

IN THE SUPREME COURT OF OHIO

Sugarcreek Township	:	Supreme Court	11 - 0926
	:	Case No. _____	
Plaintiff-Appellee,	:		
	:	On Appeal from the	
v.	:	Greene County Court of Appeals	
	:	Second Appellate District	
City of Centerville	:		
	:	Court of Appeals	
Defendant-Appellant	:	Case No. 2010-CA-52	

**BRIEF OF AMICI CURIAE OHIO HOME BUILDERS ASSOCIATION AND
BUILDING INDUSTRY ASSOCIATION OF CENTRAL OHIO
IN SUPPORT OF JURISDICTION**

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STATEMENT OF INTEREST OF AMICUS CURIAE

A. Amici Curiae Ohio Home Builders Association and Building Industry Association Of Central Ohio.

Amicus Curiae Ohio Home Builders Association (“OHBA”) is a statewide association of home builders and developers. OHBA is an affiliate of the National Association of Home Builders and serves its membership by carefully monitoring and promoting state issues and legislation that impact the residential construction industry and its customers. OHBA is the voice of the building industry at the state level and publishes detailed legislative reviews to its members regarding changes in Ohio law that are relevant to the home building industry.

Amicus Curiae Building Industry Association of Central Ohio (“BIA”), founded in 1943, is an association of single-family and multi-family home builders, developers, remodelers, subcontractors, and related businesses in the nine-county central Ohio region. BIA is affiliated with OHBA and the National Association of Home Builders. BIA serves its members by representing their interests before local and state legislative and regulatory bodies and, where necessary, the courts, by promoting industry best practices, and by sponsoring home shows, educational opportunities, and other services.

Collectively, amici curiae OHBA/BIA represent over 9,000 members. These Ohio businesses foster significant economic growth and promote home ownership in this State by developing property, by establishing new neighborhoods and growing existing neighborhoods safely and efficiently, and by building quality homes for Ohio’s citizens. As described below, OHBA/BIA and their member companies, and the Ohio citizens who benefit from new homes and growing, well-served communities, all have a compelling interest in the outcome of this appeal and strongly urge this Court to grant discretionary review.

B. OHBA/BIA's Concerns About The Court Of Appeals' Decision.

In recent years, OHBA/BIA's members have been among the most adversely impacted by the broad economic recession, and unlike some other sectors of the economy, have not yet seen meaningful recovery or improvement. The absence of a strong, vibrant construction and development industry has had a significant negative impact throughout the State's economy, well beyond the trades people and small businesses who make up much of OHBA/BIA's membership. The primary factor that will lead to economic recovery is economic development and job growth. The competition for jobs is intense and includes communities all over the world. For economic recovery to happen, it will be critical that the full complement of tools is available to promote new development and investment for Ohio to compete globally.

1. The importance of TIFs to economic development in this State.

One important tool that has played a key role in the public/private partnerships between municipalities and the building and development industry is tax increment financing as authorized by the General Assembly under R.C. 5709.40. Tax increment financing arrangements, or "TIFs", help fund and ensure that necessary infrastructure is in place concurrently with, or ahead of, development projects and their attendant impacts. TIFs provide for the temporary, partial diversion of revenue that would otherwise be paid directly in taxes to fund portions of the infrastructure that is needed to support new development and investment. Through TIF arrangements, this crucial infrastructure funding occurs without raising taxes (another advantage in these economically challenging times). Only tax revenue attributable to the incremental value added by the new development or investment which the infrastructure supports is temporarily diverted—revenue attributable to the pre-existing value is not affected.

And at the conclusion of the TIF, all tax revenues based on both the pre-existing and new value are again paid directly in taxes.

