax value. This indicates an intent to benefit townships, by allowing payment whenever any taxable

property is excluded from the township.

{¶ 112} The new statute also provides two schedules of payments, divided into categories of commercial and industrial real property versus residential and retail property. The payments are somewhat less at the beginning (80 percent, as opposed to the prior schedule of 100 percent, for the first three years). However, the payments last longer and are larger at the end. For example, the new (and current) version of R.C. 709.19(C) provides that a township will receive 80 percent of the township taxes in the annexed area during years one through three, 65 percent in years four and five, 62.5 percent in years six and seven, 57.5 percent in years eight and nine, and 42.5 percent in years ten through twelve. This applies to “commercial and industrial, real, personal, and public utility property taxes [as] if no annexation had occurred.” R.C. 709.19(C)(1)(a) through (e).

{¶ 113} An even more significant change occurred as a result of the addition of the following language to R.C. 709.19(C)(2) in **673 Senate Bill 5. As enacted in Senate Bill 5, R.C. 719.09(C)(2) states:

***503** {¶ 114} “If there has been an exemption by the municipal corporation of commercial and industrial real, personal, or public utility property taxes pursuant to section 725.02, 1728.10, 3735.67, 5709.40, 5709.41, 5709.62, or 5709.88 of the Revised Code, *there shall be no reduction in the payments owed to the township due to that exemption. The municipal corporation shall make payments to the township under division (C)(1) of this section, calculated as if the exemption had not occurred.*” (Emphasis added.)

{¶ 115} The statutes listed in R.C. 709.19(C)(2) include urban renewal development funds (R.C. 725.02), community redevelopment tax exemptions (R.C. 1728.10), exemptions from tax in metropolitan housing reinvestment areas (R.C. 3735.67), tax exemptions for improvements for a public purpose (tax increment financing), and for municipal incentive districts (R.C. 5709.40(B) and (C), respectively), tax exemptions for lands owned by municipalities and leased (R.C. 5709.41), tax exemptions for municipal enterprise zones (R.C. 5709.62), and tax exemptions for incentive agreements for remediation of property (R.C. 5709.88).

{¶ 116} Thus, after the 2001 amendments, a municipality must make the payments even if the municipality has exempted the annexed property from real estate taxes for purposes like community-redevelopment funds, TIF funds, or urban-renewal debt-retirement funds. Again, this shows an intent to benefit townships.

{¶ 117} The TIF exemption that Centerville obligated itself to enact is authorized by one of the sections referred to in R.C. 709.19(C)(2). That section, R.C. 5709.40, permits municipalities to declare improvements to parcels of real property to be for a public purpose. R.C. 5709.40(B). Up to 75 percent of an improvement declared to be for a public purpose may be exempted from real property taxation for up to ten years, without approval of the board of education of the local school district. Longer exemption periods may be granted if the school board approves, or if the municipality agrees to pay the school district the amount of taxes that would have been paid if the improvement had not been exempted from taxation. In that event, the tax exemption can be granted for up to 30 years. R.C. 5709.40(D)(1).

[17] {¶ 118} R.C. 5709.40(A)(4) defines “improvement” as “the increase in the assessed value of any real property that would first appear on the tax list and duplicate of real and public utility property after the effective date of an ordinance adopted” under R.C. 5709.40, were it not for the exemption granted by the ordinance. Accordingly, when a municipality enacts a TIF resolution, the TIF will cover any increases in the value of the property due to development.

[18] {¶ 119} Notably, R.C. 709.19 as enacted by Senate Bill 5 also includes the amount of the taxes on the value of real property, *as improved*, within the ***504** payments that a municipality is required to make to a township when the boundaries are conformed under R.C. 503.07. For example, R.C. 709.19(C)(1) states that “the municipal corporation that annexed the territory shall make the following payments to the township from which the territory was annexed with respect to *commercial and industrial real, personal, and public utility property taxes using the property valuation for the year that the payment is due * * **” (Emphasis added.) R.C. 709.19(D) similarly states, “The municipal corpora-

tion that annexed the territory shall make the following payments to the township from which **674 the territory was annexed with respect to residential and retail real property taxes *using the property valuation for the year that the payment is due * * **” (Emphasis added.)

