

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

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BRIEF OF APPELLANT, CITY OF CENTERVILLE, OHIO

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## STATEMENT OF FACTS

### Summary

The facts are undisputed and come before this Court following motions for summary judgment in the trial court. This case originates from an action for declaratory judgment arising from two separate petitions to annex a total of 270± acres from Sugarcreek Township to the city of Centerville that is located along Wilmington Pike on both sides of I-675 in Greene County, Ohio. (TDS<sup>1</sup> 1, 14, 36, 89). Each annexation was supported by 100% of the property owners and was accomplished utilizing the “Expedited Type-2” annexation process.<sup>2</sup> R.C. 709.023. Both annexation territories were accepted into and became part of the jurisdiction of the city of

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<sup>1</sup> This case comes before the court following motions for summary judgment. The record in this case is solely comprised of documents, pleadings and other papers filed with the courts below as indexed by the court of appeals in the two Docket Sheets filed with this Court on October 21, 2011. References to the documents in the record shall be by the Docket Sheet index number. Documents indexed in the Docket Sheet of the Court of Appeals in Case No. 2010 CA 0052 dated 10/12/2011 shall be referred to as “ADS” (Appeals Docket Sheet) followed by the document number assigned by the court, e.g. ‘ADS 1’ refers to the 8/3/10 Notice of Appeal. Documents indexed in the Docket Sheet of the Trial Court in Case No. 2006 CV 0784 dated 8/3/2010 shall be referred to as “TDS” (Trial Docket Sheet) followed by the document number assigned by the court, e.g. ‘TDS 1’ refers to the initial Complaint.

<sup>2</sup> The ‘Expedited Type-2’ annexation process was established by the General Assembly in 2001 as part of its comprehensive annexation reform enacted in Am. Sub. S.B. No. 5, 149 Ohio Laws, Part I, 621 (effective 2001), also known as “Senate Bill 5” or the “Annexation Bill.” The expedited type-2 process is codified as R.C. 709.023 and is the second of three special ‘expedited’ annexation processes created by the General Assembly in Senate Bill 5. (R.C. 709.022, 709.023 and 709.024). Each expedited process requires that 100% of the property owners support the annexation and the objective statutory criteria of the annexation method chosen be met. Before 2001, there was only a single method of annexation that required a petition supported by a majority of the owners of the territory sought to be annexed. That majority process remains (as modified by Senate Bill 5) as the ‘fourth’ method of annexation, (and has become the least common method of annexation in Ohio). *See R.C. 709.03 et seq.*

Centerville. (TDS 88, 89, 251 ¶4). R.C. 709.04. The annexed territories also remain in Sugarcreek Township.<sup>3</sup> R.C. 709.023(H).

A multi-million dollar development of mixed commercial, office, medical, and single and multi-family residential uses was planned for 270± acres upon annexation. (TDS 87 Exhibit A, 147). The development would bring significant jobs and tax dollars into the region but required substantial public improvements to support the proposed growth. Tax increment financing (“TIF”) was one of the mechanisms to be used for financing the public improvements necessary to support the development. (TDS 87 Exhibit A, 147). Sugarcreek Township opposed Centerville’s authority to utilize tax increment financing for needed public improvements following annexation.

After the two annexations were granted by the Greene County Commissioners in 2006, Sugarcreek Township filed this action against the city of Centerville seeking to prohibit Centerville from: (1) receiving any real property taxes from the annexed territory; (2) establishing tax increment financing (TIF) in the annexed territory; or (3) if TIF financing could be used by Centerville, preventing the municipal TIF from applying to any portion of the township’s taxes on the increased value of the land to pay for public improvements.<sup>4</sup> (TDS 1, 14, 36, 87, 147). The Township claimed that R.C. 709.023(H), a provision in the expedited

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<sup>3</sup> When property is annexed utilizing the Expedited Type-2 process, unless the township consents, the property is required by statute to remain in the township. R.C. 709.023(H).

<sup>4</sup> Sugarcreek Township amended its complaint two times to include additional claims in an attempt to invalidate the annexations. Ultimately, all those claims were resolved and on remand the parties stipulated “The annexations of the 173.181 acres and of the 94.987 acres in Sugarcreek Township to the City of Centerville, were properly petitioned, granted, accepted and have been completed in accordance with the requirements of applicable law.” (Court of Appeals Opinion, p. 8-9, Appx. 69-70; TDS 235, p. 10, ¶B(1) (Appx. 121); Magistrate’s Decision, Feb. 17, 2009, p. 72 (Appx. 195)). There are no issues relating to the validity of the annexations before this Court on remand.” (TDS 251, ¶7).

type-2 annexation statute, guarantees the township all of its taxes unabated forever from all property annexed to a municipality utilizing the expedited type-2 process. R.C. 709.023(H) provides (emphasis added):

(H) 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.**

The General Assembly granted municipalities authority to TIF under R.C. 5709.40 *et seq.* without any excluding township taxes from TIF application. The operation and tax consequences of a local government TIF are determined by the TIF statutes (R.C. 5709.40 *et seq.*) which are to uniformly apply to all parcels and taxing authorities throughout the state. There is no exception for parcels that became part of a municipal jurisdiction through a select type-2 annexation process.

The sole issue before this Court is the interpretation of R.C. 709.023(H) and R.C. 5709.40 and whether the phrase “and, thus, remains subject to real the township’s real property taxes” means that property annexed following the expedited type-2 process is forever barred from having TIF tax incentives provided for in R.C. 5709.40 by postponing township tax revenues on the land improvements made possible by the public improvements they fund. Even when TIF funding is in place, the township continues to receive the same tax revenues it previously received prior to the improvements contemplated by the TIF without reduction from the TIF.