The following brief hypothetical explains why TIFs are such an important tool for municipalities and the homebuilding industry:

Assume a developer has 20 acres on which new homes would be built, but the proposed new investment would not be feasible without [improvements] to existing roadway, water, sewer, or other utilities. * * * If the community was in need of additional new housing but did not have financial reserves in place to finance the needed infrastructure improvements, local officials would be faced with quite a dilemma.¹

With TIF financing, the municipality facing this dilemma has an appealing way to finance the needed infrastructure. The new development will increase the taxable value of the 20 acres. Through a TIF financing ordinance, however, the municipality can exempt all or part of that increase (that “increment”) from real property taxation for an extended period of time, and redirect those tax payments into a special fund established by the county auditor that is drawn down to service and retire the infrastructure debt incurred by the local government. Those redirected tax payments, known as “PILOTs” (payments-in-lieu-of-taxes), are then applied to service the infrastructure debt. This arrangement allows the municipality to finance needed improvements (and to incent commercial and residential development) without asking its residents to shoulder the burden of a tax increase.²

Prior to the recent onset of the recession, TIF arrangements pursuant to R.C. 5709.40 were effectively and successfully utilized in many Ohio communities. OHBA/BIA submit that the full availability of TIFs will be of critical importance to renewed construction and

¹ Gregory A. Davis, Ohio State University Extension Fact Sheet, Ohio’s Tax Increment Financing Program, *available at*: <http://ohioline.osu.edu/cd-fact/1559.html>.

² Id.

development activity contributing to the successful economic recovery of the State. As shown below, however, the court of appeals' decision guts this key development incentive.

2. *The court of appeals' decision unnecessarily limits and restricts TIFs.*

The court of appeals' decision in this case unnecessarily and inappropriately restricts the use of TIF arrangements, as authorized by the General Assembly, as to property added to a municipality through a Type 2 expedited annexation (the most common annexation method since the General Assembly provided for it in 2001). In short, the court of appeals' decision removes or renders TIFs useless in the development of a significant amount of Ohio land. And while no time is a good time for such a change, to judicially make it at a time when the construction and development industries – key sectors of the State's broader economy – are struggling to regain their legs would be disastrous on multiple levels.

Amici curiae OHBA/BIA believe that this Court should clarify and confirm the availability of TIF arrangements as vehicles to promote new development and investment in Ohio, including on properties that have been added to municipalities through Type 2 expedited annexation proceedings. Accordingly, OHBA/BIA respectfully urge this Court to accept jurisdiction over this appeal of great general interest and to reverse the court of appeals' decision.

STATEMENT OF THE CASE AND FACTS

OHBA/BIA hereby incorporate Appellant's Statement of the Case and Facts by reference.

ARGUMENT

PROPOSITION OF LAW I:

R.C. 709.023(H) DOES NOT PRECLUDE OR LIMIT A MUNICIPALITY FROM ADOPTING A TAX INCREMENT FINANCING ORDINANCE UNDER R.C. 5709.40 THAT TEMPORARILY DIVERTS SOME TAX PAYMENTS OTHERWISE AVAILABLE TO A TOWNSHIP TO FINANCE PUBLIC INFRASTRUCTURE TO SUPPORT NEW PRIVATE DEVELOPMENT AND INVESTMENT.

Contrary to the court of appeals' decisions in *Sugarcreek I* and *Sugarcreek II*, R.C. 709.023(H) does not preclude or limit a municipality from adopting a TIF ordinance that temporarily diverts some tax payments that a co-terminous township would otherwise receive in order to finance new private development and investment. Township taxes are not elevated above the general provisions of Ohio law that encourage infrastructure and property development through TIFs.

- A. R.C. 709.023(H)'S PROVISION THAT LAND ANNEXED IN A TYPE 2 EXPEDITED PROCEDURE REMAINS "SUBJECT TO" THE TOWNSHIP'S REAL PROPERTY TAXES IS NOT CONTRAVENED BY TEMPORARILY DIVERTING SOME TAX REVENUES THROUGH TAX INCREMENT FINANCING AUTHORIZED BY R.C. 5709.40 ET SEQ.**

Ohio property remains "subject to" property tax even when that tax is partially and temporarily abated through one of the numerous special property tax provisions of Ohio law. Ohio Revised Code Section 709.023(H), regarding expedited Type 2 annexations, 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 added.)

