ORIGINAL

IN THE SUPREME COURT OF THE STATE 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 OF *AMICUS CURIAE* CITY OF DELAWARE IN SUPPORT OF JURISDICTION OF APPELLANT, CITY OF CENTERVILLE, OHIO

Daniel B. Bennington (0007799)
City Attorney
City of Delaware, Ohio
1 South Sandusky Street
Delaware, OH 43015
(740) 203-1014
Fax: (740) 203-1021
Email: dbennington@delawareohio.net
Counsel for Amicus Curiae,
City of Delaware, Ohio

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

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

Matthew J. DeTemple (0023294)
6500 Taylor Road
Blacklick, OH 43004
(614) 863-0045
Fax: (614) 863-9751
Email: detemple@ohiotownships.org
Counsel for Amici Curiae, Ohio Township Association and Coalition Large Ohio Urban Townships

FILED
MAY 31 2011
CLERK OF COURT
SUPREME COURT OF OHIO

Scott A. Liberman (0058432)
ALTICK & CORWIN CO. LPA
1700 One Dayton Center
One South Main Street
Dayton, OH 45402
(937) 223-1201
Fax: (937 223-5200
E-mail: liberman@altickcorwin
Co-Counsel for the Appellant,
City of Centerville

TABLE OF CONTENTS

THIS IS A CASE OF PUBLIC AND GREAT STATEWIDE CONCERN.....1

STATEMENT OF THE CASE AND FACTS.....4

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW.....5

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 law solely because the expedited type-2 100% owner supported annexation process is followed.

CONCLUSION.....6

CERTIFICATE OF SERVICE.....7

THIS IS A CASE OF PUBLIC AND GREAT STATEWIDE CONCERN

The City of Delaware is the county seat of the fastest growing county in the State of Ohio and, over the past twenty years, one of the twentieth fastest growing counties in the United States. Delaware is fortunate in that it is sought out by developers for a variety of projects. Most of this development has been accomplished by annexation of undeveloped territory into the City. Roads, water lines, sewer lines and other infrastructure and investment are needed to serve newly annexed property.

Many of these development projects require pre-annexation and development agreements setting forth infrastructure requirements and the manner in which infrastructure improvements will be constructed and financed. The City and developer consider the many options that are available for financing and constructing these public improvements and the contribution of public and private dollars. Tax Increment Financing, or "TIF", for municipalities under Ohio R.C. 5709.40, has been found to be an effective means to provide the financing for much needed improvements. TIF is only available to finance public improvements. It cannot be used to finance any private improvements for development. A TIF allows the area developed to pay for public improvements through a method of financing established by the General Assembly. TIF directs payments be collected instead of taxes ("payments in lieu of taxes" or PILOTs) on only the improved value of the developing property for a limited period and placed in a restricted TIF fund. That fund is used exclusively to benefit the TIF district and pay for public improvements. The City of Delaware has established TIF districts where, for a limited number of years, monies

generated from the increase in property values from development are being used to pay for the public improvements that made the development possible.

Delaware is similarly situated to the City of Centerville in that it has had hundreds of acres annexed into the City by utilizing the "expedited type-2" annexation process of Ohio R.C. 709.023. In addition, there are hundreds of other undeveloped acres located outside the limits of Delaware, in the way of growth, that will be annexed into the City if and when those properties desire to develop, presumably by the same annexation process.

The City of Delaware has accepted and will continue to accept land into the City, when, property owners file annexation petitions under the "expedited type-2" process, resulting in joint jurisdiction with the township in which the annexed territory is located. The annexation process followed is determined by the petitioning property owners, not the City. The Type-2 annexation process does not permit a city to conform its boundaries and exclude a township from annexed territory. The decision of the Court of Appeals in the instant case would restrict the use of TIFs by municipalities in territory annexed utilizing the Type-2 process, but no other. TIFs would continue to be available to territory annexed using other statutory procedures of Ohio R. C. 709.

A holding that the tax law is changed simply by the process used to annex property into a city is illogical at best. The result, if upheld, will create great uncertainty among the growing cities and villages in Ohio. TIFs, which have funded necessary improvements in the past, will no longer be able to be offered by cities and villages with any certainty. Projects relying on significant improvements will be lost, much as in the case of Centerville, solely because a Type-2 annexation procedure was used. Existing projects may also be at risk if some or all payments

in lieu of taxes that the city, developer and financial institutions and bond underwriters relied upon to finance improvements are suddenly unavailable and can no longer be collected. Certainty is critical for development and its financing through TIF or otherwise. With its decision, the Court of Appeals shattered that certainly and undermined existing and future TIFs whenever a property owner follows the Type-2 annexation process. In the City of Delaware, that has been every annexation since the new annexation law became effective in 2001.