This case has been before the Second District Court of Appeals two times. After two convoluted and conflicted opinions, the court of appeals ultimately determined that any “TIF

Plan” that may be enacted by Appellant, Centerville does not apply to any Sugarcreek Township real property taxes on parcels that were annexed with the expedited type-2 process. This Court accepted discretionary jurisdiction to clarify the application of tax exemption statutes and give direction on the use of tax increment financing by municipalities to fund public infrastructure and entice and stimulate development throughout the state. These issues are critical to the rights of property owners, the ability of municipalities to build the public infrastructure necessary to attract and support growth and the economic well being and development throughout the state.

### **Material Facts**

On April 3, 2006, Centerville entered into three pre-annexation agreements with private property owners and a developer for the annexation and development of 220± acres on both sides of I-675 at the Wilmington Pike interchange in Greene County adjacent to the city of Centerville. (TDS 251, ¶1, 89, Exhibit 4). Two separate annexation petitions were filed with the Greene County Commissioners in 2006 to annex 173.181 acres and 94.987 acres in Sugarcreek Township to the city of Centerville. Each was supported by 100% of the property owners and each followed an expedited type-2 annexation process. (TDS 251, ¶7). The annexations were properly petitioned, granted, accepted and completed. (TDS 251, ¶7). The annexed territory is now located in the jurisdictions of *both* the city of Centerville and Sugarcreek Township.

All of the territory in the city of Centerville is within the concurrent jurisdiction of one of the several townships that exist within the city (irrespective of the method by which it was annexed).<sup>5</sup> The 220± acres in Centerville and Sugarcreek Township were to be developed with public improvements that were expected to be funded in part through a municipal TIF. The

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<sup>5</sup> The city of Centerville has not conformed any its boundaries following annexations to the city that were accomplished before or after Senate Bill 5. *See* R.C. 503.07 and 709.023(H).

prolonged litigation in this action to prevent Centerville providing for a multi-million dollar development has thwarted the adoption of a TIF, the construction of public improvements and development of the property, the very consequence the expedited annexation statutes and TIF tax exemption statutes sought to avoid.

### **Relevant Course of Proceedings**

The protracted proceedings below involved a complaint that was amended two times to add more claims and parties, multiple motions for summary judgment (originally, and as new claims arose), and various contested issues on jurisdiction, standing, ripeness, open meetings law, a Sugarcreek Township TIF and the merits of the two annexations. Many of these issues were resolved and/or are no longer challenged and will not be addressed by Appellant. The only issue before this Court on discretionary appeal is the effect a property owners' choice to use the expedited type-2 annexation process has upon future tax increment financing (or other tax incentives) available to the property for its development in the municipality following annexation. In the interest of judicial economy and for simplicity, Appellant will limit these facts to the course of proceedings relating to those issues.

This case was before the trial court and court of appeals on the merits on two occasions. In *Sugarcreek I*, the trial court held that under the "strict legislative mandate of R.C. §709.023(H)" Centerville "may not implement a TIF on the annexed land, including both the 173.181 acres and the 94.987 acres, that would in any way divert real property taxes for the annexed territory from Sugarcreek Township." (TDS 235, p. 7, 12, Appx. 118, 123). On appeal, the Second District Court of Appeals issued an extensive opinion reviewing various general principles of property taxation, annexation law, annexation reform, tax increment financing and their related statutes. *Sugarcreek Twp. v. City of Centerville*, 184 Ohio App.3d 480, 2009-Ohio-

4794, 921 N.E.2d 655, attached at Appx. 062. (“*Sugarcreek I*”). The court of appeals recognized the annexed property was in joint township/municipal jurisdictions and that both Centerville and Sugarcreek had the commensurate authority as provided by law. The court held:

1. “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.” (*Sugarcreek I*, ¶171, 91; Appx. 108, 85).
2. “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.”<sup>6</sup> (*Sugarcreek I*, ¶174; Appx. 109).
3. “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.” (*Sugarcreek I*, ¶174; Appx. 109). \* \* \* 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.” (*Sugarcreek I*, ¶175; Appx. 110).

The court of appeals only determined the application of municipal TIFs to minimum levies not all township taxes. ‘Minimum levies,’ ‘inside millage’ or ‘non-voted millage’ are common references to the “Ten-Mill Limitation” defined in R.C. 5705.02 as follows:

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<sup>6</sup> Townships can only enact tax increment financing in the unincorporated areas of a township and municipalities can only enact TIFs within the municipal corporation. R.C. 5709.73(B) and 5709.40(B). Once annexed, property becomes incorporated and a township has no authority to enact a TIF on the property. R.C. 5709.74 (township TIFs) provides that if a township is collecting TIF service payments upon a parcel that “*is annexed to a municipal corporation, the service payments shall continue to be collected and distributed to the township \* \* \* until the township is paid back in full for the cost of any public infrastructure improvements it made on the parcel.*”

The aggregate amount of taxes that may be levied on any taxable property in any subdivision or other taxing unit shall not in any one year exceed ten mills on each dollar of tax valuation of such subdivision or other taxing unit, except for taxes specifically authorized to be levied in excess thereof. The limitation provided by this section shall be known as the “ten-mill limitation,” and wherever said term is used in the Revised Code, it refers to and includes both the limitation imposed by this section and the limitation imposed by Section 2 of Article XII, Ohio Constitution.