The last clause of R.C. 709.023(H), deemed the “savings clause” by the court of appeals, merely states the obvious – that property remaining within a township is “subject to” taxation by the township, whatever assessment that may be under Ohio law. R.C. 709.023(H) does not state that, after a Type 2 annexation, the township must receive all township taxes that otherwise would have been payable had any later adopted TIF or other authorized incentive not been put into place. Properly interpreted and applied, R.C. 709.023(H), simply provides that while property annexed to a municipality in a Type 2 annexation remains “subject to” township taxation in general, it is “subject to” taxation *as modified by* the whole host of special provisions otherwise applicable to property taxation in Ohio.³ But the court of appeals distorted the language to mean, instead, that taxes on property covered by a Type 2 annexation must remain *fully* payable to the local taxing authority(the township), despite any TIF, other exemption, or other special provision of Ohio law that would otherwise apply to the property. The statute simply does not provide that result, and the court of appeals’ decision amounts to judicial legislation rather than statutory interpretation.

The General Assembly did adopt a rule specifically requiring payments by a municipality to a township in situations where the property is removed from the boundaries of the township and a TIF is put into place covering industrial or commercial improvements. As noted by the court of appeals in *Sugarcreek I*, in such a case R.C. 709.19(C)(2) mandates that a municipality implementing a TIF must make payments to the township of all taxes that the township would have imposed if the TIF had not been put into place. Revised Code Section 709.19(C)(2) states, in relevant part:

³ Except as otherwise explicitly provided in the Revised Code, namely R.C. 5709.40(F), discussed below.

If there has been an exemption by the municipal corporation of commercial and industrial real * * * property taxes pursuant to section * * * 5709.41 [TIFs] * * * 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.) R.C. 709.023(H), in contrast, contains no such provision, and the court of appeals' addition of a broad restriction on the applicability of TIF arrangements in this case unnecessarily limits an important development measure provided by the General Assembly.

The phrase "subject to" in R.C. 709.023(H) does not mean that township taxes can be assessed without application of any otherwise available exemption. In the case of a TIF, the township's property taxes are reduced, but only temporarily, and only to a certain extent. The property remains fully taxed based on the value of the land at the time of the annexation, partially taxed based on the value of the improvements (assuming a 75% TIF), and, eventually, fully taxed after the TIF expires. For reasons that are not entirely clear, the court of appeals did not think that this level of taxation benefitting the township was sufficient, and thus the court legislated from the bench to increase it – contravening the intent of the General Assembly to enable municipalities to incent development on annexed property.

For public policy reasons, Ohio law provides myriad special provisions that reduce the property taxes that a property owner pays, either through reduced valuations or through reduced tax rates. Nevertheless, the property remains "subject to" taxation in those situations, albeit taxation based on reduced valuations or collected at reduced rates.

It would be impossible to argue, for example, that agricultural land authorized under the CAUV program⁴ is not "subject to" taxation by the township in which such land is located.

⁴ See R.C. 5713.30 *et seq.* for a description of the Ohio "current agricultural use valuation" program.

While the CAUV program reduces the amount of taxes collected by the township on the farmed land, the land owner still pays property taxes and is still “subject to” taxation by the township. Similarly, the homestead of an elderly citizen is “subject to” taxation even though the property taxes on the homestead are reduced under another special provision of Ohio law. Likewise, if Centerville grants a TIF under R.C. 5709.40 to property annexed into that city in a Type 2 annexation process, the property is still “subject to” taxation in the township because the property is still in the township. But because of the TIF, expressly authorized by Title 57 of the Revised Code, the “property tax” component of an owner’s tax bill is temporarily reduced while the remainder of the assessment is paid as a PILOT that is diverted to finance infrastructure improvements, as the General Assembly intended.

