

ORIGINAL

IN THE SUPREME COURT OF OHIO

Sugarcreek Township, :  
 :  
 : Supreme Court Case No. 2011-0926  
 :  
 Plaintiff-Appellee, :  
 :  
 : On Appeal from the  
 v. :  
 : Greene County Court of Appeals  
 :  
 : Second Appellate District  
 City of Centerville, et al., :  
 :  
 : Court of Appeals  
 :  
 Defendants-Appellants. : Case No. 2010-CA-0052

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MEMORANDUM IN SUPPORT OF JURISDICTION OF AMICI,  
OHIO MUNICIPAL LEAGUE, CITIES OF TROY, KENT, NEW ALBANY,  
ZANESVILLE, WESTERVILLE, HILLIARD, MIAMISBURG AND DAYTON  
IN SUPPORT OF APPELLANT CITY OF CENTERVILLE

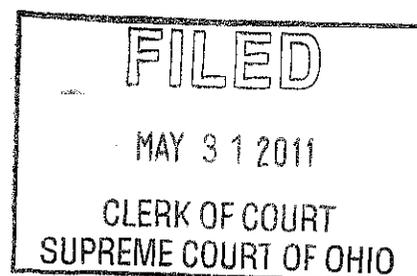
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*R.C. 709.023(H) enacted as part of annexation reform does not guarantee a township will be paid all township real property taxes forever, free from temporary exemption provided by Ohio’s tax increment financing laws solely because the “expedited type-2” 100% owner supported annexation process is followed.*

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## **PRELIMINARY STATEMENT**

The Ohio Municipal League was founded in 1952 by City and Village officials as a statewide association to serve the interests of Ohio municipal government and it has a membership of more than 725 Ohio cities and villages. On behalf of its members, the Ohio Municipal League is concerned that the Court of Appeals has radically changed tax increment financing (“TIF”) resulting in disparate treatment based solely on the method of annexation.

Due to their concern over the uncertainty created by the Court of Appeals opinion and its adverse impact on local development, eight (8) individual municipalities are joining in this brief and urging this court to take this case. They are Troy, Kent, New Albany, Zanesville, Westerville, Hilliard, Miamisburg and Canton.

With all due respect to the Second District Court of Appeals, this case is a clear example of “judicial activism”. No TIF ordinance has been enacted by the City of Centerville. As a matter of fact, the proposed developer has abandoned the project. Sugarcreek Township nonetheless filed a declaratory judgment action based upon statements in a pre-annexation agreement between the City and the developer regarding the *abandoned* project. There is no case or controversy. Yet the trial court and the Second District saw this case as an opportunity to create a judicial exception to existing and future TIF districts, which oddly only applies where the property has been annexed recently under the type-2 annexation procedure.

### **THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST**

To keep competitive with surrounding states, the Ohio General Assembly established certain incentives that municipalities, townships and counties could provide

to owners and developers. One allows for the building of public improvements that make development possible – tax increment financing. Under R.C. 5709.40, a municipality may declare certain private improvements to be a public purpose and allow owners to pay “service payments” into a particular fund in lieu of property taxes on those specific improvements. In other words, the added value of the “improvements” is exempt from real property taxes. The “service payments” paid into the TIF fund must be used to fund public improvements “directly benefitting” the TIF district. The postponement of the taxes is only for a limited time and applies only to improvements that are benefitted by the TIF district. 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 remain the same; only the taxes on the increased value of the property as improved are postponed and redirected to enhance development.

The case below radically changed tax increment financing law – based solely upon an obscure clause in, of all places, the statute concerning type-2 expedited annexations. If the Court of Appeals decision is allowed to stand, a city will not be able to pass tax increment financing (TIFs) affecting township taxes on property that is in the city and that also remains in the township, based solely on the method of annexation. Under such a rule, if a city accepts an annexation under the type-2 expedited annexation procedure – one that is desired by all of the owners of property being annexed and where the property cannot be removed from the township -- the township’s real property taxes on the improvements on that parcel cannot be temporarily postponed. For all other parcels 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, both of which are also in the township, have different tax rights and privileges as well as tax consequences, based solely on the method of annexation. According to the court below, if all of the people want to be annexed, the city cannot defer any of the township's taxes to make the public improvements which ultimately provide a greater tax base for all. 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 R.C. 5709.40 expressly permits municipal TIF exemptions upon "parcels of real property located in a municipal corporation" without limitation. This inconsistent result adds uncertainty and confusion to TIF financing including existing TIF notes and bonds -- which as tools to foster economic development require stability.

As alluded to above, the trial court and the court of appeals found that an obscure clause in R.C. 709.023(H) enacted as part of the 2001 annexation reform legislation guarantees the township's real property taxes forever in a 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 of Appeals 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. (Emphasis added)

The main thrust of this subsection is clearly to prohibit annexing municipalities from removing annexed territory from the township, contrary to Section 503.07 of the Revised Code. The courts below read much more into the statute than simply maintaining the status of the township as a legal entity within the municipality one that

still receives real property taxes within *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. This Court has never dealt with this issue.