More simply, the constitution and statutes of Ohio have placed a limit of 10-mills on the total amount of taxes (of all taxing authorities) that can apply to any parcel of land without voter approval. These limited taxes are commonly referred to as ‘minimum levies’ or ‘unvoted taxes’ or ‘inside millage.’ All real property taxes exceeding this 10-mill limit must be approved by the voters (commonly ‘outside millage,’ ‘additional levies’ or ‘voted taxes’). The court of appeals distinguished minimum levies (inside millage), perhaps because Senate Bill 5 expressly amended the tax statutes relating to the reallocation of the share of inside millage a municipality and township would receive for property that remains in the township following annexation (irrespective of the annexation process followed).<sup>7</sup> *See* R.C. 5705.315 and R.C. 5705.31. There is no distinction between minimum levies and voted levies (“outside millage”) in the tax exemption statutes, including TIF statutes and there were no amendments to any other tax or exemption statutes in Senate Bill 5, including any of the TIF statutes. *See* R.C. 5709.40 and 5709.73. Thus the only change to the tax laws implemented by Senate Bill 5 was to address a method for sharing inside millage after every annexation (not just type-2 annexations). No change was made to the application of any tax exemption following annexation, including TIF.

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<sup>7</sup> Senate Bill 5 enacted R.C. 709.192(C)(9) that permits municipalities and townships to enter into annexation agreements, which can include terms for “The reallocation of the minimum mandated levies established pursuant to section 5705.31 of the Revised Code between a municipal corporation and a township in areas annexed after the effective date of this section.” Senate Bill 5 also amended R.C. 5705.31(C) to require the county auditor to allocate, to the extent possible, the minimum levy for that municipal corporation and township in accordance with their annexation agreement.

The court of appeals rejected the idea that the last clause of R.C. 709.023(H) prohibited a municipal TIF. *Sugarcreek I*, ¶135, Appx. 99. The court of appeals expressly found “our interpretation of this phrase is 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.” *Sugarcreek I*, ¶135, Appx. 99. The appeals court then reversed the trial court, “in part,” and remanded the case back to the trial court “for further proceedings consistent with [its] opinion.” (*Sugarcreek I*, ¶178, Appx. 111).

On remand, a dispute arose regarding whether the holding of the court of appeals applied to all township real property taxes (both the inside millage and outside millage) or only to the township’s minimum levies. Upon the request of the trial court the parties entered stipulations and filed additional motions for summary judgment briefing the issue. The trial court interpreted and extended the decision of the court of appeals to also apply to outside millage. The trial court again held that “pursuant to R.C. 709.023(H)” and “by consistent application to “outside millage” of the Court of Appeals' holding [with respect to inside millage],” Centerville also may not pass TIF legislation that would exempt the township’s outside millage real property taxes ‘expedited-2 annexed territory.’ (TDS 272, p. 4, 7, Appx. 34, 37). In other words, according to the trial court, R.C. 709.023(H) guarantees Sugarcreek Township all township taxes on the annexed territory, both ‘unvoted’ (inside) and ‘voted’ (outside) millage, and their future increases without exemption, partial reduction or delay. (TDS 27 2, p. 7-8, Appx . 37 -38). Centerville appealed.

In *Sugarcreek Twp. v. City of Centerville*, 193 Ohio App.3d 408, 413-414, 415, 2011-Ohio-1830, ¶21, 28, 952 N.E.2d 519 (“*Sugarcreek II*”), (Appx. 19), the court of appeals ignored its previous reasoning and interpretation and extended its decision to broadly apply to all

township taxes. This makes the court's previous distinction of inside millage meaningless. The court stated:

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 Court accepted discretionary jurisdiction to determine whether municipal TIFs in joint township/municipal jurisdictions apply uniformly throughout the state to township taxes, or whether R.C. 709.023(H) creates a special exception for property annexed utilizing the expedited type-2 process that prohibits a municipal TIF from applying to township taxes on those select properties. Accepting the court of appeals decision means TIF funding is applied unevenly around the state. Pre-2001 TIFs and properties annexed after 2001 by any means other than the expedited type-2 process are treated one way, and properties included in a post-2001 TIF that were annexed utilizing the expedited type-2 process are treated differently. Post-2001 TIF plans that have been adopted relying on the exemption statute may be invalid and financing for TIF improvements and bonds in jeopardy.

#### **Relevant Legal Background**

This is a case of statutory interpretation. "It is a well-settled rule of statutory interpretation that statutory provisions be construed together and the Revised Code be read as an interrelated body of law." *State v. Moaning* (1996), 76 Ohio St.3d 126, 128, 666 N.E.2d 1115.

The significance of the decision of the court below and its radical change in Ohio law can best be understood within the context of Ohio annexation law and its 2001 comprehensive reform, municipal conformity of township boundaries and local tax incentives for economic development.

1. *Annexation and Conformity of Township Boundaries*

Annexation is a strict statutory process by which owners petition a board of county commissioners to have their property annexed from a township into a municipal corporation. *In Re Petition to Annex 320 Acres to the Village of South Lebanon* (1992), 64 Ohio St.3d 585, 591. An annexation is accomplished when a board of county commissioners grants an annexation petition and the municipality accepts it. R.C. 709.04. Thereafter the territory becomes part of the municipality 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* (irrespective of the process followed), the annexed territory remains in the township and is in a joint municipal/township jurisdiction. These joint jurisdiction properties are subject to the real property taxes of both the township and municipality (along with other taxing authorities) and the owners can exercise the rights of this dual citizenship as provided by the Constitution and laws of the state. *Sugarcreek I*, ¶105, Appx. 89. Joint township/municipal jurisdictions are common throughout Ohio. All of the territory in the city of Centerville is within the joint or concurrent jurisdiction of one of several townships that exist within Centerville.

Since 1961, 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.

*Sugarcreek I*, ¶¶99-103, Appx. 87-88. Removing the territory annexed from the underlying township requires a separate step which a municipality had the discretion to take. Some municipalities routinely took these steps, others did not. 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.<sup>8</sup> 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. A board of county commissioners is required to grant a city’s petition for a change of township boundaries under R.C. 503.07. Townships are not parties to or entitled to participate in city petitions to conform township boundaries and the board of county commissioners has no discretion to deny the boundary change. *State, ex rel. Dublin, v. Delaware Cty. Bd. of Commrs.* (1991), 62 Ohio St.3d 55, rehearing denied 62 Ohio St.3d 1457. Before 2001, there were no restrictions upon the right of a municipality to petition to conform its boundaries.