In sum, the property covered by Centerville’s proposed TIF would remain “subject to” taxation both in theory and in reality. Thus, Centerville’s proposed TIF does not run afoul of R.C. 709.023(H).

B. IF THE GENERAL ASSEMBLY HAD INTENDED R.C. 709.023(H) TO PRECLUDE OR LIMIT AN ANNEXING MUNICIPALITY’S AUTHORITY TO IMPLEMENT TAX INCREMENT FINANCING, IT WOULD HAVE SPECIFICALLY INCLUDED SUCH PROHIBITION OR LIMITATION IN THE LISTED EXCEPTIONS TO TAX INCREMENT FINANCING IN R.C. 5709.40(F). “DEEMED” INCLUSION OF TAX INCREMENT FINANCING ON THIS LIST IS CONTRARY TO STATUTORY LANGUAGE, IS INCONSISTENT WITH THE TREATMENT OF ITEMS ACTUALLY INCLUDED ON THE LIST, AND CONTRAVENES CANONS OF INTERPRETATION.

1. Township taxes are not included in the list of taxes collected despite TIFs.

An Ohio property owner’s overall property tax payment is sliced and diced in many ways, with money going to school districts, county government, park districts, welfare programs, municipalities, townships, and other governmental entities. Because TIFs clearly do reduce

property taxes that are collected, it was necessary for the General Assembly to consider whether TIFs divert all components of the property tax to infrastructure improvements, or only some components. The General Assembly determined that some, but not all, governmental functions paid for through “outside millage” tax levies cannot be undercut by TIFs. Ohio Revised Code Section 5709.40(F)(1)—(12) specifically lists the twelve local tax levies that may be imposed despite the presence of a TIF.

Exceptions are provided for:

- (1) Community mental retardation and developmental disabilities programs;
- (2) Senior citizen services and facilities;
- (3) County hospitals;
- (4) Alcohol, drug addiction, and mental health services and facilities;
- (5) Libraries;
- (6) Child protective services;
- (7) Zoos;
- (8) Township parks;
- (9) Joint recreation district parks;
- (10) “Park district” parks;
- (11) Certain welfare programs; and
- (12) General health districts.

Crucially, township taxes—one of the few large “outside millage” components of a property owner’s tax bill—are not included in among the twelve exceptions. That is, until the court of appeals below decided to judicially insert township taxes into this exhaustive list.

2. *The list of taxes not affected by TIFs is exhaustive.*

An ancient canon of statutory interpretation called *expressio unius est exclusio alterius* provides that the expression of one thing (or in this situation, twelve things) generally suggests the exclusion of others. In brushing this canon aside, the court of appeals stated that it “was not necessary to include an exception for expedited type-2 annexations” for township taxes because of the provision in R.C. 709.023(H) that land “remains subject to the township’s real property

taxes.”⁵ But the list in R.C. 5709.40(F) is exhaustive, not merely illustrative. The statute does not state that the list of tax levies preserved despite a TIF merely “includes” the items in the list. Rather, R.C. 5709.40(F) lists all of those “renewal and replacement [levies] that would have been payable to [the applicable] taxing authority * * * were it not for the [TIF] exemption * * * .” Therefore, this canon of interpretation, continuously and routinely applied by this Court, applies and is not undermined in this situation. See, e.g., *State ex rel. LetOhioVote.org et al. v. Brunner* (2009), 123 Ohio St.3d 322, 916 N.E.2d 462, 2009-Ohio-4900; *Craftsman Type, Inc. v. Lindley* (1983), 6 Ohio St.3d 82, 451 N.E.2d 768.