{¶ 120} As the value of commercial, residential, and retail real property increases over time due to improvements to the property, a township would, therefore, be entitled to payments that include the increases in the taxable value of real property, and a municipal corporation cannot exclude these amounts from the payments it is required to make when annexation occurs and the boundaries are conformed to the municipality. Accordingly, under existing law, if Centerville had been permitted to exclude the annexed area from Sugarcreek Township, Centerville would still have been obligated to pay Sugarcreek amounts ranging from 80 percent to 42.5 percent of the township taxes for commercial property in the annexation area, for 12 years. The payments for residential and retail real property taxes would be slightly different, as they range by statute from 80 percent to 27.5 percent, for 12 years. R.C. 709.19(D)(1) through (4).

{¶ 121} Centerville would also have been obligated to pay Sugarcreek based upon the improved value of the annexed property. As noted, R.C. 709.19(C)(2) states that in situations in which a municipality exempts real property from taxation, there shall be no reduction to the township due to the exemption, and the payments shall continue as if the exemption had not been granted. Therefore, if Centerville had excluded the annexed area from Sugarcreek and had exempted improvements in the area from taxation, Centerville would still be obligated to pay Sugarcreek the amount of real property taxes owed on the real property, *including improvements, and without reduction in the amount*, and would have to continue the payments as if the exemption had not been granted.

{¶ 122} While a municipality could argue that ~~this is unfair, we have previously rejected a similar claim.~~ In Roderer, 14 Ohio App.3d 155, 14 OBR 172, 470 N.E.2d 183, a municipality contended that R.C. 709.19 impermissibly intruded upon its home-rule powers. We disagreed, noting:

{¶ 123} “The enactment of the annexation ordinances was voluntary, and was accomplished with full knowledge that any tax monies received from the annexed territory might be subject to a future sharing requirement with the township *505 from which the territory was being annexed. Moraine concedes that the legislature could have constitutionally enacted a statute which made a redistribution of tax revenues a condition precedent to annexation. We see no distinction in making such redistribution a condition subsequent if the fifteen percent threshold is reached. If any of these municipalities was unwilling to assume the burden of the known potential condition subsequent, the same could have been avoided by failing to enact the annexation ordinance.” Id. at 157, 14 OBR 172, 470 N.E.2d 183,^{FNS}

FN5. At the time of our decision in 1983, tax-sharing payments under R.C. 709.19 were subject to a threshold requirement that 15 percent of the total taxable value of property subject to taxation in the township be reached, either by the annexation at issue or by the sum total of annexations by other municipalities. 14 Ohio App.3d at 157, 14 OBR 172, 470 N.E.2d 183. As we noted, this provision has since been eliminated, and there is no threshold limit.

{¶ 124} By indicating that a municipal corporation must pay the real property taxes to the township when it excludes the property from the township and conforms boundaries under R.C. 503.07, the legislature is applying the same reasoning that **675 we did in Roderer. The effect of the annexation statutes after Senate Bill 5 is that if a city annexes the property of a township and then excludes the property from the township under R.C. 507.03, the city must still pay the township the property taxes, even on improvements, and cannot reduce the payments. In view of these facts, what should logically occur if a municipal corporation annexes property in a township pursuant to a type-2 annexation procedure, thereby leaving the property in the township?

D. The Effect of Annexation in a Type-2 Annexation, or Other Special Procedure under Senate Bill 5, in which the Property Remains in the Township.

{¶ 125} Again, annexation is governed by R.C. Chapter 709. After an annexation is approved by the board of county commissioners and is accepted by a

municipality, the annexed territory is a part of the municipality, and the inhabitants have the rights and privileges of inhabitants, and are subject to the power, of the municipality. R.C. 709.10. However, if the municipality does not conform the township boundaries under R.C. 503.07, the inhabitants are also residents of the township, with voting rights. The residents are also subject to taxation in both the municipal corporation and in the township. 2005 Ohio Atty.Gen.Ops. 024, 9-10.