This concept of dual jurisdictions is important in the context of this case because joint jurisdictions were not created by the General Assembly as part of annexation reform and the

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<sup>8</sup> The general statutes on the organization of townships provide:  
R.C. 503.07 Conformity of Boundaries.

When the limits of a municipal corporation do not comprise the whole of the township in which it is situated, or if by change of the limits of such corporation include territory lying in more than one township, the legislative authority of such municipal corporation, by a vote of the majority of the members of such legislative authority, may petition the board of county commissioners for a change of township lines in order to make them identical, in whole or in part, with the limits of the municipal corporation, or to erect a new township out of the portion of such township included within the limits of such municipal corporation. The board, on presentation of such petition, with the proceedings of the legislative authority authenticated, at a regular or adjourned session, shall upon the petition of a city change the boundaries of the township or erect such new township, and may upon the petition of a village change the boundaries of the township or erect such new township.

statutes at issue in this case. Joint township/municipal jurisdictions have long existed in Ohio.<sup>9</sup> Tax increment financing was first established in 1993 and is a common method of funding public improvements throughout the state.<sup>10</sup> *See* R.C. 5709.40. There are municipal TIFs within dual township/municipal jurisdictions that may include some, all or no property annexed utilizing the ‘type-2 annexation process’ as indicated by various *Amici*. To Appellant’s knowledge, municipal TIFs in these joint jurisdiction areas have uniformly applied the real property taxes of all taxing authorities, including township, unless a particular tax was expressly excepted by R.C. 5709.40 and a statute authorized a portion of the service payments (made by the owner in lieu of taxes) to be paid from the restricted tax increment equivalency fund or distributed directly by the county treasurer before the distribution to the TIF fund. *See* R.C. 5709.43 and 5709.42. The rationale makes sense. The affected taxing authorities (governmental jurisdictions) under a TIF continue to get the taxes for the property as it existed before the TIF. The TIF merely “postpones” taxes on real estate on the improvements that are made possible by the publically financed public improvements. After the TIF terminates, the affected jurisdictions get the increased taxes on the property as improved: a little sacrifice, a lot of ultimate benefit.

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

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<sup>9</sup> These concurrent jurisdictions have overlapping, but not identical boundaries. When the limits of a municipal corporation become identical with those of a township, by operation of law all township offices are abolished, the township duties are performed by the municipality and, as a practical matter the township ceases to exist. *See* R.C. 703.22.

<sup>10</sup> The Ohio Department of Development (“DOD”) receives annual reports from TIFs (and other tax incentives) each year. The DOD reports on its website that there are currently 1,106 active TIFs in Ohio as of the date of this brief. *See* <http://www.development.ohio.gov/OTEISearch/tif/selection.aspx?County=All&Project=>

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 Comms.*, 112 Ohio St.3d 262, 2006-Ohio-6411, ¶3-4. Though there are certain standards common in every annexation, there are also unique criteria in each of the four annexation procedures. The three 100% owner annexations supported annexations have objective criteria and are ‘expedited’ to allow property owners (and local governments) a more rapid response to capture development opportunities as they may become available in short timelines. Challenges to these expedited annexations are very limited. See *State ex rel. Butler Twp. Bd. of Trustees v. Montgomery Cty. Bd. of Comms.*, 124 Ohio St.3d 390, 2010-Ohio-169.

Since 2001, the most frequently used annexation process throughout the state is the expedited type-2 process provided for in R.C. 709.023. One of the unique criteria of the expedited type-2 annexation statute<sup>11</sup> is the provision in R.C. 709.023(H) that prevents the exclusion of the township by the municipality by forbidding the municipality to petition to conform its boundaries without the agreement of the township:

(H) 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.*

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<sup>11</sup> 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. 709.024(H) was not at issue in this case or discussed by the courts below.

If there is no municipal/township annexation agreement<sup>12</sup> (R.C. 709.192) or cooperative economic development agreement (“CEDA,” R.C. 701.07), municipalities are prohibited from petitioning the county commissioners to conform portions of the township annexed into the limits of the municipality pursuant to the expedited type-2 process.

The General Assembly looked at what tax laws needed to be modified when it enacted Senate Bill 5. There were no tax exemptions modified by Senate Bill 5, including exemptions for tax increment financing. *See* R.C. Chapter 5709. Senate Bill 5 changed only two tax statutes provided for in R.C. Chapter 5705 (“Tax Levy Law”) in order to implement annexation reform. The Bill addresses the legislatures tax concerns by enacting R.C. 5705.315 (as part of Senate Bill 5) to provide for the ‘default’ adjustment of inside millage following every annexation where the territory remained in a joint jurisdiction. Senate Bill 5 allowed townships and municipalities to enter into annexation agreements and agree on how their inside millage would be adjusted following annexation. *See* R.C. 709.192(C)(9). It also amended R.C. 5705.31(D) to require the county budget commission and auditor to reallocate municipal/township inside millage to the extent possible in accordance with an annexation agreement of a township and municipality. Senate Bill 5 did not amend any other tax law, including the tax exemption for municipal tax increment financing.

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<sup>12</sup> Senate Bill 5 enacted R.C. 709.192 allowing municipalities and townships to enter into annexation agreements on various items, including “(C)(9) the reallocation of the minimum mandated levies established pursuant to section 5705.31 of the Revised Code between a municipal corporation and a township in areas annexed after the effective date of this section.).