As annexation and taxes are strictly statutory and can be highly technical, this case is crucial for the predictability and certainty that is necessary for economic development in Ohio, as well as to ensure the integrity of bonds issued on the basis that township taxes can be deferred to improve the public improvements. Many cities have issued long-term debt in areas annexed since 2001 pursuant to type-2 expedited annexation, and it is critical that the law remain stable and predictable to protect those bonds. Allowing the tax law in Ohio to be determined and changed by a lone court of appeals rather than the General Assembly or this Court raises significant policy and separation of power issues. The Amici urge this Court to accept jurisdiction of this case in order to provide stability and to continue development opportunities in Ohio. In the alternative, given that this is a declaratory judgment action with regard to an abandoned project where the City has not actually adopted a TIF ordinance, the Amici respectfully request that the Court accept jurisdiction for the purpose of vacating the lower court decisions and finding that this case is moot.

#### **STATEMENT OF THE CASE AND FACTS**

There is no need to repeat the thorough exposition of the history of this case in Centerville memorandum in support of jurisdiction which is adopted and incorporated the same as if fully rewritten herein. It is clear that the facts are undisputed and that this case

presents solely questions of law involving statutory interpretation for consideration by this court.

### **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.**

If one follows the logic of the lower courts, township taxes in certain annexation areas are immune from all tax exemptions, including the current agricultural use valuation exemption. The General Assembly obviously has not protected township taxes from municipal TIF and all other tax exemptions, 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 it was annexed.

Senate Bill 5 did not amend R.C. 5709.40 to protect township taxes from municipal TIFs. R.C. 5709.40 has been amended several times since the adoption of Senate Bill 5 to prospectively protect select tax levies (notably, not *all* villages of a certain jurisdiction) from the application of municipal TIFs. *See* R.C. 5709.40(E)(2) and (F)(1)-(12). None of those amendments protect township tax levies, or the taxes from properties annexed utilizing the expedited type-2 process from a municipal TIF. None of these changes demonstrate a legislative intent to essentially create special rules for townships when the type-2 process is used. Certainly, none of these amendments evidence an intent to retroactively affect existing TIFs and bonds.

Municipal TIFs have been established throughout the state in dual

municipal/township areas. In joint township/municipal jurisdictions where municipal TIF plans have been established, the taxes of all taxing authorities, including townships have been uniformly exempted from incremental increases in property value. The decision of the court of appeals changes all this by creating different and unique TIF rules with different 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.

Under the rules of statutory interpretation, 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 court of appeals erroneously held that the plain language of R.C. 709.023(H) “and, thus, remains subject to township taxes” prevents a municipal TIF from exempting township taxes.

R.C. 709.023(H) does not refer to municipal TIF or any other exemption. It is the affirmation 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,” which are strictly statutory. When interpreting a statute, a court must give meaning to every word in the statute. The court of appeals ignored the words “and, thus” and the connection of the taxes to the first phrase of the statute prohibiting its exclusion from the township. R.C. 709.023(H) does not guarantee township taxes without change or exemption. 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.”

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 annexations. *See*, 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). And, strictly speaking, the legislature did *not* exclude township taxes from the operation of the municipal TIF – it provided a system of compensation payments from the municipality’s general fund.

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. *See*, 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.

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. *See*, R.C. 5709.40(B) and (C)(1). The municipal TIF statute expressly identifies the tax levies which prospectively will not be affected by the imposition of a TIF. *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. Municipalities cannot select which tax levies to redirect to a TIF: Centerville cannot create a TIF plan that excludes Sugarcreek Township as the court of appeals erroneously presumes. When taxes are “protected” from a TIF, those taxes are actually exempted and there is express statutory authorization for the “service payments” to be shared with the taxing authority by the county treasurer upon collection (or by the municipality from the tax increment equivalency fund.) *See*, R.C. 5709.42(C) and 5709.43(C). There is no statutory authority for the payment of township taxes in this system.

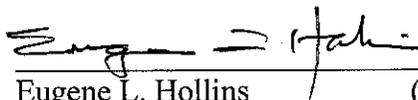
If allowed to stand, a significant consequence of the decision of the court of appeals is that expedited type-2 parcels will not have all the same rights, privileges or tax consequences of other identically situated properties in the same municipality which were annexed utilizing a different process. 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 method of annexation. Only expedited type-2 parcels would not receive all TIF incentives. This is contrary to R.C. 709.10 and 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 and should not be treated differently.

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 financial risk and at a competitive disadvantage.

**CONCLUSION**

Uncertainty stifles economic development. This Court needs to undo the uncertainty and confusion wrought by the Court of Appeals opinion. Ohio municipalities, townships and business have been cast adrift on a sea of uncertainty and confusion. Only this court can restore order to this area of the law and thus foster much needed economic development. Consequently, Amici which include an association and individual municipalities urge this court to accept this appeal.

Respectfully submitted,



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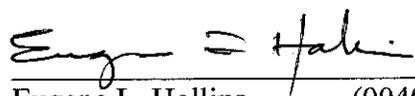
**CERTIFICATE OF SERVICE**

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 31<sup>st</sup> day of May, 2011:

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