{¶ 126} The legislature enacted Senate Bill 5 in 2001 and substantially altered existing annexation statutes. Under prior law, there were no special procedures that could be applied where 100 percent of the property owners consented to an annexation. The statutes provided that a majority of owners of adjacent real *506 estate could petition the board of county commissioners to be annexed and a public hearing had to be held, after which the board could grant the petition if, among other things, the annexed area was not unreasonably large. This gave the board discretion over the annexation. *In re Annexation of 118.7 Acres in Miami Twp.* (1990), 52 Ohio St.3d at 131-132, 556 N.E.2d 1140. The special procedures, however, eliminate discretion by requiring the commissioners to approve annexation if the petition complies with certain technical requirements. *State ex rel. Butler Twp. Bd. of Trustees v. Montgomery Cty. Bd. of Commrs.*, 112 Ohio St.3d 262, 2006-Ohio-6411, 858 N.E.2d 1193, at ¶ 10, fn. 3, and *State ex rel. Butler Twp. Bd. of Trustees v. Montgomery Cty. Bd. of Commrs.*, Montgomery App. No. 22664, 2008-Ohio-6542, 2008 WL 5196445, at ¶ 25.

{¶ 127} Expedited type-2 annexations are governed by R.C. 709.023, which states:

{¶ 128} “(A) A petition filed under section 709.021 of the Revised Code that requests to follow this section is for the special procedure of annexing land into a municipal corporation when, subject to division (H) of this section, the land also is not to be excluded from the township under section 503.07 of the Revised Code. The owners who sign this petition by their signature expressly waive their right to appeal in law or equity from the board of county commissioners' entry of any resolution under this section, waive any rights they may have to sue on any issue relating to a municipal corporation requiring a buffer as provided in this section, and waive any rights to

seek a variance that would relieve or exempt them from that buffer requirement.”

{¶ 129} R.C. 709.023(B) requires notice to be given to various entities, including the fiscal officer of each township that has territory included within the proposed annexation area. The municipal corporation to which the area is to be annexed is required to adopt an ordinance indicating what services will be provided to the area **676 upon annexation. R.C. 709.023(C). However, the statute does not require specific services to be provided. The municipality is also required to provide a buffer separating the annexed territory from adjacent land in the township if the municipal zoning is incompatible with uses permitted by township zoning. *Id.*

{¶ 130} The township is permitted to object to the annexation petition, but its objection is limited solely to the petition's failure to meet the conditions specified in R.C. 709.023(E). These conditions relate to items like whether the borders of the annexed area and municipality are contiguous, and whether the persons who signed the petition are the owners of the real estate located in the proposed annexation area. R.C. 709.023(D). Failure to timely file an ordinance or resolution objecting to the annexation constitutes consent to the annexation. *Id.* If objections are filed, the board of commissioners reviews the petition to decide whether the petition meets the requirements of R.C. 709.023(E). If the petition *507 meets the requirements, the board must enter upon its journal a resolution granting the annexation. There is no appeal from the grant or denial of the resolution, but any party may seek a writ of mandamus to compel the board to perform its duties. R.C. 709.023(F) and (G).^{FN6}

FN6. We have previously held that townships are not “parties” under R.C. 709.023(F) and (G) for purposes of filing mandamus actions to compel the commissioners to perform their duties. *State ex rel. Butler Twp. Bd. of Trustees v. Montgomery Cty. Bd. of Commrs.*, Montgomery App. No. 22664, 2008-Ohio-6542, 2008 WL 5196445, at ¶ 27. We also concluded in *Butler Twp. Bd. of Trustees* that a township lacks standing to file a declaratory-judgment action contesting an expedited type-2 annexation. *Id.* at ¶ 29. The Supreme Court of Ohio has

accepted an appeal in that case, and the appeal is currently pending. *State ex rel. Butler Twp. Bd. of Trustees v. Montgomery Cty. Bd. of Commrs.*, 121 Ohio St.3d 1449, 2009-Ohio-1820, 904 N.E.2d 900. *State ex rel. Butler Twp. Bd. of Trustees* is not relevant to the case before us, since Sugarcreek did not appeal the dismissal of its challenge to the annexation petitions. Furthermore, one of our primary reasons for rejecting the township's appeal rights in *Butler Twp. Bd. of Trustees* is that "in * * * type II * * * [annexation] proceedings, the land annexed is not withdrawn from the township, and the township *suffers no economic detriment by the approval of the annexation.*" (Emphasis added.) 2008-Ohio-6542, at ¶ 26.