## 2. Tax Increment Financing

The General Assembly has established a variety of local government tax incentives to encourage development throughout the state.<sup>13</sup> 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 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 an economic development incentive created by the General Assembly to allow local governments to finance public infrastructure improvements to support future development.<sup>14</sup> A TIF works by locking in the taxable worth of real property at the value it holds at the time the TIF is created (the base value). Then payments derived from the increased assessed value of any improvement to real property beyond that base value are directed towards a separate fund to finance the construction of public infrastructure defined within the TIF legislation that supports the

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<sup>13</sup> 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 (R.C. 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. 5709.77-709.81) and townships (R.C. 5709.73-5709.75).

<sup>14</sup> The General Assembly has authorized the use of tax increment financing by municipalities for properties within a municipal corporation (R.C. 5709.40-43), and by townships (R.C. 5709.73-75) and counties (R.C. 5709.77-79) for properties in the unincorporated areas of their jurisdictions.

development. These are referred to as ‘payments in lieu of taxes’ or PILOTS. R.C. 5709.42. TIFs typically apply to only a portion of the increase in assessed value (normally 75%) for a limited period of time (usually 10 years) or until the debt is paid, whichever first occurs.<sup>15</sup> 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 and job creation and build the public improvements necessary to support it. 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 improvements on the property. The other 75% is paid by the owner to the county treasurer but is temporarily exempt from taxes and redirected into a special ‘tax increment equivalent fund’ that can only be used to pay for public infrastructure debt or as otherwise directed by statute. *See* R.C. 5709.42 and 5709.43.

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<sup>15</sup> Local governments may exempt from real property taxes the value of private improvements up to 75% for a term of up to 10 years through TIF. Local governments may exempt the value of improvements up to 100% for a term of up to 30 years with the concurrence of the affected board(s) of education and other statutorily required government entities. R.C. 5709.40; 5709.73; 5709.79.

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 in place the township would still continue to receive taxes from the annexed territory.

Municipal TIFs have been established throughout the state in dual municipal/township areas. Municipal TIFs are among the more than 1,100 active TIFs in the state.<sup>16</sup> Municipal jurisdictions with TIFs have issued long term debt (TIF bonds) in areas annexed that include parcels annexed with the expedited type-2 process. See R.C. 133.04 and 133.05 and Memorandum in Support of Jurisdiction of the *Amici* Ohio Municipal League *et al.* at p. 4. To Appellant's knowledge, in all 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. There are some select taxes the General Assembly protected from TIFs in R.C. 5709.40(F)(1)–(12), but townships are not among them. The decision of the court of appeals changes all this by creating different TIF and tax

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<sup>16</sup> See footnote 10. The TIFs reported are *all* active township, county and municipal TIFs in the Ohio.

consequences for select parcels in a joint municipal/township jurisdiction on the sole basis that they were annexed utilizing the expedited type-2 process.

Throughout its opinion, the court of appeals refers to a Centerville “TIF Plan” and seems to presume that Centerville can somehow select what taxes its “plan” will exempt. In its opinion in *Sugarcreek II*, the court of appeals states at ¶21: “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.” (Appx. 26-27). Centerville has no authority to adopt a plan that selectively exempts certain taxes or determine whose taxes its TIF Plan will impact. It also has no authority to direct the distribution of PILOTs or pay money from the restricted TIF fund to a township. *See* R.C. 5709.42, 5709.43 and 5709.40(F)(1)-(12). Furthermore, R.C. 709.023(H) does not provide for exemptions, it only allows the township to receive real estate taxes. Real property taxes and exemptions are strictly statutory and must be expressly provided. All taxes are affected by any “TIF Plan” adopted by Centerville unless expressly exempted from the TIF by the General Assembly.

## ARGUMENT

### Proposition of Law No. I:

**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 only for properties annexed using the expedited type-2 process. The General Assembly has not protected township taxes from municipal TIF or any other tax exemption solely for expedited type-2 properties, and no others.

Contrary to the court of appeals' decisions below, R.C. 709.02(H) does not preclude or limit a municipality from adopting a TIF ordinance that temporarily diverts some tax payments that a township may otherwise receive from land improvements in the area with the TIF in order to finance new public improvements for new private development and investment in Ohio. Township taxes were not elevated above the general provisions of Ohio law that facilitate annexation and encourage property development through TIFs.

#### **Standard of Review**

This matter comes before this Court following motions for summary judgment in the trial court in its initial determination, and upon remand. This Court's review of cases decided on summary judgment is *de novo*, governed by the standard set forth in Civ.R. 56. *New Destiny Treatment Ctr., Inc. v. Wheeler*, 129 Ohio St.3d 39, 2011-Ohio-2266, ¶24, citing *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶8. Summary judgment involves questions of law, not fact, which this Court reviews without deference to the decisions below. *Akron Centre Plaza L.L.C. v. Summit Cty. Bd. of Revision*, 128 Ohio St.3d 145, 2010-Ohio-5035, 942 N.E.2d 1054.

The dispute between the city of Centerville and Sugarcreek Township does not concern the underlying facts of what occurred with respect to three annexation agreements, two annexations or municipal or township TIFs. It concerns the effect or legal consequences that property owners annexing property using the expedited type-2 process has upon the property

rights, township taxes and municipal TIFs upon the property when the expedited type-2 property is annexed. This dispute calls for the construction of R.C. 709.023(H), R.C. 5709.40 and consideration of various other statutes—which is a question of law. *Brennaman v. R.M.I. Co.* (1994), 70 Ohio St.3d 460, 466, 639 N.E.2d 425. This Court’s review is not deferential, but de novo. *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163 ¶8, 871 N.E.2d 1167.

