

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 No. 2010-CA-0052
:
:
:

MEMORANDUM IN OPPOSITION TO JURISDICTION OF
APPELLEE SUGARCREEK TOWNSHIP

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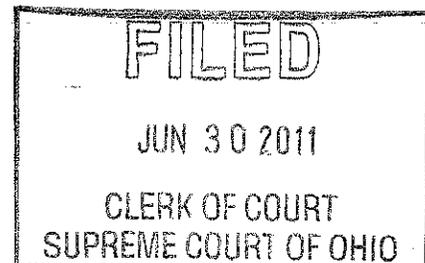
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EXPLANATION OF WHY THIS CASE DOES NOT INVOLVE A QUESTION
OF PUBLIC OR GREAT GENERAL INTEREST

This case involves an attempt by a single city to abuse the “expedited Type II” annexation procedure in the Revised Code. An expedited Type II annexation allows a municipal corporation quickly to annex territory within a township without the township’s consent and without any discretion by the board of county commissioners to deny the annexation. The tradeoff is that the township retains its real property tax revenues from the annexed territory. Appellant City of Centerville wants to have its cake and eat it too – it wants to exploit the benefits of the expedited Type II annexation procedure while grabbing all the real property tax revenues from Appellee Sugarcreek Township.

While the annexation statutes themselves are of public or great general interest, the application of those statutes to this particular set of facts is not. The relevant statute, R.C. 709.023(H), is clear that the annexed territory “remains subject to the township’s real property taxes.” Both the court of common pleas and the court of appeals had little difficulty finding that this language means what it says, and that Centerville could not divert real property tax revenues from Sugarcreek. There is nothing difficult or unusual about the application of this straightforward language to the facts of this case that would warrant this Court’s review of the decision of the court of appeals.

Centerville accurately characterizes this as a case of first impression, but it may also be a case of last impression. The narrow issue presented is whether a municipal corporation can implement a tax increment financing plan to divert real property taxes from territory annexed under an expedited Type II annexation. That this issue has never arisen before suggests that it is unlikely to recur. Furthermore, it is unlikely to recur because, as explained below, Centerville’s position is so inconsistent with the plain language of the statute that it is hard to believe that this

Court's guidance is needed for future disputes. Indeed, Centerville's jurisdictional memorandum is bereft of any examples of other municipal corporations that have tried to do what Centerville attempted here.

In an effort to conjure up broader implications from its attempted land-and- revenue grab, Centerville offers a silly parade of horrors. Economic development will stall! Ohio's economy recovery will falter! Tax increment financing bonds may not be repaid! This Court's review is needed to reverse "the damage the decision below has done to TIF bonds and Ohio's economic recovery." Memorandum in Support of Jurisdiction of Appellant, City of Centerville, Ohio at 4.

This is just fanciful hyperbole. Centerville cannot cite a single real-world example of any of these supposed concerns. No wonder – annexation is not a prerequisite for economic development, let alone a particular method of annexation. The expedited Type II annexation procedure did not even exist until 2002, which belies Centerville's apparent belief that the procedure is somehow central to pulling Ohio out of recession. The only consequence of the decision below is that municipal corporations will not be able to exploit an expedited annexation procedure to deprive townships of real property tax revenue without the township's consent. And the plain language of the statute indicates that the General Assembly intended to protect townships' real property tax revenues in the expedited Type II annexation process.

The Court should therefore decline to exercise jurisdiction in this case for at least these reasons:

- the narrow issue presented here has not arisen before and may not arise again;
- there are no conflicting decisions on this issue among the lower courts;
- the court of appeals correctly interpreted and applied statutory language that is clear and unambiguous;

- Centerville has no reasonable, alternative interpretation of this statutory language; and
- the interpretation of R.C. 709.023 by the court of appeals is consistent in all respects with the structure of the annexation statutes and the General Assembly's intent as expressed in the statutory language.

While this case is of keen interest to the parties, it is not of public or general importance. This Court should decline to use its limited resources to decide narrow issues of rare application – especially when the appellant has not even offered an alternative explanation of the key statutory language.