{¶ 131} R.C. 709.023(H) provides:

{¶ 132} "Notwithstanding anything to the contrary in section 503.07 of the Revised Code, unless otherwise provided in an annexation agreement entered into pursuant to section 709.192 of the Revised Code or in a cooperative economic development agreement entered into pursuant to section 701.07 of the Revised Code, territory annexed into a municipal corporation pursuant to this section shall not at any time be excluded from the township under section 503.07 of the Revised Code and, thus, remains subject to the township's real property taxes."

{¶ 133} Sugarcreek contends that R.C. 709.023(H) unambiguously authorizes it to collect all taxes due from real property in the annexation area, without restriction. Centerville contends that R.C. 709.023(H) is unambiguous and merely reflects that a municipality may not conform township boundaries after annexation is approved. Alternatively, Centerville contends that if R.C. 709.023(H) is ambiguous, it must be reconciled with existing authority, which allows municipalities to enact TIFs following annexation.

{¶ 134} R.C. 709.023(H) is not quite as narrow as Centerville contends. R.C. 709.023(H) does not merely indicate that boundaries may not be conformed; it also clearly states that the annexed property **677 "remains subject to the township's real property taxes."

{¶ 135} That phrase is used in R.C. 709.023(H) in declaring, "Notwithstanding anything to the contrary in section 503.07 of the Revised Code, * * * territory annexed into a municipal corporation pursuant to this section *shall not at any time be excluded from the township under section 503.07 of the Revised Code and, thus, remains subject to the township's real property taxes.*" (Emphasis *508 added.) Our interpretation of this phrase is that the words "and, thus, remains subject to the township's real property taxes" are simply intended to reflect the law prior to Senate Bill 5.

{¶ 136} Under R.C. 709.023(H), the territory remains in the township, as in situations in which a municipality has annexed township property but has failed to exclude the property from township borders under R.C. 503.07. Under existing interpretations of the Ohio attorney general and Ohio case law, residents of the annexed territory would be residents of both the township and municipality, would be entitled to vote in both city and township elections, and would be subject to taxation by both taxing authorities. E.g., 2005 Ohio Atty.Gen.Ops. 2005-024, at 2-244 to 2-245 (discussing situations where township property is annexed and the city has not asked the commissioners under R.C. 503.07 to conform the township boundaries to those of the city). Therefore, under the law in effect prior to Senate Bill 5, the annexed property would still have been subject to township taxation if it remained in the township.

{¶ 137} The Legislative Service Commission's Final Analysis of Senate Bill 5 does not discuss R.C. 709.023(H) in any detail. The Final Analysis simply states:

{¶ 138} "Notwithstanding anything to the contrary in the provision of continuing law pertaining to the conforming of township boundaries * * *, unless otherwise provided in the annexation agreement or in a cooperative economic development agreement, territory annexed into a municipal corporation pursuant to this special procedure must not at any time be excluded from the township, and remains subject to the township's real property taxes (sec. 709.023(H))." Id. at 18.

{¶ 139} Admittedly, R.C. 709.023(H) does not say that the property is also subject to municipal tax, but under existing law, that would not be necessary,

since each parcel of land in Ohio is subject to taxation by every taxing unit within which it is located. R.C. 5705.01(A) and (H); R.C. 5705.93; and 2005 Ohio Atty.Gen.Ops. 2005-043, 2-449 to 2-450.

{¶ 140} Because R.C. 709.023(H) fails to state that the annexed property is not subject to municipal taxes, it does not appear to have been intended to alter existing law. Had the legislature intended to remove a municipality's existing ability to tax real property located within its borders, the legislature would have said so. This does not mean, however, that Sugarcreek is restricted to taxing only the unimproved value of the property, nor does it mean that Centerville can enact a TIF or other tax-abatement ordinance that interferes with Sugarcreek's collection of property tax revenue on the unimproved and improved portions of the annexed property.

*509 [19] {¶ 141} Under the law before and after the enactment of Senate Bill 5, revenues from real property taxation must be shared by the jurisdictions that have taxing authority over the property.