**A. R.C. 709.023(H) IS UNAMBIGUOUS.**

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*, 128 Ohio St.3d 221, 2010-Ohio-6280. Where the statute is clear and unambiguous, it must be applied, as written, and the court need not, indeed must not, invoke rules of statutory interpretation. *Id.* and *State v. Muncie* (2001), 91 Ohio St.3d 440, 447, 746 N.E.2d 1092. The court of appeals erred when it found “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.*” *Sugarcreek II*, p. 10, Appx. 28, ¶21. Sugarcreek Township is not entitled to taxes from property that is subject to tax exemption or reduction, whether it is a 100% exemption from an exempt purpose such as a school, church or government use, a partial exemption such as a TIF exemption from only certain private improvements for land development for a limited period of time, or a periodic reduction from a qualifying use, such as an agricultural use exemption. *See* R.C. 5709.07, 5709.08, 5709.40, 5713.30 *et seq.* R.C. 709.023(H) did not eliminate these exemptions. The annexation property and every taxing authority, including the township, remain subject to them.

The plain language of R.C. 709.023 does not alter the real property tax consequences or economic development incentives prescribed by the general laws of the state of Ohio exclusively in territories that are annexed using the expedited type-2 annexation processes. The only purpose of R.C. 709.023(H) is to prevent the city from excluding the newly annexed territory from the township's boundaries without permission of the township. As the court of appeals properly held in its first appeal (and later repudiated), "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." *Sugarcreek I* at 184 Ohio App.3d 480, 508, 2009-Ohio-4794, ¶135, Appx. 99. The court of appeals erred in *Sugarcreek II* when it interpreted a statute that was clear on its face then judicially amended it to create a new exception for township taxes from municipal TIFs that the General Assembly did not. *State v. Hughes* (1999), 86 Ohio St.3d 424; *State ex rel. Russo v. McDonnell*, 110 Ohio St.3d 144, 2006-Ohio-3459, ¶150; *State ex rel. Cincinnati Bell Tel. Co. v. Pub. Util. Comm.*, 105 Ohio St.3d 177, 2005-Ohio-1150.

The plain language "and thus, remains subject to township taxes" does not alter the taxes or exemptions established by the General Assembly in R.C. Title 57 that apply to all property following annexation. R.C. 709.023(H) does not refer to a TIF or any other exemption or alter or amend their application to the annexed property. The words state that as a consequence ("and, thus") of being in a dual municipal/township jurisdiction, the annexed parcel continues to be ("remains") "subject to the township's real property taxes" and other taxes and exemptions provided by statute. Not to the exclusion of municipal taxes or the taxes of any other taxing authority (schools, libraries, zoos, etc.), in addition to them. This result is not because tax exemptions that are provided by statute (e.g. municipal TIF) no longer apply in the township as Sugarcreek argues. It is a consequence because the annexed territory "remains" in the township

without any boundary conformity by a municipality unless the township agrees and is thus subject to its taxing authority as expressly provided by law. R.C. 709.023(H), 503.07 and R.C. 709.192. Taking the court of appeals decision to its logical conclusion, using a type-2 annexation process prevents all tax exemptions and reductions (e.g., CAUV).

When interpreting a statute, a court must give meaning to every word in the statute. The court of appeals did not. The annexed property “remains” subject to 100% of the township taxes in effect at the time of the annexation, irrespective of any future municipal TIF. When a municipal TIF is adopted and the township will continue to receive 100% of those taxes *plus* additional taxes on *a portion* of the increased assessment for private improvements made by the developer. The interpretation of the Court of Appeals that a municipal TIF is not effective against township taxes is contrary to the plain language of the statute.

**B. IT IS THE INTENTION OF THE GENERAL ASSEMBLY TO PROMOTE AND SUPPORT ECONOMIC DEVELOPMENT AND THE CREATION AND PRESERVATION OF ECONOMIC OPPORTUNITIES THROUGH ANNEXATION AND TAX INCENTIVES.**

If this Court finds that R.C. 709.023(H) is subject to various interpretations, it must invoke the rules of statutory construction in order to arrive at a legislative intent. *Summerville v. Forest Park, supra* at 2010-Ohio-6280, ¶19. The primary rule of statutory construction is to give effect to the legislature’s intention. *Id.* citing *Cline v. Ohio Bureau of Motor Vehicles* (1991), 61 Ohio St.3d 93, 97, 573 N.E.2d 77. It must be presumed that General Assembly intended R.C. 709.023(H) to be in compliance with the Ohio Constitution and that all Ohio statutes not expressly limited by R.C. 709.023(H) remain effective. R.C. 1.47 and 1.51. The Revised Code must be read as an interrelated body of law. *State v. Moaning, supra* at 76 Ohio St.3d 126. This Court must examine laws upon the same or similar subjects, the consequences of the

construction advocated by the township and made by the court of appeals, and the object sought to be attained by the relevant statutes. R.C. 1.49(A), (D), and (E). Any conflict between statutory provisions must be reconciled, where possible, to give effect to all provisions. R.C. 1.51.

It is apparent from annexation reform and the various statutes creating development and tax incentives available to state and local governments that it is the intention of the General Assembly to support and promote economic development and to capture and preserve economic opportunities in Ohio, not to benefit townships, as the court of appeals erroneously found. (*Sugarcreek II*, ¶16, p. 11, Appx. 29). The three expedited annexation processes were created to allow property owners to take advantage of development opportunities that are often available for a limited time and in competition with other locations within and outside of Ohio. The General Assembly created TIF incentives to allow counties, townships and municipalities to build public improvements necessary to attract and support development that are paid for from future tax revenues generated from the increased value of improvements from development itself. If an owner chooses to annex and develop in a municipality, then only the municipality can offer TIF incentives for necessary public improvements on the same basis as counties and townships, without disadvantage to the owner and developer for township taxes. Economic development is critical throughout the state, particularly in the current economy and ‘downturn.’ The decision of the court of appeals discourages economic development and TIF incentives available in municipalities which are often the only political subdivision with the services and resources to support development. It is contrary to the intention of the General Assembly and policy to encourage development throughout the state.