ARGUMENT REGARDING THE APPELLANT'S PROPOSITION OF LAW

Appellant City of Centerville's Proposition of Law: "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 General Assembly enacted comprehensive reform of the annexation laws in 2002. Prior to then, Ohio law provided for a single form of annexation requiring a petition signed by a majority of affected property owners. The traditional annexation process vested discretion in the board of county commissioners to approve or deny the annexation, and certain interested parties – such as the township from which the land would be removed – had the opportunity to object. See generally R.C. 709.02 – 709.11.

The 2002 reform changed certain aspects of the traditional process and also created three new, expedited forms of annexation. See generally *State ex rel. Butler Township Bd. of Trustee v. Montgomery Cty. Bd. of Cty. Comm'rs*, 124 Ohio St.3d 390, 2010-Ohio-169, 922 N.E.2d 945; *State ex rel. Butler Township Bd. of Trustee v. Montgomery Cty. Bd. of Cty. Comm'rs*, 112 Ohio St.3d 262, 2006-Ohio-6411, 858 N.E.2d 1193. Each of the three expedited annexation

procedures involves trade-offs for all interested parties; each party gains some benefit for each of the new forms, but also gives up something in exchange for that benefit. The end result is that municipal corporations that seek to annex land from a township have four distinct options to accomplish that result, each option with its own advantages and disadvantages.

An expedited Type I annexation requires the consent of all parties – the municipal corporation, the township, and all affected property owners – as well as either an annexation agreement among the parties or a “cooperative economic development agreement.” R.C. 709.022. If these requirements are met, the board of county commissioners *must* approve the annexation, and there is no right of appeal from the commissioners’ decision. *Id.* The municipal corporation obtains the benefit of expedited, automatic approval without the possibility of appeals. But in return, it must obtain consent from all interested parties, and it must obtain the township’s agreement on tax and other economic issues.

An expedited Type II annexation – the form at issue here – requires a petition from all affected property owners and also requires the board of county commissioners to approve the annexation so long as certain procedural requirements are met. R.C. 709.023. The commissioners have no discretion, and the township has no ability to object on substantive grounds. *Id.* Because the township has no voice in the process, an expedited Type II annexation does not remove the land from the township’s jurisdiction; instead, the territory “shall not at any time be excluded from the township” R.C. 709.023(H). The land becomes part of both the township and the municipal corporation and – “remains subject to the township’s real property taxes.” *Id.* Under an expedited Type II annexation, then, a municipal corporation obtains expedited, virtually automatic approval; it does *not* have to obtain the consent of the township or entered into an agreement on economic terms with the township; it can obtain additional revenue

from the annexation territory through earnings, sales, and hotel taxes and the like; but it cannot divert the township's real property taxes.

This design makes perfect sense. When an annexation can proceed without the affected township's consent, the municipal corporation should not be able unilaterally to remove the territory from the township. And when the annexed territory remains part of the township, the township may have financial or other obligations to the territory even after the annexation. Here, for example, Sugarcreek retains responsibility in the annexed territory for fire protection, because Centerville has no fire department. The General Assembly therefore wisely provided townships with the financial resources to perform these continuing obligations by requiring that the township retains its real property tax revenues after an expedited Type II annexation.

An expedited Type III annexation is similar to an expedited Type II annexation in that the land is not excluded from the township and remains subject to the township's real property taxes. R.C. 709.024. The municipal corporation must obtain a certification from the state's Director of Development that the annexation is for the purpose of a "significant economic development," which requires that the project meet specified investment and payroll criteria. *Id.* If this requirement is met, the board of county commissioners must approve the annexation, and the township has no ability to object on substantive grounds. *Id.*

One of the goals of the General Assembly's annexation reform was "to promote cooperation among local governments." *State ex rel. Butler Township Bd. of Trustee v. Montgomery Cty. Bd. of Cty. Comm'rs*, 112 Ohio St.3d 262, 2006-Ohio-6411, ¶ 8, 858 N.E.2d 1193. The annexation statutes accomplish that goal by offering an expedited form of annexation – Type I – that provides for automatic approval by the board of county commissioners and no right of appeal when the municipal corporation and the township reach agreement on the

economic issues and resolve their respective concerns about the fiscal impacts of the annexation. When the municipal corporation and township are not able to agree on these issues, the General Assembly offered two other, still expedited, annexation methods – Types II and III – in which the fiscal impact to the township will be minimized through retention of real property tax revenues. The statutory scheme therefore encourages both municipal corporations and townships to work cooperatively with each other and to try to agree on economic issues to create a win-win situation. When that does not happen, the statutes split the baby, so to speak, by allowing the annexation to occur without diversion of real property tax revenues.