[20] {¶ 142} As noted, Ohio law allows up to ten mills of property tax to be levied without voter approval. This millage, which is called "inside millage," is allocated **678 among various taxing authorities. 2005 Ohio Atty.Gen.Ops. 2005-043, 2-463. Therefore, even before annexation, Sugarcreek would not have been entitled to the total amount of the inside millage on the property within the township if other taxing authorities also had the ability to levy taxes. For example, local school districts are taxing authorities under R.C. 5705.01(A) and receive money from the unvoted or inside millage within their district. See, e.g., Strongsville City School Dist. Bd. of Edn. v. Lorain Cty. Budget Comm. (1988), 38 Ohio St.3d 50, 526 N.E.2d 297 (discussing dispute between school district and township over allocation of inside millage obtained from taxation of property located in the township).

{¶ 143} Furthermore, reduction of taxes obtained from levies may be required in situations involving overlapping political subdivisions. R.C. 5705.31 provides for "minimum levies within the 10-mill limitation for the current expense and debt service of each subdivision or taxing unit, based on the average inside millage levies in effect during the last five years before the 10-mill limitation went into effect (that is,

during the years 1929 through 1933). * * * Certain levies are given priority, and specific provisions govern the minimum levy for a school district." 2005 Ohio Atty.Gen.Ops. No. 2005-043, at 2-463 to 2-464.

{¶ 144} Because of these competing interests, tax levies paid to cities and townships that overlapped could have been reduced under R.C. 5705.31 prior to the enactment of Senate Bill 5 in 2001.

{¶ 145} "The general rule prior to [the effective date of Senate Bill 5] * * *, was that the allocation of the inside millage was made in accordance with R.C. 5705.31 in the territory having the most taxing units eligible to share in that millage, and (subject to express statutory exceptions) the rate so determined for each taxing unit was then levied uniformly throughout that taxing unit, in accordance with the requirement of Ohio Const. art. XII, § 2 that land and improvements be taxed 'by uniform rule.' As was stated in 1993 Op. Att'y Gen. No. 93-019:

[21] {¶ 146} " 'It is evident that, because of the financial needs of various taxing units, the amount of inside millage sought may exceed the amount of inside millage available. The county budget commission is given statutory responsibility for approving tax levies and for fixing the amounts that various taxing units may levy within the ten-mill limitation. Certain levies are required to be *510 approved, and some taxing units are guaranteed minimum levies within the ten-mill limitation. The county budget commission must, however, also make adjustments and reductions, as appropriate, in order to comply with the ten-mill limitation on unvoted taxes. See R.C. 5705.31-.32, .34; 1979 Op. Att'y Gen. No. 79-063; 1956 Op. Att'y Gen. No. 7421, p. 813. Reduction of various levies may be necessary in the case of overlapping political subdivisions to assure that the ten-mill limitation is given effect throughout the state. See, e.g., Cambridge City School District v. Guernsey County Budget Commission, 11 Ohio App.2d 77, 40 O.O.2d 239, 228 N.E.2d 874 (Guernsey County 1967), aff'd, 13 Ohio St.2d 77, 42 O.O.2d 226, 234 N.E.2d 512 (1968); Op. No. 79-063; 1956 Op. No. 7421.' " 2005 Ohio Atty.Gen.Ops. 2005-043, 2-464.

{¶ 147} Unfortunately, because of the requirement of uniform taxation within districts, if the inside millage in part of a township or municipality had to

be reduced because it overlapped another political subdivision, the millage in the entire township or municipality had to be correspondingly reduced. 2005 Ohio Atty.Gen.Ops. 2005-043 at 2-465 to 2-466. Therefore, there might be parts of the township and **679 municipality where the entire ten-mill limit could not be levied. In order to address this issue, the General Assembly enacted R.C. 5705.315 in 2001, as part of Senate Bill 5. R.C. 5705.315 states:

{¶ 148} “With respect to annexations granted on or after the effective date of this section and during any tax year or years within which any territory annexed to a municipal corporation is part of a township, the minimum levy for the municipal corporation and township under section 5705.31 of the Revised Code shall not be diminished, except that in the annexed territory and only during those tax year or years, and in order to preserve the minimum levies of overlapping subdivisions under section 5705.31 of the Revised Code so that the full amount of taxes within the ten-mill limitation may be levied to the extent possible, the minimum levy of the municipal corporation or township shall be the lowest of the following amounts:

{¶ 149} “(A) An amount that when added to the minimum levies of the other overlapping subdivisions equals ten mills;

{¶ 150} “(B) An amount equal to the minimum levy of the municipal corporation or township, provided the total minimum levy does not exceed ten mills.