**1. R.C. 709.023(H) And R.C. 5709.40 Do Not Except Township Taxes On The Increased Assessed Value of Private Improvements From Municipal TIFs.**

R.C. Chapter 709 governs annexation. R.C. Chapter 5709 governs tax exemptions. R.C. 709.023(H) and R.C. 5709.40 must be construed together and each given full effect. R.C. 709.023(H) is not a tax statute, it is an annexation statute. It does not provide for any township tax levies or any exemption from taxes. It simply assures that property annexed utilizing the type-2 process remains in township, and subject to real property taxes and exemptions and reductions therefrom, as provided by the tax statutes.

If this Court determines that R.C. 709.023(H) and R.C. 5709.40 conflict and are irreconcilable, then R.C. 5709.40 must prevail both as the specific statute on taxes and tax exemptions and the more recently amended statute. R.C. 1.51.

Tax exemptions are strictly statutory and must be “explicitly provided” by the General Assembly. 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.<sup>17</sup> R.C. 5709.40(F)(1)-(12) and *see*

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<sup>17</sup> 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. R.C. 5709.40(F) provides:

(F) Service payments in lieu of taxes that are attributable to any amount by which the effective tax rate of either a renewal levy with an increase or a replacement levy exceeds the effective tax rate of the levy renewed or replaced, or that are attributable to an additional levy, for a levy authorized by the voters for any of the following purposes on or after January 1, 2006, and which are provided pursuant to an ordinance creating an incentive district under division (C)(1) of this section that is adopted on or after January 1, 2006, shall be distributed to the appropriate taxing authority as required under division (C) of section 5709.42 of the Revised Code in an amount equal to the amount of taxes from that additional levy or from the increase in the effective tax rate of such renewal or replacement levy that would have been payable to that taxing

5709.40(E)(2). These exceptions to TIF exemption are explicit and exhaustive. The twelve local tax levies that are protected from the application of a TIF exemption on improvements include taxes levied 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;

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authority from the following levies were it not for the exemption authorized under division (C) of this section:

- (1) A tax levied under division (L) of section 5705.19 or section 5705.191 of the Revised Code for community mental retardation and developmental disabilities programs and services pursuant to Chapter 5126. of the Revised Code;
- (2) A tax levied under division (Y) of section 5705.19 of the Revised Code for providing or maintaining senior citizens services or facilities;
- (3) A tax levied under section 5705.22 of the Revised Code for county hospitals;
- (4) A tax levied by a joint-county district or by a county under section 5705.19, 5705.191, or 5705.221 of the Revised Code for alcohol, drug addiction, and mental health services or facilities;
- (5) A tax levied under section 5705.23 of the Revised Code for library purposes;
- (6) A tax levied under section 5705.24 of the Revised Code for the support of children services and the placement and care of children;
- (7) A tax levied under division (Z) of section 5705.19 of the Revised Code for the provision and maintenance of zoological park services and facilities under section 307.76 of the Revised Code;
- (8) A tax levied under section 511.27 or division (H) of section 5705.19 of the Revised Code for the support of township park districts;
- (9) A tax levied under division (A), (F), or (H) of section 5705.19 of the Revised Code for parks and recreational purposes of a joint recreation district organized pursuant to division (B) of section 755.14 of the Revised Code;
- (10) A tax levied under section 1545.20 or 1545.21 of the Revised Code for park district purposes;
- (11) A tax levied under section 5705.191 of the Revised Code for the purpose of making appropriations for public assistance; human or social services; public relief; public welfare; public health and hospitalization; and support of general hospitals;
- (12) A tax levied under section 3709.29 of the Revised Code for a general health district program.

- (10) “Park district” parks’
- (11) Certain welfare programs; and
- (12) General Health District.

This list is exclusive, and exhaustive. Importantly, townships taxes *are not protected* from the application of a municipal TIF exemption on future improvements. The express identification and inclusion of certain tax levies that are protected from municipal TIF exemption implies the exclusion of all other tax levies, as the canon of interpretation *expressio unius est exclusio alterius* provides. *State ex rel. Butler Twp. Bd. of Trustees v. Montgomery Cty. Bd. of Commrs.*, *supra* at 2010-Ohio-169 at ¶21. A general reference to property remaining subject to real property taxes in R.C. 709.023(H) is not sufficient to overcome this interpretation. 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.

The court of appeals erred when it found that the general language in R.C. 709.023(H) “ ‘remains subject to the township’s real property taxes’ served the same purpose” as the explicit exception of certain tax levies from the municipal TIFs in R.C. 5709.40. *Sugarcreek II* ¶25, p. 11, Appx. 29. The General Assembly certainly understood that any taxes that were to be changed by annexation reform required express amendment. If the General Assembly had intended to protect township taxes from municipal TIF through annexation reform, it should have expressly done so by amending the tax statutes as it did in in R.C. 5705.315 to allow for the reallocation of inside millage following every annexation (enacted as part of Senate Bill 5). *See also* R.C. 5705.31. It chose not to. 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.

Absent express statutory exception in R.C. 5709.40, the General Assembly has provided no means to exclude a tax levy from a TIF or distribute the TIF payments (PILOTS). Cities cannot select what tax levies a TIF applies to.<sup>18</sup> Centerville cannot create a TIF plan that excludes Sugarcreek Township taxes to the 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.

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.

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<sup>18</sup> R.C. 5709.40(D), (E)(2) and 5709.43(B) provide the city the limited ability to enter into an agreement to pay certain school taxes and township taxes from the tax increment equivalency fund.