3. *The “savings clause” of R.C. 709.023(H) does not obviate the need to include a levy in R.C. 5709.40(F) if such levy is not affected by a TIF.*

The court of appeals suggests, in effect, that it was not necessary for the General Assembly to include township taxes in the exhaustive list of items in R.C. 5709.40(F) because another provisions of the Revised Code, R.C. 709.023(H), organically (and by itself) provides that a TIF cannot supersede any township taxes levied through “outside millage.” If that were the situation, however, then the list includes an item, R.C. 5709.40(F)(8) relating to *township* parks, that should also not be included in the list. Revised Code Section 511.27(A), by itself, provides that “[t]he levy [for township parks] shall be over and above all other taxes and limitations on such property authorized by law.” Yet the General Assembly explicitly did include township park levies in R.C. 5709.40(F) as not being undercut by TIFs, despite language in R.C. 511.27(A) arguably saying the same thing. This suggests that the General Assembly believed R.C. 5709.40(F) to be the exclusive and exhaustive list of those levies that are fully collected regardless of a TIF being in place.

⁵ As discussed above, OHBA/BIA do not dispute that the property remains subject to township taxation, albeit at a temporarily reduced rate because of the TIF.

Further, the General Assembly did contemplate townships and their various taxes, including township park taxes, when generating the list of levies in R.C. 5709.40(F). Therefore, contrary to the court of appeals' determination, the General Assembly did intend R.C. 5709.40(F) to provide a stand-alone, exhaustive list of taxes that are not undercut by TIFs. The General Assembly affirmatively decided not to include general township taxes on that list.

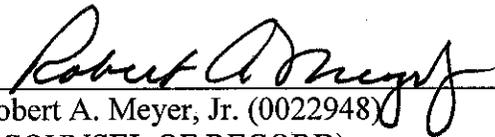
4. *The court of appeals should not be permitted to create new law.*

The court of appeals' decision to judicially insert an additional levy into the General Assembly's exhaustive list of levies not impacted by TIFs conflicts directly with this Court's consistent admonishment that judge-made exceptions to statutes are not appropriate. See, e.g., *Olympic Holding Co., L.L.C. v. ACE Ltd.*, 122 Ohio St.3d 89, 2009-Ohio-2057, paragraph 36 (rejecting a judge-made "promissory estoppel" exception to Ohio's Statute of Frauds); see, also, *State ex rel. Cincinnati Enquirer v. Jones-Kelley*, 118 Ohio St.3d 81, 2008-Ohio-1770, paragraph 3 of the syllabus (refusing to insert a "judicially created good sense" exception to the Public Records Act); *State ex rel. Stoll v. Logan County Bd. of Elections*, 117 Ohio St.3d 76, 2008-Ohio-333, ¶ 39 (holding that it would be inappropriate for the Court to add an exemption to a statutory referendum procedure); *United Tel. Credit Union, Inc. v. Roberts*, 115 Ohio St.3d 464, 2007-Ohio-5247, ¶¶ 7-9 (refusing to engraft a judge-made exception onto the procedures for challenging the appointment of a conservator over a credit union, saying "We will not read into a statute any further exceptions to the general rule not expressly provided for by the General Assembly.") These recent decisions refusing to recognize new judge-made exceptions to statutes should be noted as the Court considers whether to review the court of appeals' decision to insert a new exception into R.C. 5709.40(F) that will be devastating to municipal TIF incentives for new development.

CONCLUSION

For the reasons set forth above, amici curiae OHBA/BIA join Appellant, the City of Centerville, in respectfully urging this Honorable Court to accept jurisdiction over this appeal of great general interest and to reverse the decision of the Greene County Court of Appeals.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Amici Curiae Ohio Home Builders Association and Building Industry Association of Central Ohio In Support of Jurisdiction was sent by first class mail, postage prepaid, this 31st day of May, 2011 to the following:

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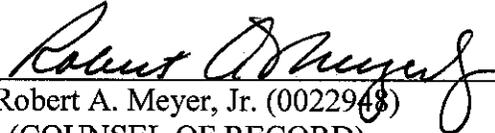
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