{¶ 151} “The municipal corporation and the township may enter into an agreement to determine the municipal corporation's and the township's minimum levy under this section. If it cannot be determined what minimum levy is available to each and no agreement has been entered into by the municipal corporation and township, the municipal corporation and township shall each receive one-half of the millage available for use within the portion of the territory annexed to the municipal corporation that remains part of the township.”

*511 [22] {¶ 152} The Ohio attorney general has interpreted this provision as follows: “[W]ith respect to any annexation granted on or after October 26, 2001, during any tax year within which territory

annexed to a municipality is part of a township, both the municipality and township retain the minimum levies calculated pursuant to R.C. 5705.31, except in the territory in which the subdivisions overlap. In that territory, the minimum levies are reduced as prescribed, in order to come within the 10-mill limitation. The municipality and township may enter into an agreement regarding their respective minimums within the 10-mill limitation. If there is no agreement, the municipality and township ‘shall each receive one-half of the millage available for use within the portion of the territory annexed to the municipal corporation that remains part of the township.’ R.C. 5705.315.” 2005 Ohio Atty.Gen.Ops. 2005-043, at 2-466 to 2-467.

{¶ 153} If the municipal corporation and the township enter into an annexation agreement to reallocate their shares of the minimum levies, the county auditor is required to allocate, to the extent possible, the minimum levy according to their agreement. R.C. 3705.31(D).

{¶ 154} Notably, R.C. 5705.31 and 5705.315 do not provide that the township is entitled to no more than its share of the levies on the taxable value of the real property prior to improvement. Furthermore, the attorney general's interpretation is consistent with the Final Analysis for Senate Bill 5, which contains the following discussion:

{¶ 155} “Division of inside millage in annexed territory

{¶ 156} “The act contains special provisions related to the allocation in the annual tax budget process of the minimum levies within the ten-mill limitation for the current expense and debt service of an annexing municipal corporation and a township **680 whose territory is annexed. These special provisions apply only (1) in the annexed territory, (2) for those tax years in which annexed territory remains part of a township after annexation, and (3) for annexations that are granted on or after the act's effective date. (Sec.5705.315.)

{¶ 157} “Under these circumstances, the minimum levy under the Tax Levy Law as pertains to the annexed territory is an amount that, when added to the minimum levies of the other overlapping subdivisions, equals ten mills or, if the amount would be

lower, an amount equal to the minimum levy of the municipal corporation or township. * * * This formula is stated to be for the purpose of preserving the minimum levies of overlapping subdivisions so that the full amount of taxes within the 10-mill limitation may be levied to the extent possible. (Sec.5705.315.)

{¶ 158} “Once determined, the minimum levy amount pertaining to the annexed territory then must be divided between the municipal corporation and the township. The amount to go to each is to be determined either by an agreement *512 between them or, if no agreement can be reached and the amount to go to each cannot be determined otherwise, by dividing the available millage determined for the annexed territory so that the municipal corporation and the township each receive one-half. (Sec.5705.315.)” (Footnotes omitted.) Legislative Service Commission Final Analysis, Am.Sub.S.B. 5, 34.

{¶ 159} The annexation laws thus provide compensation for townships in two different situations. Where a municipality annexes land and conforms the boundaries under R.C. 503.07, the municipality is required to pay the township gradually decreasing proportions of the property tax revenues for 12 years. Where land is annexed using the expedited type-2 annexation procedure, the land is not excluded from the township and remains subject to township real property taxation. In the latter event, the township and annexing municipality share the real property tax revenues on the inside millage.