As is obvious from this description of the various annexation forms, the General Assembly offered municipal corporations several options from which they are free to choose. Each option has advantages and disadvantages for all affected parties. And each option provides townships with protections and rights customized to the losses and risks to townships. The smaller the role the township is given in a particular annexation process, the more protections the General Assembly built in for the township.

The City of Centerville wants to undo this carefully constructed system of checks and balances. It *voluntarily* employed an expedited Type II annexation, in which the Greene County Board of Commissioners had no discretion to deny the annexation, and in which Sugarcreek Township had no ability to object to the annexation on substantive grounds. Because Centerville chose an expedited Type II annexation, it did not have to obtain the consent of the township. And Centerville did not have to enter any sort of agreement with the township on economic issues. The tradeoff, of course, is that the annexed land “remains subject to the *township’s* real property taxes.”

Centerville wants all the benefits of the expedited Type II annexation process with none of the drawbacks. It wants to divert real property taxes from the annexed territory, even though the relevant statute could not be any clearer in forbidding that result. Centerville entered a pre-annexation agreement that required the municipal corporation to implement a tax increment financing plan in which *all* of the real property taxes on the annexed territory would be diverted for 30 years to pay for improvements elected by Centerville. Under Centerville's scheme and theory of the case, Sugarcreek would not receive *any* real property taxes from the annexed territory for 30 years. Far from the *cooperation* between local governments envisioned by the General Assembly, Centerville has adopted a theory of *exploitation* of townships by municipal corporations.

That theory cannot possibly be reconciled with the clear command in R.C. 709.023 that the annexed territory "remains subject to the township's real property taxes." Indeed, the court of appeals accurately characterized this as an "absurd result." *Sugarcreek Township v. City of Centerville*, Greene Cty. App. No. 2010-CA-52, 2011-Ohio-1830, ¶ 26. Centerville has never explained – and could never explain – how its taxing plan, which would eliminate all real property tax revenues for Sugarcreek for 30 years is consistent with the property "remain[ing] subject to" Sugarcreek's real property taxes. Simply put, Centerville's theory and the plain language of the statute cannot coexist.

To distract from this problem, Centerville offers a diversionary tactic – a convoluted argument about the tax increment financing statutes – and a misstatement of the holding of the court of appeals. *First*, Centerville argues that the court of appeals has effectively prohibited municipal corporations from enacting tax increment financing plans in connection with expedited Type II annexations. That is *not* what the court of appeals held. Instead, the court of

appeals held that a municipal corporation could not, after an expedited Type II annexation, use a tax increment financing plan to diminish the revenue received by the township on real property taxes imposed by the township. *Sugarcreek Township v. City of Centerville*, Greene Cty. App. No. 2010-CA-52, 2011-Ohio-1830, ¶ 28. The court of appeals holding leaves a municipal corporation free to impose real property taxes – or to exempt real property taxes under a tax increment financing plan – in the annexed territory, *so long as* it does not diminish the revenues from taxes imposed by the township. Centerville is trying to grab *all* of the real property tax revenue from the annexed territory. And that it may not do.¹

Second, Centerville fixates on the tax increment financing statutes, specifically R.C. 5709.40, in an effort to argue that R.C. 709.023(H) does not mean what it clearly says. According to Centerville, the General Assembly “protected” certain real property tax streams from tax increment financing, and township taxes are not among them. *See* R.C. 5709.40(F)(1)-(12). But these “protected” tax streams have nothing to do with the interaction of municipal and township taxation after an annexation. To the contrary, the listing of “protected” tax streams in R.C. 5709.40(F) is all about ensuring that tax revenues from levies voted for specific purposes are put toward those purposes. In all events, the General Assembly “protected” townships’ real