**2. The General Assembly Intended For Annexation Reform And Expedited Annexations To Create and Preserve Economic Opportunities.**

The township argued below, and the court of appeals erroneously found that the sole intent of R.C. 709.023(H) was to protect townships. The court is simply wrong and neither the annexation statutes nor the TIF statutes support that conclusion. Expedited annexations that were created with annexation reform were intended to streamline the annexation process in three circumstances when all of the owners support annexation: (1) when the township trustees agree (type-1; R.C. 709.022); (2) when the annexation territory is less than 500 acres and meets certain other objective criteria (type-2; R.C. 709.023); and (3) when the annexation involves a significant economic development project (type-3; R.C. 709.024). To the extent R.C. 709.023(H) protects townships, it merely insures that the status of the property will remain in the township without exclusion. As such, the township will receive whatever real property taxes the property generates as otherwise provided by law. Under a TIF, the township would get the protection envisioned to keep the property in the township and receive the taxes it received prior to the land's improvement and more after the land was improved and the TIF expired. It clearly was not the intent to hamper development of property annexed into cities using a type-2 process. In some instances, only the city can provide water or sewer, roads or appropriate zoning. The legislature could not have meant to limit development once annexed by prohibiting publicly assistance to public improvements that can only occur in the city.

Through annexation reform, the General Assembly encouraged local governments to cooperate in attracting development. Senate Bill 5 enacted R.C. 709.192 which allows townships and municipalities to enter into annexation agreements to cooperatively provide services, agree on the allocation of minimum levies, changing township boundaries under

R.C. Chapter 503 among the fifteen items expressly identified including the catchall “any other matter pertaining to the annexation *or development* of publically or privately owned territory. R.C. 709.192(C)(15). This cooperation and these agreements “shall be liberally construed to allow parties to these agreements to \* \* \* promote and support economic development and the creation of preservation of economic opportunities.” R.C. 709.192. When the governments can not agree, the General Assembly has provided for expedited annexations and tax incentives to provide for economic opportunities without the municipal/township agreement.

Without township agreement, upon annexation following an expedited type-2 process, the annexed territory remains in the township to allow the township to benefit from any economic development that occurs through increased tax revenues. When TIFs or other tax incentives are required for the development to move forward, tax increases that the township and other taxing authorities would receive from the development are delayed. Since the property remains in the township, the township will receive the benefit of the tax increases in part during the period of the TIF, and 100% at its conclusion. The General Assembly made no provision for the payment of taxes subject to TIF to a township.

The General Assembly did expressly provide 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.

**3. The Consequences Of The Construction Of R.C. 709.023(H) By The Court Of Appeals Are Contrary To Law And The Intent And Policy Of The General Assembly To Promote And Support Development.**

The construction of R.C. 5709.023(H) by court of appeals judicially inserted township tax levies into R.C. 5709.40 as additional levies that are not subject to municipal TIFs. This was "not interpretation but legislation, which is not the function of courts." *Campbell v. City of*

*Carlisle*, 127 Ohio St.3d 275, 2010-Ohio-5707, 939 N.E.2d 153, citing *Iddings v. Jefferson Cty. School Dist. Bd. of Edn.* (1951), 155 Ohio St. 287, 290, 98 N.E.2d 827.

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 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. It also makes no sense. What possible governmental interest is advanced by denying certain properties the right to receive tax incentives simply based upon the annexation process they chose? The property remains in the township and the township will ultimately benefit from its development and improvements, like every other taxing authority affected by at TIF. There is no rational basis for such a distinction. 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

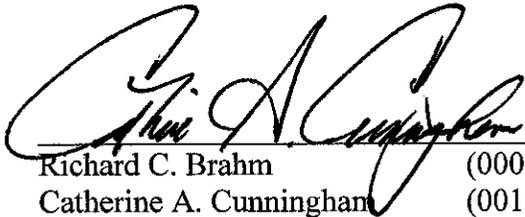
This case is an example of what the expedited annexation and development incentive statutes sought to avoid – prolonged litigation and lost development opportunities. In 2006, 270± acres of prime ground for development were annexed to Centerville. After more than 5 years of litigation, multiple appeals and approximately 193 pages of relevant court decisions in this case, the development originally proposed is lost and future development remains uncertain. (See Appx. pp. 3-196). The opportunity and investment as originally proposed is no longer viable. (TDS 87, 147, Exhibit B). The proposed commercial development, medical facility and professional offices have all moved on finding other opportunities and locations. Development does not wait for complications and ensuing litigation. Opportunities for financing are lost with controversy.

The expedited type-2 annexation process was designed to allow property owners to capture development opportunities by expediting the governmental approvals necessary to facilitate proposed development. TIFs are designed to allow local governments to partner with property owners and developers to build the public infrastructure necessary to support their developments with the tax dollars the development itself will generate. Without the public improvements there would be no development, and without the development there would be no funds for improvements (whether or not those were otherwise necessary or beneficial for the region).

Rather than apply the plain language of R.C. 709.023(H) and R.C. 5709.40, or follow the policy and intent of the General Assembly to promote and encourage development in Ohio, the

Second District Court of Appeals created its own legislation and policies contrary to law. The court of appeals found, in error, the “legislature’s intent to benefit townships” with annexation reform at the expense of development for all property annexed utilizing the expedited type-2 process. This finding is contrary to the intent of the General Assembly and law and Appellant Centerville urges this Court to reverse the court of appeals and find that “and, thus, remains subject to township taxes” does not alter or amend any tax law that may apply to territory annexed utilizing the special expedited type-2 process. R.C. 709.023(H) affirms that, absent agreement from the township, the annexed territory will remain in the township in dual jurisdictions with the municipality, and be subject to the township taxing authority, to the extent it is otherwise provided by law.

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 by regular U. S. mail, postage pre-paid, on this 20<sup>th</sup> day of December, 2011:

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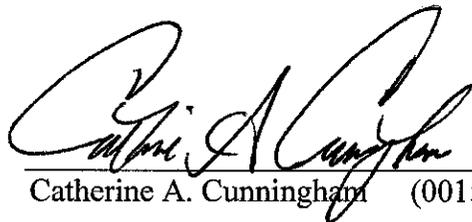
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