E. The Effect of the Statutes Pertaining to Municipal and Township Tax-Increment Financing

(1) Municipal Tax-Increment Financing

[23] {¶ 160} R.C. 5709.40(B) allows municipalities to declare improvements to certain parcels of real property to be a “public purpose” and to exempt not more than 75 percent of the improvement from taxation for up to ten years. The percentage may exceed more than 75 percent, for a period up to 30 years, if the ordinance declaring the improvements to be a public purpose also states that the local school district shall be paid the amount of taxes that would have been paid if the parcel had not been exempted from taxation. R.C. 5709.40(D)(1). The school district can also consent to the increased time period and amount of exempted assets. R.C. 5709.40(D)(2). Even where the relevant period is only ten years, the school district must still be notified. R.C. 5709.83(A).

{¶ 161} Under R.C. 5709.42(A), the municipal corporation may require owners of any structure located on the parcel to make annual service payments in lieu of taxes. These payments are collected and distributed at the same time and in the same manner as real property tax payments. The municipal corporation must also establish a public-improvement tax-increment fund into which the service payments are deposited. R.C. 5709.43(A).

{¶ 162} Under R.C. 5709.40(A)(4), “improvement” is defined as:

{¶ 163} “The increase in the assessed value of any real property that would first appear on the tax list and duplicate of real and public utility property after the effective**681 date of an ordinance adopted under this section were it not for the exemption granted by that ordinance.”

{¶ 164} Thus, under the municipal TIF statute, Centerville could enact a TIF resolution for the annexed property and exempt up to 75 percent of the assessed *513 value of improvements on the property from real property taxation, for ten years. If Centerville obtained the approval of the local school districts, or agreed to pay the districts the amount of property tax they would have received anyway, Centerville could exempt up to 100 percent of the assessed value for up to 30 years. In either situation, this would deprive Sugarcreek of its statutory share of the inside millage on the property. Although Sugarcreek would still receive its proportionate share of the inside millage on the unimproved portions of the annexed real property, it would not receive any share of the tax revenue from the improvements to the property.

(2) Township Tax-Increment Financing

{¶ 165} Like municipalities, townships are also permitted to designate TIF districts in public-improvement areas and to exempt real property in the area from taxation, contingent upon the property owners' service payments in lieu of tax. R.C. 5709.73. The provisions for township TIFs are similar to those for municipalities, including the fact that school districts must approve the exemption of percentages of improvements that exceed 75 percent. R.C. 5709.73(B) and (D).

{¶ 166} R.C. 5709.73(B) provides:

{¶ 167} “A board of township trustees may, by unanimous vote, adopt a resolution that declares to be a public purpose any public infrastructure improvements made that are necessary for the development of certain parcels of land located in the unincorporated area of the township. Except with the approval under division (D) of this section of the board of education of each city, local, or exempted village school district within which the improvements are located, the resolution may exempt from real property taxation not more than seventy-five per cent of further improvements to a parcel of land that directly benefits from the public infrastructure improvements, for a period of not more than ten years. The resolution shall specify the percentage of the further improvements to be exempted and the life of the exemption.”

{¶ 168} “Further improvements” is defined as “the increase in the assessed value of real property that would first appear on the tax list and duplicate of real and public utility property after the effective date of a resolution adopted under this section were it not for the exemption granted by that resolution. For purposes of division (B) of this section, ‘improvements’ do not include any property used or to be used for residential purposes.”

[24] {¶ 169} Thus, a township is permitted to create its own TIF district and the improvements that can be exempted include increases in the assessed value of real property after the date of the resolution creating the TIF. The TIF statutes, therefore, anticipate that the township is entitled to revenues from the increased value of the improved property.

*514 {¶ 170} Sugarcreek enacted a TIF resolution in April 2006. Consistent with R.C. 5709.73, the resolution created a TIF district that encompasses some of the annexed area and exempts 75 percent of the assessed value of improvements in the area from real property taxation for a period of ten years. The property owners are to make semiannual service payments in lieu of taxes, which will be deposited in a tax-increment-equivalent fund and will be used to pay the cost of the public **682 improvements in the TIF district. Sugarcreek Township Resolution No. 2006-04-20-01.

F. How to Reconcile All the Statutes Involved in This

Case.