¹ Centerville also misstates the decision below by contending that the court of appeals “repudiated” its decision in the first appeal in this case. That is simply wrong. In the first appeal, the court of appeals held that both Sugarcreek and Centerville were entitled to half of the real property tax “inside millage” pursuant to R.C. 5705.31, the “splitting statute” that determines apportionment of inside millage when a territory is located within more than one taxing authority’s jurisdiction. *Sugarcreek Township v. City of Centerville*, 184 Ohio App.3d , 2009-Ohio-4794, ¶¶ 171-72, 921 N.E.2d 655. Inside millage is the real property tax up to the 10 mill-limit (\$0.01 per \$1 of valuation) imposed by the Ohio Constitution. *Id.* at ¶ 20. In the second appeal, the court of appeals held that Centerville could not use a tax increment financing plan to diminish the tax revenues received by Sugarcreek from “outside millage.” *Sugarcreek Township v. City of Centerville*, Greene Cty. App. No. 2010-CA-52, 2011-Ohio-1830, ¶ 28. Outside millage is the excess of real property taxation over the constitutional limit that is approved by the voters in the jurisdiction. *Id.* at ¶ 9.

property tax revenues in the clearest possible terms in R.C. 709.023(H); there was no need to say more in another statute that is unrelated to the annexation process. Centerville's theory apparently is that the clear language in the statute that is directly on point was somehow overruled by negative implication from a statute addressing a different topic. That theory makes no sense.

Third, Centerville argues that the court of appeals decision will impede economic development in Ohio. This argument does not pass the red-faced test. Economic development in Ohio is hardly limited to territories annexed by municipal corporations using the expedited Type II method. Economic development can and does occur in rural areas, townships, and the non-annexed portions of municipal corporations. Economic development can and does occur in municipally-annexed territories under other annexation methods. And economic development can and does occur in territories annexed by municipal corporations using the expedited Type II method – just not at the expense of township real property tax revenues. Centerville has no evidence, or even a single plausible argument, that this court of appeals decision will have *any* impact on economic development in the State of Ohio. After all, it was Centerville that freely chose this particular method of annexation instead of the other available options. And presumably it did so because it believed that the expedited Type II method would be beneficial for its economic development.

In all events, it is not the role of this Court (or the lower courts) to rewrite statutes in the name of alleged economic development. If enforcement of the plain language of the statute impedes economic development, Centerville's remedy is in the General Assembly, not the courts. (Of course, a much simpler "remedy" was always available to Centerville – it could have

chosen one of the annexation methods that would have allowed it to divert all of the real property taxes from the annexed territory.)

Fourth, Centerville argues that the decision of the court of appeals puts at risk bonds issued under tax increment financing plans in municipally-annexed territories. This is another argument in search of some evidence. Centerville cannot cite to a single example in which this has been or will be a concern. Indeed, for this concern to be real, the Court would have to presume that a municipal corporation would issue tax increment financing bonds that must be paid off with revenues that the municipal corporation *cannot* obtain under the plain language of R.C. 709.023(H). Put another way, the Court would have to presume that other municipal corporations assumed the same “absurd result” for which Centerville argues. *See Sugarcreek Township v. City of Centerville*, Greene Cty. App. No. 2010-CA-52, 2011-Ohio-1830, ¶ 26.

For all of its huffing and puffing, Centerville has never explained how its position, which would allow it to divert the township’s real property taxes, can be squared with the statute, which forbids that diversion of the township’s real property taxes. There is no good explanation. R.C. 709.023(H) is clear and understandable. When the township has no voice in an annexation, and the board of commissioners has no discretion to deny the annexation, the township gets to retain its real property tax revenues. That is a reasonable and fair tradeoff, given that the township can and usually does have obligations to the annexed territory *after* the annexation. And it is the tradeoff the General Assembly mandated. If Centerville wanted the annexed territory *and* all of its real property tax revenue, it was free to pursue another method of annexation. If did not do so, and now it must take the bitter with the sweet.

CONCLUSION

The court of appeals correctly decided the issue before it. That issue is *not* one of public or great general importance – instead, it is an apparently isolated instance of a brazen land-and-tax revenue grab by an overreaching city. This Court should decline jurisdiction over this appeal.

Respectfully submitted,

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