The City of Delaware urges this Court to accept jurisdiction of this case and undo the damage done by the misguided decision of Second District Court of Appeals. The decision below threatens development and the jobs it brings, along with the improvement of property and construction of public infrastructure throughout the state. Ohio's economic recovery depends upon it.

STATEMENT OF THE CASE AND FACTS

The City of Delaware adopts and incorporates the Statement of the Case and Facts contained in the Appellant's, City of Centerville, Memorandum in Support of Jurisdiction.

ARGUMENT IN SUPP0RT 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 law solely because the expedited type-2 100% owner supported annexation process is followed.

Expedited Type-2 annexations, under the provisions of Ohio R.C. 709.023, have been used exclusively by property owners and developers in the City of Delaware and many other municipalities since annexation reform took place in 2001. The Type-2 process requiring 100% of the property owners to participate is simpler, more consistent, and more reliable in its outcome. It can be negotiated with a greater degree of certainty than any other annexation procedure set forth in Ohio R.C. Chapter 709. It is an 'expedited' process that allows property owners a more rapid response to capture development opportunities that may become available with short timelines.

Because Type-2 annexations do not permit a city to conform its boundaries and exclude the township from the territory to be annexed, a joint jurisdiction between the city and township

is created. These joint jurisdictions have existed throughout Ohio long before annexation reform in 2001. They are the product of every annexation, until boundaries are altered or conformed through a separate process following annexation. Since annexation reform, joint jurisdictions in cities like Delaware and Centerville also exist in many places across the state because Type-2 annexations have become the preferred process for bringing property into a city and boundaries are not then conformed. Property annexed by a Type-2 procedure, in many cases, receives unique services from the city to which it is annexed and has all the rights and privileges of every other property in the city following annexation.

It is the position of the City of Delaware that the municipal TIF statute, Ohio R.C. 5709.40 does not make township taxes untouchable. The statute makes no exception of the availability of municipal TIF exemptions for Type-2 annexations. All property and taxing authorities are and should be treated the same regardless of how the property was annexed into a city or village. Neither does the annexation statue Ohio R.C. 709.023(H), which recognizes a township's ability to impose real estate taxes in this joint jurisdiction area, remove township taxes from the operation of a TIF. The TIF statute makes other exceptions for specific tax levies, but none of the exceptions is for township real estate taxes.

CONCLUSION

The City of Delaware urges this Court to accept jurisdiction and issue a decision which will provide certainty to the Cities and Villages that are growing and would grow and develop if allowed to rely on the certainty of statutes regarding annexation and taxation. The status of annexed territory and its ability to raise funds for improvements should not be based on how that territory became a part of the city as held by the Court of Appeals. The court's decision is directly contrary to the well-established law in Ohio that once property becomes annexed to a municipality, it is treated like every other municipal property, with the same rights and privileges. For tax purposes, annexed property is treated as property within the municipality and subject to municipal taxing authority and municipal TIF exemptions. Any other result is a departure from existing Ohio law and will have a dramatic effect on growth and development in the State of Ohio.

Respectfully submitted,

Daniel B. Bennington (0007799) by CAC (0015730) per e-mail authorization
City Attorney
City of Delaware, Ohio
1 South Sandusky Street
Delaware, OH 43015
(740) 203-1014
Fax: (740) 203-1021
Email: dbennington@delawareohio.net
Counsel for Amicus Curiae,
City of Delaware, Ohio

Certificate of Service

The undersigned hereby certifies that at true and correct copy of the foregoing was served upon the following parties by electronic mail on this 31st day of May, 2011:

Scott D. Phillips, Esq.
Frost Brown Todd LLC
9277 Center Point Drive, Suite 300
West Chester, OH 45069
E-mail: sphillips@fbtlaw.com

Catherine A. Cunningham
Richard C. Brahm
BRAHM & CUNNINGHAM, LLC
145 East Rich Street
Columbus, OH 43215
E-mail: ccunningham@brahmcunningham.com

Matthew J. DeTemple, Esq.
Ohio Township Association
6500 Taylor Road
Blacklick, OH 43002
Email: detemple@ohiotownships.org

Scott A. Liberman
ALTICK & CORWIN CO. LPA
1700 One Dayton Center
One South Main Street
Dayton, OH 45402
E-mail: liberman@altickcorwin

Daniel B. Bennington

Daniel B. Bennington (0007799) by CAC (0015730) per e-mail authorization
Counsel for Amicus Curiae,
City of Delaware, Ohio