{¶ 171} The only way to reconcile all the statutes in this case is to conclude that Sugarcreek and Centerville are both entitled to tax the real property in the annexation area, since the real property is within each of their respective borders. The residents in the annexation area are considered residents of both areas and are entitled to all the rights associated with residency, including voting privileges.

{¶ 172} Both Centerville and Sugarcreek are entitled to retain their minimum levies on the real property in the annexation area, calculated pursuant to R.C. 5705.31. However, their minimum levies must be reduced in the manner prescribed, to come within the ten-mill limit on inside millage. Sugarcreek and Centerville may enter into an agreement regarding their respective minimums within the ten-mill limit, but if there is no agreement, and it cannot be decided what minimum levy is available to each, Sugarcreek and Centerville shall each receive one-half of the inside millage available for use within the portion of the territory annexed to Centerville that remains within Sugarcreek Township. R.C. 3705.315(B).

{¶ 173} If Sugarcreek and Centerville enter into an annexation agreement to reallocate their shares of the minimum levies, the county auditor must allocate, to the extent possible, the minimum levy according to their agreement. R.C. 3705.31(D).

{¶ 174} Both Sugarcreek and Centerville may enact TIF resolutions that exempt improvements on real property within the annexation area, including the assessed value of improvements to the real property, from real property taxation. However, Sugarcreek and Centerville may not enact TIF resolutions that interfere with each other's share of the minimum levies on the real property within the annexation area.^{FN7}

^{FN7}. {¶ a} Centerville has not questioned the validity of Sugarcreek's TIF, which was enacted before the property was annexed. However, the conclusion appears inescapable that neither Sugarcreek nor Centerville can validly enact a TIF that interferes with the other entity's minimum levy under R.C. 5709.31 and 5709.315. This could be an alternative basis for finding standing, because Sugarcreek has already enacted the TIF.

However, Centerville did not raise this as a counterclaim, nor did it ask the trial court to declare Sugarcreek's TIF invalid. Sugarcreek did raise as an issue below that Centerville was not entitled to impose a TIF plan on territory that is already part a TIF district created by Sugarcreek. However, the magistrate indicated that he did not need to address this issue, in view of his conclusion that Sugarcreek was entitled to all the property tax and that Centerville was not entitled to impose a TIF that would divert any part of the tax.

{¶ b} Notably, R.C. 5709.73(B) refers to a township's ability to enact TIFs for development of parcels in the "unincorporated area of the township." This would seem to restrict Sugarcreek's ability to enact further TIFs in the annexation area, because even though the property remains in the township pursuant to R.C. 709.023(H), the property might not be considered to be in an unincorporated area of the township after annexation. Thus, when Sugarcreek's TIF expires in ten years, Sugarcreek may not be able to enact a further TIF plan, assuming the laws remain the same. This may be why Sugarcreek passed the TIF resolution before the land was annexed. However, whether this is the appropriate interpretation of the statute is currently unclear, and there is no explanation in the legislative history of Senate Bill 5.

{¶ 175} In view of the preceding discussion, the trial court erred in concluding that Centerville could never pass TIF legislation that would divert any of the ****683 *515** property taxes from Sugarcreek. The court was correct in concluding that Centerville cannot interfere with Sugarcreek's collection of its share of the minimum levies on the unimproved and improved value of the real estate that still remains in the township. Since Sugarcreek has already enacted a TIF plan that exempts 75 percent of the improvements on some of the annexation property, Centerville's proposed TIF, exempting 75 percent of the property from taxation, would violate R.C. 709.023(H).

{¶ 176} However, the trial court failed to recognize that Centerville is also entitled to its share of the

minimum levies on the property under R.C. 5709.31 and 5709.315 and can therefore enact TIF legislation to the extent that it does not interfere with Sugarcreek's right to collect its share of the minimum levies on the property.

{¶ 177} Accordingly, Centerville's third assignment of error is sustained in part and overruled in part. This cause is remanded to the trial court for further proceedings consistent with this opinion.

V

{¶ 178} Centerville's first and second assignments of error having been overruled, and the third assignment of error having been sustained in part and overruled in part, the judgment of the trial court is reversed, and this cause is remanded for further proceedings consistent with this opinion.

Judgment reversed and cause remanded.

GRADY and FROELICH, JJ., concur.

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